

401(k) Advisers See Clarity for Now in Fiduciary Rule Rollbacks

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Financial advisers and insurance agents are hoping a series of recent court rulings and Department of Labor actions that reduced regulatory burdens provide consistency on when giving advice on a 401(k) plan qualifies someone as a fiduciary.

The question of whether one-time rollover advice establishes a fiduciary relationship has been the subject of attempted rulemaking and subsequent court challenges for more than a decade. If brokers, insurance agents, or certain advisers are considered fiduciaries, they would be subject to the Employee Retirement Income Security Act's high standards of prudence and loyalty, risking potential lawsuits if they do not abide by those standards.

Since March 12, a [federal court vacated](#) a 2024 rule that would have expanded fiduciary duties to cover rollovers from 401(k) plans; the Department of Labor said it was [restoring](#) a 1975 five-part test for determining fiduciary status; and the agency and a group representing insurers dropped a lawsuit over 2020 guidance on the issue.

That leaves insurers and brokers to largely rely on the five-part test and a 2005 advisory opinion that addressed rollover advice.

Industry groups representing insurers and brokers, some of whom opposed the 2024 Biden administration rule on fiduciary advice in court and warned it would hurt business, have embraced the end of the roughly 16-year legal and regulatory saga, even as they acknowledge a future administration could bring another round of proposed changes.

"Historically, the department has taken the position that a recommendation to take a rollover, even if combined with advice about how to use the proceeds, would not be considered advice that would trigger fiduciary status. We are back into that realm," said Jason Berkowitz, chief legal and regulatory affairs officer at the Insured Retirement Institute, which was party to a lawsuit over the 2024 rule.

[Kim O'Brien](#), CEO of Federation of Americans for Consumer Choice, which brought one of two lawsuits against the 2024 investment advice rule and a suit over the 2020 guidance, said the confluence of court rulings and DOL decisions has restored “the status quo.”

“Agents and brokers should seek whatever professional advice they need to be comfortable with their own business practices,” O'Brien said. “But we think DOL has been as clear as it can be in restoring the status quo.”

Winding History

The first attempt at a fiduciary rule came in 2010, when the Obama administration issued a proposal defining when an individual providing investment advice qualifies as a fiduciary.

The DOL withdrew that proposal a year later in the face of opposition, and it published a modified version in 2016. That rule was [overturned](#) in 2018 by the US Court of Appeals for the Fifth Circuit.

The first Trump administration published guidance in 2020 attempting to address rollover transactions.

The Biden administration in 2024 finalized its own [fiduciary rule](#) to expand strict standards of conduct to cover 401(k) rollovers. It was vacated in March, and the Trump administration said it was restoring the 1975 five-part test for determining when an adviser meets the definition of a fiduciary.

Under the test, the individual must provide investment advice to the plan, the plan fiduciary, or the retirement account owner on a regular basis, pursuant to a mutual agreement that their advice serves as the primary basis for investment decisions based on the needs of the plan.

Last month, the DOL and FACC agreed [to dismiss](#) a lawsuit the group had filed over the 2020 guidance. In doing so, the DOL said it would reinstate its [2005 Deseret advisory opinion](#), which stated that giving advice to rollover assets out of an employer-sponsored plan wouldn't typically cause a financial adviser to be considered a fiduciary.

“The results of the core decisions is that for financial institutions that want to be in the situation that

they were before all this, they can be,” said [Scott Mayland](#), a principal at Groom Law Group. “And that was the goal of the litigation really, to restore the five-part test and also the Deseret opinion.”

Proponents of the DOL’s attempts at implementing a fiduciary advice rule have maintained the regulations hold brokers and insurers to ERISA’s high standards, offering needed protections to individuals getting advice about rolling their savings from 401(k) plans into annuities and individual retirement accounts.

Critics of the fiduciary rule have argued the combination of state regulations and the best-interest standard implemented in 2019 by the Securities and Exchange Commission, which requires brokers to act in the best interest of the customer, provides sufficient protections to consumers.

Future Changes Possible

[William Nelson](#), director of public policy and associate general counsel at the Investment Adviser Association, said future DOL leadership will have to take into account multiple court decisions vacating attempts at investment advice rules when considering whether to pursue future rulemaking. IAA represents fiduciary investment adviser firms.

“We like certainty, especially when it comes to regulations. You don’t want to be changing your policies every four years,” Nelson said.

Tim Hauser, who [retired](#) in December after a nearly 35-year career at DOL, was sharply critical of the DOL’s decision to walk away from the 2024 rule, which he noted was subject to a lengthy and rigorous regulatory process.

Hauser, who most recently served as deputy assistant secretary for program operations at the Employee Benefits Security Administration, said he disagreed with the idea that insurance agents should be able to present themselves as investment professionals and not be subject to obligations under ERISA.

He also argued relying on the five-part test without additional guidance isn’t sustainable long-term given the changing dynamics around retirement products and investment accounts.

“I don’t think the issue is going to go away until it finds a better landing place, and one that better harmonizes what the rule is for advice,” Hauser said. “I don’t think the issue goes away by just saying let’s go back to where we were in 1975. That was a hugely different world.”

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