

## DOL Rule Redux

By Dec. 20, broader “prohibited transaction exemption” rules will be mandatory and advisors will need to comply.

**T**he Department of Labor rule — much to the chagrin of the advisory community — is back in a new “prohibited transaction exemption.” Although the PTE became effective on Feb. 16, 2021, as discussed below, full compliance will not be required until Dec. 20, 2021.

PTE requirements will seem similar to those of the prior rule. To gain a better understanding of the PTE and how to comply with its requirements, I sat down with my colleague Ryan Walter, an ERISA specialist.

Ryan advised that the PTE allows investment advice fiduciaries to receive what would otherwise be prohibited compensation.

An investment advice fiduciary is defined as a person who provides investment advice for a fee or other compensation, direct or indirect, with respect to any money or other property of a plan, if the following facts and circumstances apply:

- The person renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property;
- does it on a regular basis;
- pursuant to a mutual agreement, arrangement or understanding with the plan, plan fiduciary or individual retirement account owner;
- and 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 particular needs of the plan or IRA.

The above analysis of facts and circumstances also applies to rollover recommendations. Thus, a recommen-



dation to roll assets out of an ERISA plan is fiduciary investment advice if provided by a person who satisfies all of the requirements of the above five-part test.

The DOL has indicated that until Dec. 20, 2021, an investment advice fiduciary can comply by simply adhering to the PTE’s Impartial Conduct Standards:

- Providing investment advice that is in retirement investors’ best interest;
- Charging only reasonable compensation;
- Making no materially misleading statements about the investment transaction and other relevant matters; and
- Seeking to obtain the best execution of the investment transaction reasonably available under the circumstances, as required by federal securities laws.

After that date, compliance with the broader requirements of the PTE shall become mandatory, including:

- Adherence to the above Impartial Conduct Standards.

• **Written disclosure:** Prior to engaging in a transaction pursuant to the PTE, the *investment advice fiduciary* must provide written disclosure to the retirement investor acknowledging that the financial institution and its investment profession-

als are fiduciaries under ERISA and/or the Code, as applicable, and a written description of corresponding conflicts of interest.

• **Rollover analysis and disclosure:**

Document and disclose the reasons that a recommendation to roll over assets is in the retirement investor’s best interest. This requirement extends to recommended rollovers from an ERISA plan to another ERISA plan or IRA; from an IRA to an ERISA plan; from an IRA to another IRA; or from one type of account to another (e.g., from a commission-based account to a fee-based account).

• **Policies and procedures:**

Establish, maintain and enforce written policies and procedures prudently designed to ensure that the financial institution and its investment professionals comply with the Impartial Conduct Standards.

• **Retrospective review:** Conduct a retrospective review, at least annually, that is reasonably designed to assist the financial institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the PTE.

Over the coming months, advisory firms should be working on achieving compliance with the above pending required broader requirements. The firm should be prepared to demonstrate such compliance in regulatory examinations. I know that Ryan will.

And yes, the DOL does conduct exams of investment advisors. **IA**

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