

Excerpt from the February 2023 Edition of The Call: A Legislative and Regulatory Roundup

DOL

FACC and ASA Lawsuits – Update

American Securities Association v. U.S. Department of Labor et al.

(U.S. District Court for the Middle District of Florida – Tampa Division)

On Monday, February 13, 2023, a **decision** was rendered in the *American Securities Association v. U.S. Department of Labor et al.* lawsuit. In an Order issued by Federal District Court Judge Virginia Hernandez Covington, ASA was granted partial summary judgment, prevailing in its challenge to the policy referenced in one of the Frequently Asked Questions (**FAQs**) that the Department had promulgated in connection with the 2020-02 fiduciary rule.

Specifically, the Court found that the guidance under FAQ 7 – regarding the Department's interpretation of when advice to roll over assets from an employee benefit plan to an IRA was considered to be on a “regular basis” in determining ERISA fiduciary status – was arbitrary and capricious and, therefore, unlawful. As a result, the Court vacated the policy referenced in FAQ 7 and remanded it to the Department for further proceedings consistent with the Order.

ASA's Legal Challenge

ASA sued the Department of Labor in February 2022, challenging, under the Administrative Procedures Act (APA), the policies referenced in two of the FAQs. The lawsuit claimed that FAQ 7 and FAQ 15 violated the APA both as a procedural matter (for improperly amending the Department's rules without notice and comment) and as a substantive matter (for being inconsistent with the plain meaning of the Department's existing rules and, therefore, arbitrary and capricious).

The February 13, 2023 Order

As a threshold matter, the Court determined that the ASA plaintiffs had proper standing to bring the lawsuit, rejecting the DOL's motion to dismiss on the issue of standing. However, the Court found in favor of the DOL on the ASA's procedural challenges to the two FAQs finding that the Department's guidance did not violate the notice-and-comment requirements under the APA because the FAQs were *interpretive rules* rather than *legislative rules* and, therefore, the DOL was within its authority to issue such guidance without notice and comment. The Court also granted summary judgment to DOL on ASA's claim that FAQ 15 was arbitrary and capricious.

However, while the DOL successfully defended three of the four counts brought by the ASA in its 2022 lawsuit, the significant victory was on Count II – finding for the ASA in its claim that the policy referenced in FAQ 7 was arbitrary and capricious and was, therefore, an unlawful agency action.

The Court's Analysis and Holding

In reviewing the policy referenced in FAQ 7, the Court looked to the definition of who is a fiduciary under ERISA (29 U.S.C § 1002(21)(A)). The Court noted the statutory definition requires that an ERISA fiduciary must render investment advice for a fee ... with respect to moneys or other property *of a[n employee benefit] plan*. The 1975 five-part test determines when such a person renders investment advice and that one prong of the five-part test requires that such advice be given “on a regular basis to the plan.” (p. 47) In other words, the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan. (p. 50)

With respect to rollovers, one-time rollover advice is the last advice that a financial professional will make to the specific plan because any future advice will be with respect to a new non-ERISA plan – such as an IRA – that contains assets from the rollover. Assets cease to be assets of an ERISA plan after the rollover is complete; any future advice is, by nature, no longer to that ERISA plan. Because any provision of future advice occurs at a time when the assets are no longer plan assets, it is not captured by the “regular basis” analysis. (pp. 51-53)

Because the policy referenced in FAQ 7 “impermissibly unmoors” the focus of the inquiry into whether an individual is a fiduciary away from a specific ERISA plan, it is inconsistent with Department’s existing regulations under ERISA and the 1975 five-part test. (pp. 46) The Court held, therefore, that because the policy referenced in FAQ 7 conflicts with the Department’s existing regulations, it is an arbitrary and capricious interpretation of the 1975 regulation and granted summary judgment to ASA. (p. 56)

Anticipated Litigation Developments

It is likely that the Department of Labor will appeal the Florida district court ruling; any such appeal would be to the U.S. Court of Appeals for the Eleventh Circuit. If the Department files an appeal, it may also request a stay of the district court ruling through appeal – and there is a good probability that the request would be granted. Meanwhile, we await a decision in the FACC case, which is discussed below.

FACC et al. v. U.S. Department of Labor

(U.S. District Court for the Northern District of Texas – Dallas Division)

Oral arguments in the FACC case were held on Tuesday, January 24, 2024. On February 17, 2023, the FACC plaintiffs filed a **Notice of Supplemental Authority** with Magistrate Judge Rebecca Rutherford to ensure the judge was aware of the recent decision in the ASA case. In its filing, the FACC plaintiffs contend that the ASA holding is relevant to their legal challenge in that, like the DOL’s FAQ 7 guidance, the DOL’s new interpretation of determining fiduciary status as set forth in the preamble to the 2020-02 rule similarly runs afoul of ERISA and the five-part test by impermissibly conflating Title I employee benefit plans with IRAs for purposes of determining fiduciary status.

We expect Judge Rutherford will issue her recommended disposition of the matter in the near future, along with any findings of fact she deems appropriate. Both parties will then have the opportunity to file specific written objections to the proposed findings and recommendations, and either party may respond to the other party's objections. The matter will then go to District Court Judge Kinkeade to make a determination on any part of the magistrate judge's disposition that has been properly objected to. He may accept, reject, or modify the recommendation of Magistrate Judge Rutherford, receive further evidence, or return the matter to her with instructions.

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