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DOL Extends Non-Enforcement Period for PTE for Investment Advice Fiduciaries

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On October 25, 2021, the Department of Labor ("DOL") released Field Assistance Bulletin 2021-02 (FAB 2021-02), which extends its non-enforcement policies regarding certain rules applicable to fiduciaries who provide investment advice and rely on Prohibited Transaction Exemption 2020-02 (PTE 2020-02). The DOL recognized that an extension was necessary for investment advisers and other financial institutions to bring themselves into full compliance with the exemption, and in particular with the disclosure requirements and annual retrospective review requirements.

PTE 2020-02 Background

In the aftermath of the DOL's 2016 "Fiduciary Rule" being vacated by the Fifth Circuit, the DOL announced a change in its interpretation of its traditional definition of an investment advice fiduciary so that advice regarding rollovers from a retirement plan to an IRA may be considered fiduciary investment advice. (See our prior Legal Alert: "Fiduciary Rule 2.0: What You Need to Know About the DOL's New Fiduciary Rule").

In connection with this change, the DOL issued PTE 2020-02, which allows a fiduciary to provide investment advice to an ERISA Plan or an IRA and receive compensation that varies based on the fiduciary's advice, provided that the conditions of the exemption are met. For example, under PTE 2020-02, a financial adviser may provide investment advice to a client in a fiduciary capacity regarding a rollover to an IRA when the financial adviser will receive additional advisory fees as the result of the rollover. The terms and conditions of PTE 2020-02 are summarized in our Legal Alert: "PTE 2020-02 for Investment Advice Fiduciaries: Overview and Checklist."

Although PTE 2020-02 became effective on February 16, 2021, the DOL announced that it would not, as a matter of enforcement policy, pursue claims for fiduciary duty or prohibited transactions until after December 20, 2021 against fiduciaries who are working diligently and in good faith to comply with the "Impartial Conduct Standards" of PTE 2020-02.

Extension of Good Faith Compliance with Impartial Conduct Standards until January 31, 2022.

FAB 2021-02 extends this temporary enforcement policy to January 31, 2022. The DOL explained that this extension may allow investment advisers and other financial institutions to align their compliance with PTE 2020-02 with regular distribution cycle for disclosures and to provide relief for fiduciaries that want to perform an annual retrospective review during the calendar year.

As a result, until January 31, 2022, the DOL will not pursue prohibited transaction claims against financial institutions that are working in good faith to comply with the "Impartial Conduct Standards" of PTE 2020-02 by:

- Providing advice that meets the prudence and loyalty standards of care,
- Charging no more than reasonable fees for services and complying with federal securities laws regarding "best execution", and
- Avoiding any misleading statements about the transaction or other relevant matters.

Extension of Documentation and Disclosure Standards for Rollover Transactions until June 30, 2022

In addition, the DOL said in FAB 2021-02 that it would not pursue enforcement until after June 30, 2022 against fiduciaries for documenting a fiduciary's specific reasons for a rollover recommendation from an ERISA Plan. The DOL stated this relief is appropriate in order for financial institutions to implement the documentation requirements in an automated and systematic manner.

This aspect of the extension is limited to the special documentation and disclosure standards applicable to advice with respect to rollover transactions. The DOL noted that all other terms and conditions of PTE 2020-02 will be subject to full enforcement on February 1, 2022. This includes requirements to maintain policies and procedures that mitigate the potential for conflicts of interest and to provide disclosures regarding conflicts of interest. As a result, financial institutions will need to continue to work diligently to bring themselves into full compliance with PTE 2020-02 with all other terms and conditions by February 1, 2022.

