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Court overturns DOL guidance on rollover advice

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A federal court has vacated part of the 2021 Department of Labor (DOL) rollover guidance for investment advice fiduciaries (*Am. Sec. Ass'n v. DOL*, No. 8:22-cv-330-VMC-CPT (M.D. FL Feb. 13, 2023)). In one of those [FAQs](#), DOL said a recommendation to roll over a participant's retirement plan account to an individual retirement account (IRA) may be fiduciary investment advice when the advisor expects to give ongoing advice after the rollover. According to the court, this guidance contradicts the agency's [current regulation](#) — originally issued in 1975 — which says advice does not qualify as investment advice unless given to a plan on a “regular basis.” The court's ruling likely isn't the last word on rollover advice, since amending the 1975 regulation remains one of DOL's top priorities.

Lawsuit targets interpretive FAQs

The ruling stems from a year-old lawsuit seeking to invalidate two FAQs interpreting DOL's new prohibited transaction exemption ([PTE 2020-02](#)) for investment advice fiduciaries. The PTE enables fiduciaries to receive certain compensation in connection with their advice — including advice to participants on retirement plan rollovers — that would otherwise give rise to a prohibited transaction under ERISA and the Internal Revenue Code.

Evolution of DOL's position on rollover advice

The 1975 regulation contains a five-part test for determining whether investment recommendations are fiduciary investment advice under ERISA. A person who makes a recommendation meeting all five conditions — including providing such advice on a regular basis — is a fiduciary subject to ERISA's conduct standards and self-dealing prohibitions.

In 2005, DOL issued [guidance](#) applying the 1975 regulation to participant rollover recommendations. DOL opined that — as long as the person making the recommendation isn't already a plan fiduciary —

advising a participant to take a distribution wouldn't be fiduciary investment advice, even if that recommendation includes advice on investing the proceeds of the distribution.

Citing [changing market conditions](#) in the years after issuing this guidance, DOL [amended](#) the 1975 regulation in 2016 to expand the definition of investment advice and supersede the 2005 rollover guidance. But the 2016 regulation was short-lived: The 5th US Circuit Court of Appeals vacated the rule in 2018, reinstating the 1975 regulation and its five-part test. However, DOL didn't revive its prior guidance on rollover recommendations. Instead, DOL adopted PTE 2020-02, explaining in the [preamble](#) that some rollover recommendations would meet the regular-basis requirement and therefore could be fiduciary investment advice if such recommendations also meet the 1975 regulation's other conditions.

Court vacates FAQ on rollover recommendations

In April 2021, DOL released a series of FAQs providing guidance for investment advice providers with respect to PTE 2020-02. [FAQ 7](#) reiterated the agency's updated interpretation of rollover advice. The FAQ explains that although a single instance of advice to roll over a retirement plan distribution wouldn't meet the regular-basis condition of the 1975 regulation, a rollover recommendation provided as part of an ongoing advice relationship would. The FAQ said this could happen not only when an ongoing advice relationship existed before the rollover recommendation, but also when the rollover recommendation is the first instance of advice in a new relationship that's expected to continue after the rollover.

Plaintiffs in this lawsuit challenged the FAQ's policy on rollover recommendations at the start of an advice relationship (but not the similar discussion of rollover advice in the PTE's preamble). The court concluded that this policy isn't a reasonable interpretation of the 1975 regulation and must be vacated. ERISA's fiduciary definition relates to investment advice given with respect to the assets of a particular plan. The court drew a sharp distinction between a rollover recommendation — provided with respect to the ERISA plan's assets — and advice regarding the investment of IRA assets after a rollover. If no ongoing advice relationship previously existed, then the rollover recommendation is the first and only advice provided with respect to the plan, and "any provision of future advice occurs ... when the assets are no longer plan assets." As a result, the court determined the FAQ inherently conflicts with the 1975 regulation's regular-basis requirement.

The plaintiffs didn't challenge the FAQ's policy on rollover recommendations as part of a preexisting advice relationship. The court's ruling doesn't suggest that this part of the FAQ is inconsistent with the 1975 regulation's regular-basis requirement. The court also suggests that ongoing advice about the investment of IRA assets after a rollover could trigger fiduciary responsibilities to the IRA under the Internal Revenue Code, even if the rollover recommendation wasn't investment advice with respect to the ERISA plan.

Challenge to FAQ on documentation requirements rejected

The PTE requires investment advice fiduciaries to document their specific reasons for determining that a rollover recommendation is in a participant's best interest. In [FAQ 15](#), DOL explained the relevant factors fiduciaries should consider when making and documenting this determination. Plaintiffs argued that the

FAQ's specific documentation requirements exceed the scope of the PTE. The court rejected the plaintiffs' challenge, finding that the FAQ simply provides further detail on the PTE's existing documentation requirements for rollover advice and doesn't impose new obligations on investment advice fiduciaries.

Final outcome uncertain

DOL has yet to appeal the court's ruling. As noted earlier, the court's decision is limited to FAQ 7 and doesn't extend to DOL's similar interpretive discussion of rollover advice in the PTE's preamble, which may raise questions about the ruling's immediate effects. However, a separate lawsuit — filed shortly before this one — directly challenges the PTE preamble guidance (*Fed'n of Ams. for Consumer Choice v. DOL*, No. 3:22-cv-00243 (N.D. TX filed Feb. 2, 2022)).

The retirement industry also continues to anticipate further DOL guidance on investment advice under ERISA. The agency's most recent regulatory agenda signals additional rule-making in the future, including amendments to the 1975 regulation and existing PTEs, as well as new exemptions. The court's ruling is unlikely to deter — and may even reinvigorate — those rule-making efforts.

Related resources

Non-Mercer resources

- *Am. Sec. Ass'n v. DOL*, No. 8:22-cv-330-VMC-CPT (M.D. FL Feb. 13, 2023)
- FAQs on PTE 2020-02 for employers and advisors (DOL, April 13, 2021)

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- DOL transition relief for investment advice fiduciaries rolls over to 2022 (Nov. 8, 2021)
- DOL issues guidance on fiduciary investment advice PTE (April 16, 2021)
- DOL finalizes more fiduciary investment guidance (Dec. 22, 2020)

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