

FIELD ASSISTANCE BULLETIN NO. 2021-02

DATE: 10/25/2021

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SUBJECT: TEMPORARY ENFORCEMENT POLICY ON PROHIBITED TRANSACTION
RULES APPLICABLE TO INVESTMENT ADVICE FIDUCIARIES

Background

This document announces a temporary enforcement policy related to the Department of Labor's prohibited transaction exemption (PTE) 2020-02.

On December 18, 2020, the Department adopted PTE 2020-02, Improving Investment Advice for Workers & Retirees, a new prohibited transaction exemption under the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code of 1986, as amended (the Code), for investment advice fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs). Investment advice fiduciaries who rely on the exemption must render advice that is in their plan and IRA customers' best interest in order to receive compensation that would otherwise be prohibited in the absence of an exemption, including commissions, 12b-1 fees, revenue sharing, and mark-ups and mark-downs in certain principal transactions. The exemption expressly covers prohibited transactions resulting from both rollover advice and advice on how to invest assets within a plan or IRA. PTE 2020-02 became effective on February 16, 2021, but the Department provided transitional relief through December 20, 2021.

The Department's adoption of PTE 2020-02 followed a series of actions regarding the regulation of investment advice. In 2016, the Department issued a regulation that updated a 1975 regulation defining who is an investment advice fiduciary for the purposes of ERISA. At the same time, the Department also granted new associated prohibited transaction class exemptions and amended certain preexisting class exemptions. The U.S. Court of Appeals for the Fifth Circuit subsequently vacated that rulemaking, including both the rule defining fiduciary advice and the new and amended exemptions.¹ Following the

¹ *Chamber of Commerce of the United States v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

Fifth Circuit's vacatur, the Department issued Field Assistance Bulletin (FAB) 2018-02, a temporary enforcement policy providing prohibited transaction relief to investment advice fiduciaries.²

In FAB 2018-02, the Department stated it would not pursue prohibited transaction claims against investment advice fiduciaries who worked diligently and in good faith to comply with "Impartial Conduct Standards" for transactions that would have been exempt under the new exemptions or treat such fiduciaries as violating the applicable prohibited transaction rules. In finalizing PTE 2020-02, the Department announced that the temporary enforcement policy stated in FAB 2018-02 would remain in place until December 20, 2021.

The Department understands that the December 20, 2021 expiration date of the temporary enforcement policy poses practical difficulties for financial institutions that are in the process of complying with the exemption conditions. Specifically, financial institutions have expressed concern that they would incur significant additional distribution costs, because the December 20, 2021, expiration date does not align with their regular distribution cycle for disclosures. The expiration date also complicates the retrospective review requirement for financial institutions that want to perform their review on a calendar year basis.

In addition, financial institutions are in the process of developing tools to comply with the rollover documentation and disclosure requirements in Sections II(b)(3) and (c)(3) of PTE 2020-02. Some financial institutions are working with third party vendors to automate much of the documentation and analysis of rollover recommendations. In previous guidance, the Department had acknowledged the difficulty that firms may sometimes face in obtaining plan data as they make the transition to PTE 2020-02:

To satisfy the documentation requirement for rollovers from an employee benefit plan to an IRA, investment professionals and financial institutions should make diligent and prudent efforts to obtain information about the existing employee benefit plan and the participant's interests in it. In general, such information should be readily available as a result of Department regulations mandating disclosure of plan-related information to the plan's participants (*see* 29 CFR 2550.404a-5). If the retirement investor won't provide the information, even after a full explanation of its significance, and the information is not otherwise readily available, the financial institution and investment professional should make a reasonable estimation of expenses, asset values, risk, and returns based on publicly available information. The financial institution and investment professional should document and explain the assumptions used and their limitations. In such cases, the financial institution and investment professional could rely on alternative data sources, such as the most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of plan at issue.³

² Available at www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.

³ New Fiduciary Advice Exemption: PTE 2020-02, Improving Investment Advice for Workers & Retirees, Frequently Asked Questions, April 2021, Q15, available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf>. *See also* preamble to PTE 2020-02, Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees 85 Fed Reg. 82798, 82831-32 (Dec. 18, 2020).

Even with this flexibility, however, financial institutions have expressed concern that they face significant challenges in implementing the rollover documentation and disclosure requirements by the December 20 deadline in a sufficiently automated and systematic manner, and that these challenges and concerns may delay their ability to rely on the exemption as the Department intended. While some believe they will be ready by the deadline with fully operational systems, others believe more time is necessary and have requested additional time to build the required systems and make the transition to full compliance with the exemption.

Based upon these and related concerns, the Department has concluded that it is appropriate to provide additional transition relief through this enforcement policy. First, for the period from December 21, 2021, through January 31, 2022, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that are exempted in PTE 2020-02 or treat such fiduciaries as violating the applicable prohibited transaction rules.

The Impartial Conduct Standards specifically require financial institutions and investment professionals to:

- Give advice that is in the “best interest” of the retirement investor. This best interest standard has two chief components: prudence and loyalty;
 - Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
 - Under the loyalty standard, advice providers may not place their own interests ahead of the interests of the retirement investor, or subordinate the retirement investor’s interests to their own;
- Charge no more than reasonable compensation and comply with federal securities laws regarding “best execution”; and
- Make no misleading statements about investment transactions and other relevant matters.

Second, the Department has determined that it will not enforce the specific documentation and disclosure requirements for rollovers in PTE 2020-02 through June 30, 2022. All other requirements of the exemption, however, will be subject to full enforcement as of February 1, 2022. The Department is convinced that this temporary and limited enforcement relief is appropriate and in the interest of plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners.

Temporary Enforcement Policy

Accordingly, for the period from December 21, 2021 through January 31, 2022, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that are exempted in PTE 2020-02 or treat such fiduciaries as violating the applicable prohibited transaction rules. In addition, from December 21, 2021 through June 30, 2022, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are otherwise in compliance with PTE 2020-02 based solely on their failure to comply with the disclosure and documentation requirements set

forth in Sections II(b)(3) and (c)(3) of that exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.⁴

This Bulletin is an expression of the Department's temporary enforcement policy, and it does not address the rights or obligations of other parties.

⁴ On March 28, 2017, the Treasury Department and the IRS issued IRS Announcement 2017-4 stating that the IRS will not apply § 4975 (which provides excise taxes relating to prohibited transactions) and related reporting obligations with respect to any transaction or agreement to which the Labor Department's temporary enforcement policy described in FAB 2017-01, or other subsequent related enforcement guidance, would apply. The Treasury Department and the IRS have confirmed that, for purposes of applying IRS Announcement 2017-4, this FAB 2021-02 constitutes "other subsequent related enforcement guidance."