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Judge Says Parts Of DOL's Rollover Advice Exemption Invalid

By **Kellie Mejdrich**

Law360 (June 30, 2023, 8:23 PM EDT) -- A federal magistrate judge in Texas on Friday recommended partially invalidating a Trump-era investment advice rule involving employee retirement savings and rollover transactions, finding a new interpretation from the U.S. Department of Labor exceeded its statutory authority.

U.S. Magistrate Judge Rebecca Rutherford handed down a **75-page** findings, conclusions and recommendations filing laying out the decision in the Administrative Procedure Act lawsuit, which must be adopted by a district judge to become final.

Judge Rutherford said the court could view the DOL's new interpretation "as part of the agency's well-intentioned efforts to update its regulations to ensure that fiduciary advice providers adhere to stringent standards designed to ensure that investment recommendations by financial institutions and professionals reflect the best interests of plan and IRA investors."

But she said "the court must also recognize that other similar agency efforts have not held up well under judicial scrutiny."

Judge Rutherford's order cited multiple court losses for the DOL related to its interpretation of fiduciary duties when rendering investment advice for a fee, including the Fifth Circuit's invalidation of an Obama-era regulation in 2018 and a Florida federal court's **invalidation** of related **guidance** in February.

A group of insurance agents and the trade group Federation of Americans for Consumer Choice **first sued** in February 2022, alleging the DOL's **prohibited transaction exemption** from December 2020 illegally expanded the definition of an Employee Retirement Income Security Act fiduciary. The rule took effect in 2021 and explains how retirement advisers can avoid certain ERISA obligations when recommending rollovers.

Judge Rutherford first recommended the court deny the DOL's **motion to dismiss** for lack of jurisdiction based on a finding that the group of insurance agents and the trade group had standing.

Judge Rutherford then recommended the court partially grant a motion for summary judgment from the insurance agents and the trade group and recommended the court vacate offending portions of the transaction exemption. The judge said that recommendation was "based on ERISA's text and purpose, coupled with the common law understandings of fiduciary relationships."

The insurance agents and trade group alleged that while the DOL's prohibited transaction exemption from 2020 purported to leave in place a five-part test the DOL established in 1975 to determine whether a retirement adviser is a fiduciary, the agency illegally advanced a new interpretation in a 64-page preamble on how the test applied to rollover situations.

Judge Rutherford agreed with plaintiffs in the case that the interpretation was illegal. "The court should find the DOL's new interpretation of the five-part test narrowly conflicts with ERISA and the DOL's own regulations," she said.

"In view of this conflict, the court should conclude that the DOL exceeded its statutory authority in promulgating the new interpretation and that the new interpretation is an arbitrary and capricious interpretation of the five-part test," Judge Rutherford said.

Judge Rutherford's order explained how a core dispute between the DOL and the insurance agents has to do with how employer- and union-sponsored retirement plans are governed by Title I of ERISA, while Title II deals with other retirement savings vehicles like IRAs.

To remedy the APA violation, Judge Rutherford recommended vacating offending portions of the 2020 exemption's text and preamble to remove any language that reflected the DOL's interpretation of how those two titles interacted based on a finding it exceeded the agency's authority.

Specifically, Judge Rutherford said the portion that should be vacated was anywhere in the 2020 exemption, including in the preamble, that "permit consideration of actual or expected Title II investment advice relationships when determining Title I fiduciary status."

A DOL spokesperson directed a comment request on Friday to the U.S. Department of Justice. A DOJ spokesperson and counsel for the plaintiffs did not immediately respond to requests for comment Friday.

The Federation of Americans for Consumer Choice Inc., John Lown, Lown Retirement Planning, David Messing, Miles Financial Services Inc., Jon Bellman, Bellman Financial, Golden Age Insurance Group LLC, ProVision Brokerage LLC and V. Eric Couch are represented by Donald Colleluori and Andrew G. Jubinsky of Figari & Davenport LLP.

The U.S. Department of Labor is represented by Alexander N. Ely and Galen N. Thorp of the U.S. Department of Justice.

The case is Federation of Americans for Consumer Choice Inc. et al. v. United States Department of Labor et al., case number 3:22-cv-00243, in the U.S. District Court for the Northern District of Texas.

--Editing by Haylee Pearl.
