

Publications

DOL Drops Appeal in ASA Case

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U.S. Department of Labor (“DOL”) has accepted a new setback to its longstanding initiative to subject IRA rollover recommendations to ERISA’s fiduciary standard and its prohibited transaction rules. On May 15, 2023, the DOL dropped its appeal in [*American Securities Ass’n v United States Dep’t of Labor*](#) (“ASA”) and accepted a Florida district court’s interpretation of the five-part test for fiduciary status. The district court held that a recommendation to take a rollover from a retirement plan cannot be aggregated with post-rollover advice such that the rollover recommendation satisfies the “regular basis” prong of the five-part test and vacated a DOL FAQ that concluded otherwise. By conceding this point, DOL has not only put itself in a difficult situation in other related litigation in Texas but has also likely signaled that it recognizes that any further attempts to materially expand the scope of entities and individuals held to a fiduciary standard will either require new legislation or a new regulatory initiative.

As background in March of 2023 the U.S. District Court for the Middle District of Florida granted [summary judgment](#) to the American Securities Association holding that a DOL regulatory policy underlying a piece of guidance expressed in the form of a Frequently Asked Question (“FAQ”) was arbitrary and capricious. As further explained below, the Court’s vacatur of that DOL policy has broader implications for DOL’s longstanding efforts to characterize rollover recommendations as fiduciary in nature.

A 1975 DOL regulation establishes a “five part test” for determining when a person is deemed to be rendering “investment advice” as an ERISA fiduciary. All five parts of the test must be met in order to confer fiduciary status. The consequences of assigning fiduciary status are significant. Persons who provide IRA rollover recommendations as investment advice fiduciaries are subject to ERISA’s fiduciary standards of prudence and loyalty and to prohibited transaction restrictions that disallow self-interested recommendations absent an exemption.

In the preamble to a 2022 prohibited transaction exemption – PTE 2020-02 – DOL included a “final interpretation” of the five part test, and subsequently issued FAQ guidance on elements of that final interpretation in 2021. FAQ 7 asked a key question as to the application of the “regular basis” prong of the five part test as follows: “When is advice to roll over assets from an employee benefit plan to an IRA considered to be on a ‘regular basis’?”

DOL answered that key question as follows:

A single, discrete instance of advice to roll over assets from an employee benefit plan to an IRA would not meet the regular basis prong of the 1975 test. However, advice to roll over plan assets can also occur as part of an ongoing relationship or as the beginning of an intended future ongoing relationship that an individual has with an investment advice provider. When the investment advice provider has been giving advice to the individual about investing in, purchasing, or selling securities or other financial instruments through tax-advantaged retirement vehicles subject to ERISA or the Code, the advice to roll assets out of the employee benefit plan is part of an ongoing advice relationship that satisfies the regular basis prong. *Similarly, when the investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding the IRA as part of an ongoing relationship, the advice to roll assets out of an employee benefit plan into an IRA would be the start of an advice relationship that satisfies the regular basis requirement. The 1975 test extends to the entire advice relationship and does not exclude the first instance of advice, such as a recommendation to roll plan assets to an IRA, in an ongoing advice relationship.*

As noted, the District Court decision in *ASA* set aside not just the FAQ itself but also the underlying DOL policy that it reflects. The Court indicated that the five part test properly describes the ongoing provision of advice to a single plan as satisfying the regular basis prong, whereas under the challenged FAQ, the regular basis test could be satisfied by a single plan recommendation (i.e., the recommendation to rollover to an IRA) by combining that single recommendation with a series of subsequent recommendations to a second plan (i.e., the IRA itself).

DOL is facing a similar challenge to its final interpretation of the five part test in a lawsuit pending in the Northern District of Texas in *Federation of Americans For Consumer Choice v. United States Dep’t of Labor* (“*FACC*”). Against that backdrop, many observers were surprised by DOL’s decision to abandon its appeal in the *ASA*.

Members of the regulated community are now watching closely to see what DOL does next. For some time, DOL representatives have been indicating that the agency intends to propose an amendment of the five part test notwithstanding its prior failure to refashion the same rule, which was vacated by the Fifth Circuit in the 2018 *Chamber of Commerce* decision. It is likely that DOL will do exactly that, although just how the agency may seek to package a new amendment proposal to avoid another successful judicial challenge is unknown.

As of this date, the DOL has made no public statement on the reason for dropping the lawsuit. That being said, the court in *FACC* has asked DOL to “discuss whether its [interpretation of the regular basis prong] is “unworkable” if the government is not challenging the [*ASA*] vacatur” and set a deadline of May 26, 2023 for that explanation.