Enforcement of Investment Advice Exemption – On The Horizon

Investment consultants and other service providers who advise plan participants and fiduciaries about rollovers and investment choices received another reprieve from new rules governing that advice. But the reprieve is only temporary; those consultants and advisors must be prepared to comply by February 1, 2022.

As described in our 2020 article, "DOL Finalizes Fiduciary Investment Advice Guidance," the Department of Labor issued Prohibited Transaction Exemption 2020-02, which defines when entities and individuals are acting as investment advice fiduciaries under ERISA and the Internal Revenue Code. The Exemption also establishes a framework that allows investment advice fiduciaries to receive compensation and to engage in principal transactions that would otherwise violate ERISA's and the Code's prohibited transaction provisions. The Exemption became effective on February 16, 2021. However, as previously communicated, the Department issued a press release on February 12, 2021, confirming that the temporary enforcement relief provided by Field Assistance Bulletin 2018-02 would remain in place until December 20, 2021.

The Department has now further extended the temporary enforcement relief under Field Assistance Bulletin 2021-02. As a result, the Department will not "pursue prohibited transaction claims against investment advice fiduciaries who work diligently and in good faith to comply with [the Exemption's] '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," for the period from December 21, 2021, through January 31, 2022. In addition, the Department will not enforce the Exemption's rollover documentation and disclosure requirements through June 30, 2022. With the exception of the rollover requirements, however, the Department reminds fiduciaries that all other requirements of the Exemption will be enforced as of February 1, 2022.

In the interim, investment advice fiduciaries should continue to develop and implement their policies, procedures, and systems to ensure compliance with the Exemption's requirements and to be ready for the Department's enforcement of it in the coming months.

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