Client Alert

December 2021

The U.S. Department of Labor Rolls Over Relief for Investment Fiduciaries Into 2022

The U.S. Department of Labor ("DOL") recently issued year-end relief to investment advice fiduciaries with its release of Field Assistance Bulletin No. 2021-02 (the "Notice") on October 25, 2021. Previously, the DOL adopted Prohibited Transaction Exemption 2020-02 ("PTE 2020-02") on December 18, 2020, which set forth several requirements that financial institutions and investment professionals must satisfy when providing fiduciary investment advice, including advice to roll over a retirement plan account ("Plan") into an Individual Retirement Account ("IRA"). Although PTE 2020-02 became effective February 16, 2021, interim transitional relief delayed its effective date through December 20, 2021. The Notice further extended transitional relief to as late as June 30, 2022.

PTE 2020-02

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), generally penalizes certain parties in transactions between a fiduciary of an ERISA Plan and a party in interest (a "Prohibited Transaction"). Parties in interest include Plan fiduciaries, the employer that sponsors the Plan, an employee of the employer and any service provider to the Plan. Prohibited Transactions consist of transactions between a Plan and a party in interest and include (a) sales, exchange, or leasing of property, (b) lending of money, or extending credit, (c) furnishing goods, services, or facilities, (d) transfer of Plan income or assets to use by or for the benefit of a party in interest, (e) Plan fiduciary's actions whereby Plan assets or Plan income are used for his or her own interest, and (f) receipt for consideration by a fiduciary from any party dealing with the Plan that involves Plan income or assets.

The Prohibited Transaction rules under ERISA are intricate and punitive when violated without an exemption.

The exemption under PTE 2020-02 applies to Prohibited Transactions resulting from rendering both rollover advice and advice on how to invest assets within a Plan or IRA. Investment advice fiduciaries who rely on PTE 2020-02 to be able to render advice may generally do so provided such advice is in the "best interests" of the retirement investor. Reliance upon the PTE

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2020-02 exemption enables investment advice fiduciaries to receive compensation that would otherwise be prohibited in the absence of an exemption. Such compensation may include commissions, 12b-1 fees, revenue sharing arrangements, and mark-ups and mark-downs in principal transactions. An example of when compensation would be otherwise prohibited without an exemption is when a firm recommends to investors that they roll assets over from a Plan and into an IRA that such firm also manages for a fee. To provide such investment advice and receive compensation, the investment advice fiduciary must:

(a) Disclose the material conflicts, including written acknowledgement of their fiduciary status;

(b) Adhere to the "Impartial Conducts Standards" and mitigate conflicts of interest that could otherwise cause violations of those standards;

(c) Document and disclose the specific reasons that any rollover recommendations are in the investor's best interest; and

(d) Conduct a retrospective compliance review.

Extension Relief

The Notice provides for two extensions of relief. First, the Notice provides that for the period from December 21, 2021 through January 31, 2022, the DOL will not pursue claims against investment advice fiduciaries or treat such fiduciaries as violating the applicable Prohibited Transaction rules who are working in good faith to comply with the "Impartial Conduct Standards". Second, the DOL will not enforce the documentation disclosure requirement for rollovers, as detailed above and further described in Sections II(b)(3) and (c)(3) of PTE 2020-02, through June 30, 2022. Investment advice fiduciaries will want to meet all other requirements under PTE 2020-02 by February 1, 2022.

In sum, financial institutions and investment professionals will need to create or update policies, procedures, checklists, forms, and service agreements to meet the requirements of PTE 2020-02 by the new extended deadlines. Failure to do so will not protect the financial institution or investment professional against the consequences of a Prohibited Transaction.

Please contact the Olshan attorney with whom you regularly work or the attorney below if you would like to discuss further or have questions.

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