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If it Ain't Broke, Fix it as Needed: The DOL's Revised Fiduciary Rule and Exemptions Proposal

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On June 29, 2020, the Department of Labor (the ''DOL'') issued a proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended (''ERISA''),[1] and the I.R.C., entitled ''Improving Investment Advice for Workers & Retirees'' (the ''Proposed Class Exemption''). The Proposed Class Exemption would allow investment advice fiduciaries to receive compensation, including compensation resulting from the advice to roll over plan assets to an IRA, and to transact with plans and IRAs on behalf of their own accounts — actions otherwise prohibited under ERISA and the I.R.C.

In this article, I will first discuss the historical timeline that provided the impetus for the Proposed Class Exemption. Then, I will provide a broad overview of the Proposed Class Exemption along with key takeaways.

HISTORY

DOL Five-Part Test

Section 3(21)(A)(ii) of ERISA and §4975(e)(3)(B)[2] confer fiduciary status to a person that ''renders *investment advice* for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.'' In 1975, the DOL provided guidance regarding the definition of ''investment advice,'' setting forth the analytical framework that has become widely-known as the ''five-part test.''[3] Under the five-part test, a person acted as an investment advice fiduciary when such person, for a fee: (1) provided advice to a plan as to the value of an investment, or made recommendations on investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement or understanding; (4) that such advice would serve as a primary basis for investment decisions with respect to the plan assets; and (5) such advice would be individualized to the particular needs of the plan.[4] Because each prong of the test had to be met, the DOL's framework had the effect of excluding certain advisors, broker-dealers, and other financial professionals from characterization as investment advice fiduciaries.[5]

Advisory Opinion 2005-23A: Deseret Letter

On December 7, 2005, the DOL issued an advisory opinion to Deseret Mutual Fund Administrators (the ''Deseret Letter''), in which it addressed whether an advisor that recommends an IRA rollover to a plan participant would be considered an investment advice fiduciary and whether a management fee or other compensation received by said advisor from investments in the IRA would violate prohibited transaction

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[1] Pub. L. No. 93-406.

[2] All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[3] 29 C.F.R. §2510.3-21.

[4] 29 C.F.R. §2510.3-21.

[5] 81 Fed. Reg. 20,946 (Apr. 8, 2016).

restrictions.[6] In addressing both questions, the DOL took the view that, as a preliminary matter, such advisor would not be an investment advice fiduciary, even if the advisor provided advice on how to invest distributed funds.[7] The DOL reasoned that a recommendation to take a distribution (even with the intent to roll over to an IRA) has no effect, especially when such distribution is permissible.[8] Also, the DOL stated that such recommendation was not one that was contemplated in the DOL's 1975 regulation.[9] Additionally, the DOL expressed that once funds are distributed, those distributed proceeds are no longer plan assets, and accordingly, the five-part test would not be applicable to any investment recommendations regarding those proceeds.[10] However, the DOL opined that a person who is already a plan fiduciary may not even respond to a participant's questions regarding a plan distribution or the investment of amounts withdrawn from a plan without exercising fiduciary control over the participant's account.[11]

2016 Regulatory Package

On April 8, 2016, the DOL issued the ''Definition of the Term 'Fiduciary;' Conflict of Interest Rule—Retirement Investment Advice'' final regulation (the ''Fiduciary Rule''), which reshaped the definition of ''investment advice'' for purposes of §3(21)(A)(ii) of ERISA and §4975(e)(3)(B).[12] By effectively eliminating ''the regular basis,'' ''mutual understanding,'' and ''primary basis'' prongs of the five-part framework, the Fiduciary Rule was intended to capture activities that were once deemed outside the scope of ''investment advice.''[13] Notably, under the Fiduciary Rule, any person making a recommendation regarding whether to rollover a plan account balance to an IRA would now be classified as a fiduciary, and thus subject to the duties and standard of conduct imposed by ERISA and to the excise tax provisions of the I.R.C.[14] The DOL's stance, as provided in the preamble to the Fiduciary Rule, essentially rescinded its position set forth in the Deseret Letter.[15]

In addition to the Fiduciary Rule, the DOL also issued the Best Interest Contract Exemption (the ''BIC Exemption'') and the Principal Transactions Exemption as part of its regulatory package.[16] The BIC Exemption allowed financial institutions and their advisors, who were now deemed investment advice fiduciaries, to receive commission and other forms of compensation without violating the prohibited transaction restrictions of ERISA and the I.R.C., so long as they met the requisite conditions.[17] Accordingly, an investment advice fiduciary would be required to enter into a written enforceable contract with the retirement investor that included, among other things, the following provisions: (1) an acknowledgement of its fiduciary status, (2) an agreement to comply with the Impartial Conduct Standards (''2016 Impartial Conduct Standards''),[18] (3) warranties that the financial institution has adopted and will comply with policies and procedures reasonably designed to ensure compliance with the 2016 Impartial Conduct Standards, and (4) an agreement to make available disclosures, at or prior to the execution of a recommended transaction, regarding fees, compensation, and material conflicts.[19] Additionally, the contract could not have any exculpatory provisions limiting the financial institution's or advisor's liability.[20]

Similarly, the Principal Transactions Exemption allowed investment advice fiduciaries to engage in principal transactions and riskless principal transactions in certain investments with a plan or an IRA, without violating self-dealing restrictions imposed by ERISA and the I.R.C.[21] Principal transactions are transactions in which a financial advisor or financial institution purchases from, or sells to a plan or IRA, on behalf of

[6] DOL Adv. Op. 2005-23A (Dec. 7, 2005), withdrawn as of June 29, 2020.

