Miller & Chevalier

EB Flash: DOL Issues New Prohibited Transaction Class Exemption for Investment Fiduciaries and Plan Rollovers to IRAs

Employee Benefits Alert
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The Department of Labor (DOL) granted Prohibited Transaction Exemption (PTE) 2020-02, a new class exemption for investment professionals based on the DOL temporary policy adopted after the Fifth Circuit Court of Appeals vacated the agency's 2016 fiduciary rule in *Chamber of Commerce of the United States v. United States Department of Labor*.[1] PTE 2020-02, entitled Improving Investment Advice for Workers & Retirees, also acknowledges the reinstatement of the 1975 regulation establishing the five-part test for determining investment advice fiduciary status and provides DOL's interpretation as to how the test applies to rollovers from an ERISA plan to an IRA.

Under the 1975 regulation, which DOL reinstated by a technical amendment on July 7, 2020, as a result of the Chamber decision, for advice to constitute "investment advice" under the five-part test and ERISA § 3(21)(a)(ii), a financial institution or investment professional who is not a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) must:

- Render advice to a plan as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property,
- On a regular basis,
- Pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary, or IRA owner, that
- The advice will serve as a primary basis for investment decisions with respect to the plan or IRA assets, and that
- The advice will be individualized based on the particular needs of the plan or IRA.

A financial institution or investment professional who satisfies the above and receives a fee or other compensation, either directly or indirectly, will be considered an "investment advice fiduciary" under ERISA and/or the Internal Revenue Code (Code). The new exemption does not "put at issue the five-part test," which remains intact from 1975, but, as noted in the Preamble, the exemption interprets aspects of the test.

PTE 2020-02 interprets the 1975 regulation to apply to IRA rollovers by including advice related to such rollovers as within the scope of "investment advice" pursuant to § 3(21)(a)(ii) in connection with the transactions in the class of transactions covered by the exemption. As explained in the Fact Sheet issued with the new exemption, DOL moved away from prior guidance and states that providing advice regarding the rollover of assets from a plan to an IRA constitutes "advice to sell, withdraw, or transfer investment assets currently held in the plan," and therefore falls under the definition of fiduciary advice if the five-part test is satisfied. At the same time, DOL recognized in the Fact Sheet that advice regarding such rollovers "may be an isolated and independent transaction that would fail to meet the 'regular basis' prong of the five-part test." Additionally, DOL stated that advisers providing rollover advice may avoid fiduciary status if they make clear in their communications that they do not intend to enter into an ongoing relationship to provide advice and they act accordingly.

The new class exemption broadly permits "investment advice fiduciaries . . . to receive compensation, including as a result of advice to roll over assets from a Plan to an IRA, and to engage in principal transactions, that would otherwise violate the prohibited transaction provisions of Title I and the Code" if its conditions are satisfied. Principal transactions are transactions in which investment advice fiduciaries "sell or purchase certain securities and other investments from their own inventories to or from plans and IRAs."

To qualify for the exemption, the investment fiduciary must provide advice that meets the "Impartial Conduct Standards," which include a best interest standard, a reasonable compensation standard, and a requirement to make no materially misleading statements. "The standards in the Department's exemption announced today align with standards of other regulators, including the SEC."

The class exemption includes "protective conditions designed to safeguard the interests of Plans, participants and beneficiaries, and IRA owners," including investor disclosure, conflict mitigation, and retrospective compliance review requirements.

DOL states that this new prohibited transaction class exemption covers SEC registrants and state-registered investment advisers, broker-dealers, banks, insurance companies, and their employees, agents, and representatives that are investment advice fiduciaries.

DOL advises that FAB 2018-02 will remain in effect for one year after official publication. "This will provide a transition period for parties to develop mechanisms to comply with the provisions in the new exemption," DOL notes.

- 295-page text of the final exemption - it is scheduled to take effect 60 days after publication in the Federal Register
- Related DOL fact sheet
- Press release

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[1] *U.S. Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).