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Publications

# DOL Delays Advice Exemption Enforcement Against Good Faith Fiduciaries


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On October 25, 2021, the Department of Labor ("DOL") issued Field Assistance Bulletin 2021-02 announcing:

- A new nonenforcement policy in effect from December 21, 2021 through January 31, 2022 for certain prohibited transactions that may arise because of the provision of fiduciary investment advice; and
- That DOL will not enforce the documentation and disclosure requirements applicable to rollover recommendations a financial institution makes while otherwise relying on PTE 2020-02 through June 30, 2022.

## Background

On April 8, 2016, DOL published a new fiduciary regulation (the "2016 Fiduciary Rule") that significantly expanded the scope of investment advice for purposes of determining who is an investment fiduciary. Because of the 2016 Fiduciary Rule, many service providers modified their investment advice programs to comply with the Best Interest Contract ("BIC") Exemption and/or the Principal Transactions Exemption that were also issued in connection with the 2016 Fiduciary Rule. However, the Fifth Circuit in *Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018) subsequently issued a mandate vacating both the 2016 Fiduciary Rule and the related exemptions.

Consequently, DOL issued FAB 2018-02 to provide temporary nonenforcement relief to investment advice fiduciaries who made good faith efforts to comply with the impartial conduct standards that were the basis of the vacated exemptions. Subsequently, in late 2020, DOL finalized a new prohibited transaction exemption, PTE 2020-02, for financial institutions that are investment advice fiduciaries. In connection with the issuance of PTE 2020-02, DOL announced that FAB 2018-02 would remain in place through December 20, 2021. On October 25, 2021, DOL announced additional transition relief, in recognition of the expiration of FAB 2018-02, and the challenges faced by investment advice fiduciaries implementing the FAB's successor, PTE 2020-02. In extending this new transition relief, DOL cited "practical difficulties for financial institutions that are in the process of complying with the exemption conditions" of PTE 2020-02.

# DOL's Transitional Relief

DOL's PTE 2020-02 transition relief includes two components. First, for the period from December 21, 2021 through January 31, 2022, DOL will not pursue prohibited transaction claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have otherwise been exempted under PTE 2020-02, or treat such fiduciaries as violating the applicable prohibited transaction rules. This welcome and much needed relief allows financial institutions to rely upon DOL's nonenforcement position rather than having to conduct the annual retrospective compliance review for the stub of 2021. Instead, financial institutions relying on PTE 2020-02 may conduct those reviews on a calendar year basis. Additionally, the new nonenforcement policy allows a financial institution to forego making a disclosure acknowledging fiduciary status until January 31, 2022, which will permit some flexibility to include these acknowledgments with other mailings.

Second, DOL extended express relief through June 30, 2022 to certain rollover recommendation conditions under PTE 2020-02. Specifically, FAB 2021-02 invokes a new nonenforcement policy under which DOL will not pursue prohibited transaction claims solely as a result of a financial institution's failure to comply with the documentation and disclosure requirements applicable to rollover recommendations made relying on PTE 2020-02. PTE 2020-02's rollover recommendation conditions require a financial institution to document the specific reasons a rollover recommendation is in the best interests of a retirement investor, and to provide that documentation to a retirement investor. In extending this new relief, DOL cited practical difficulties and costs faced by financial institutions that will prevent the financial institutions from meeting the December 20, 2021 deadline.

In a footnote to FAB 2021-02, DOL indicated that the Treasury Department and the IRS confirmed that IRS Announcement 2017-4, which states that IRS will follow a previous DOL nonenforcement policy, also applies to FAB 2021-02. Therefore, the IRS will not apply prohibited transaction excise taxes or related reporting obligations with respect to any transaction that is subject to relief under FAB 2021-02. DOL also noted that the nonenforcement policy does not address the rights or obligations of other parties.

# Summary of New Temporary Nonenforcement Policy

Until at least January 31, 2022, the DOL "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". This is essentially a full extension of the current FAB from December 20, 2021 through January 31, 2022. Additionally, DOL will not enforce the documentation and disclosure requirements applicable to rollovers covered by PTE 2020-02 through June 30, 2022.