

# DOL Fiduciary Rollover Guidance Struck Down by District Court

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A recent U.S. District Court dealt a major setback to the U.S. Department of Labor's (DOL) guidance regarding rollover recommendations as fiduciary investment advice under ERISA. In *American Securities Association (ASA) v. U.S. Department of Labor*, Case No. 8:22-cv-330 (M.D. Fla. Feb. 13, 2023) (the "ASA Case"), the court vacated a critical part of the DOL's latest fiduciary rule bringing uncertainty to financial institutions and advisors who implemented new rollover policies and procedures in order to comply with the DOL fiduciary rule.

## 1975 Fiduciary Rule and PTE 2020-02

In 1975, the DOL released regulations clarifying that a "fiduciary" is one who: (1) renders investment advice; (2) on a regular basis; (3) pursuant to an agreement; (4) on a primary basis for investment decisions; and (5) which advice is individualized for the needs of the plan (the "1975 Fiduciary Rule"). In 2020, the DOL released Prohibited Transaction Exemption (PTE) 2020-02. PTE 2020-02 permits financial institutions and advisors to provide rollover advice and receive compensation in connection with the rollover. Receipt of such compensation would otherwise be impermissible without a prohibited transaction exemption.

A critical piece of the PTE 2020-02 guidance centered around what constitutes investment advice and whether advice provided as part of the rollover process satisfies the "regular basis" portion of the 1975 five-part fiduciary test. Through frequently asked questions (FAQ), the DOL clarified that advice relating to a rollover (e.g., 401(k) plan account to an IRA) meets the regular basis requirement if such advice is part of or the beginning of an intended ongoing relationship. This topic was addressed in FAQ-7 of the DOL guidance and departed from past interpretations of the 1975 Fiduciary Rule.

The American Securities Association challenged this guidance, stating that the DOL acted in an arbitrary and capricious manner by releasing guidance that went against the plain reading of ERISA and the 1975 Fiduciary Rule. The court agreed and vacated FAQ-7. The court stated that the DOL's policy in FAQ-7 discarded the plan-specific focus of the 1975 Fiduciary Rule by sweeping in conduct that is not related to plan assets.

## What Is Next?

As of the date of this bulletin the DOL had not taken any action in response to the ASA Case decision. The DOL may appeal the ASA Case or let the decision stand. Because the decision was handed down by a district court, the DOL has multiple levels of appeal available to it. Given this uncertainty, financial institutions and advisors should tread carefully and continue to comply with DOL guidance under PTE 2020-02 until there is more clarity on the ASA Case status.

Should you have any questions, please contact **Christopher T. Collins** at [ccollins@vedderprice.com](mailto:ccollins@vedderprice.com), **Joseph M. Mannon** at [jmannon@vedderprice.com](mailto:jmannon@vedderprice.com), **Jeff VonDruska** at [jvondruska@vedderprice.com](mailto:jvondruska@vedderprice.com), **Amal Rafiq** at [arafiq@vedderprice.com](mailto:arafiq@vedderprice.com) or the Vedder Price lawyer(s) with whom you normally work.