

## Southern District of New York: Defendant Company Did Not Act as an ERISA Fiduciary When It Recommended Defined Contribution Plan Participants Roll Over Assets Into Its Managed Account Service (Securities Law Alert)

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On September 27, 2022, the Southern District of New York dismissed with prejudice a putative class action alleging that a financial services company and its subsidiary (together, “the company”) violated the Employee Retirement Income Security Act (“ERISA”), by inducing plaintiff participants in employer-sponsored defined contribution retirement plans to transfer assets from these plans to the company’s managed account service. *Carfora v. Tchrs. Ins. Annuity Ass’n of Am.*, 2022 WL 4538213 (S.D.N.Y. 2022) (Failla, J.). The court held that plaintiffs failed to allege that the company acted as a fiduciary when recommending rollovers, finding that, among other things, plaintiffs failed to plead facts demonstrating that the company rendered investment advice on a regular basis to the plans.

### Background

The company provided plaintiffs’ employer-sponsored plans with various administrative and investment related services while also running an individual advisory business in its capacity as a broker-dealer and investment advisor. Plaintiffs alleged that the company encouraged them to roll the money from their defined contribution plans over into the company’s “Portfolio Advisor,” a managed account service, allowing the company to earn higher fees. However, plaintiffs alleged that Portfolio Advisor had higher fees but did not consistently perform better than employer-sponsored plans. Plaintiffs commenced this putative class action asserting that the company acted as an ERISA fiduciary by soliciting them into the Portfolio Advisor program. The company sought dismissal, arguing that it was not an ERISA fiduciary and as such could not have breached any fiduciary duties.

### The Court Weighs Whether the Company Was a Functional Fiduciary Under ERISA

The court explained that ERISA and its regulations lay out two avenues through which one can become a plan fiduciary subject to its statutory duties: either as a named fiduciary in the plan’s written instrument or as a *de facto*, functional fiduciary. Because plaintiffs acknowledged that the company was not a named fiduciary, the court considered whether the company could be considered a functional fiduciary. ERISA provides that, “a person is a fiduciary with respect to a plan to the extent he renders investment advice for a fee . . . with respect to any moneys or

other property of such plan, or has any authority or responsibility to do so.” 29 U.S.C. § 1002(21)(A)(ii). The court stated that it would consider, among other things, the relevant statutory and regulatory provisions of ERISA, including the five-part investment advice test<sup>[1]</sup> promulgated by the Department of Labor in 1975, to determine whether the company was a functional fiduciary during the relevant time period.

**Two to Three Interactions Was Insufficient to Constitute Providing Advice on a Regular Basis**

As to whether the company provided “investment advice” on a “regular basis” under the five-part investment advice test, the court concluded that it did not. The court explained that to provide advice on a “regular basis,” there must have been some number of instances in which advice was provided. However, the court found that plaintiffs’ allegations of two to three interactions was “clearly insufficient.” The court determined that the company’s consultative sales process<sup>[2]</sup> did not constitute advice on a “regular basis” in a strictly numerical sense given the limited number of actual interactions with plan participants prior to the rollover decision. The court also pointed out that this limited number of actual interactions was related only to one investment decision, which was the roll over. According to the court, the term “regular basis” should not be considered as a mere quantitative inquiry, but could also be “understood in the context of routinely providing plans with investment advice on a variety of decisions.” The court reasoned that “[t]he plain meaning of ‘regular’ runs counter to advisement related to a one-time decision, even if this decision is a consequential one.”

**Aggregate Roll-Over Recommendations Did Not Constitute Advice on a Regular Basis**

As to plaintiffs’ contention that all of the company’s interactions with various plan participants in the aggregate could constitute regular investment advising, the court determined that this was “not supported in the caselaw, and indeed is contradicted by the statutory text and prevailing regulations.”

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<sup>[1]</sup> The test is used to determine who qualifies as an “investment advice” fiduciary under the functional fiduciary statutory provision, stating that, “To plead that a defendant is a fiduciary because it provided investment advice for a fee in satisfaction of 29 U.S.C. § 1002(21)(A)(ii), a plaintiff must plead that (i) the defendant provided individualized investment advice; (ii) on a regular basis; (iii) pursuant to a mutual agreement, arrangement, or understanding that (iv) the advice would serve as a primary basis for the plan’s investment decisions; and (v) the advice was rendered for a fee.”

<sup>[2]</sup> During the consultative sales process, the company’s advisors would cold-call participants in company-administered employer sponsored plans to offer free financial planning services, the advisor would then meet with the participant, the advisor would create an individual financial plan based on the meeting and have a follow-up meeting where the advisor would pitch Portfolio Advisor.

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