[7] DOL Adv. Op. 2005-23A (Dec. 7, 2005), withdrawn as of June 29, 2020.

[8] DOL Adv. Op. 2005-23A (Dec. 7, 2005), withdrawn as of June 29, 2020.

[9] DOL Adv. Op. 2005-23A (Dec. 7, 2005), withdrawn as of June 29, 2020.

[10] DOL Adv. Op. 2005-23A (Dec. 7, 2005), withdrawn as of June 29, 2020.

[11] DOL Adv. Op. 2005-23A (Dec. 7, 2005), withdrawn as of June 29, 2020.

[12] 81 Fed. Reg. 20,946 (Apr. 8, 2016).

[13] 81 Fed. Reg. 20,946, 20,955, 20,990 (Apr. 8, 2016) (''ERISA's statutory definition of fiduciary status broadly covers any person that renders investment advice to a plan or IRA for a fee . . . The final rule honors the broad sweep of the statutory text in a way that the 1975 rule does not.'').

[14] 81 Fed. Reg. 20,946, 20,997 (Apr. 8, 2016) (''a person shall be deemed to be rendering investment advice . . . [if he or she provides] a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA . . . or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made'').

[15] 81 Fed. Reg. 20,946, 20,964 (Apr. 8, 2016).

[16] 81 Fed. Reg. 21,002 (Apr. 8, 2016); 81 Fed. Reg. 44,784 (July 11, 2016).

[17] 81 Fed. Reg. 21,002 (Apr. 8, 2016).

[18] 81 Fed. Reg. 21,002, 21,007 (Apr. 8, 2016). The 2016 Impartial Conduct Standards required acting in the best interest of the retirement investor, accepting no more than reasonable compensation, and refraining from making misleading statements about investment transactions, compensation, and conflicts of interest. The best interest standard required that advice reflect ''the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use . . . based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, *without regard* to the financial or other interests of the [a]dviser, [f]inancial institutions or any [a]ffiliate, [r] elated entity, or other party'' (emphasis added).

[19] 81 Fed. Reg. 21,002, 21,076-21,078 (Apr. 8, 2016).

[20] 81 Fed. Reg. 21,002, 21,076-21,078 (Apr. 8, 2016).

[21] 81 Fed. Reg. 44,784 (July 11, 2016).

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the account of the financial institution or its affiliates.[22] Riskless principal transactions are transactions in which a financial institution, after having received an order from a retirement investor to buy or sell a principal traded asset, purchases or sells the asset for the financial institution's own account to offset the contemporaneous transaction with the retirement investor.[23] The Principal Transactions Exemption employed the same conditions set forth in the BIC Exemption, including compliance with the 2016 Impartial Conduct Standards.[24]

Fifth Circuit Decision

While the DOL's 2016 regulatory package represented a shift from the long-standing five-part paradigm, it was short-lived. On June 21, 2018, the United States Court of Appeals for the Fifth Circuit issued a mandate vacating the DOL's 2016 regulations.[25] The declaration followed the Fifth Circuit's decision in *Chamber of Commerce v. DOL*, in which it ruled that the Fiduciary Rule and its accompanying prohibited transaction exemptions were invalidly promulgated, representing an overreach in interpretation and abuse of power by the DOL.[26] The Fifth Circuit's vacatur of the DOL's regulatory package presumably — though not entirely clear at the time — signaled a restoration of the five-part test and the DOL's position in the Deseret Letter.[27]

Field Assistance Bulletin 2018-02

On May 7, 2018, the DOL issued a temporary non-enforcement policy for investment advice fiduciaries who, in good faith, had worked or were working towards complying with the 2016 Impartial Conduct Standards set forth in the 2016 regulatory package.[28] As this guidance was intended to provide transitional relief, the DOL hoped to temporarily quell some of the uncertainty caused by the Fifth Circuit's decision, until it could provide further regulations, exemptions, or administrative guidance.[29]

PROPOSED CLASS EXEMPTION

The Proposed Class Exemption provides relief from the transactional restrictions of §406(a)(1)(A), §406(a)(1)(D), and §406(b) of ERISA and §4975(c)(1)(A), §4975(c)(1) (D), §4975(c)(1)(E), and §4975(c)(1)(F) of the I.R.C. for prohibited compensation received by investment advice fiduciaries.[30] Notably, and for purposes of this article, the Proposed Class Exemption would permit investment advice fiduciaries to receive compensation upon the execution of recommended transactions, including recommendations to roll over a plan to an IRA, or roll over an IRA to another IRA.[31] Additionally, the Proposed Class Exemption would permit investment advice fiduciaries to enter into riskless and certain other principal transactions.[32] In order to rely on this Proposed Class Exemption, investment advice fiduciaries must comply with certain conduct standards, provide certain disclosures, undertake to keep certain records, and establish policies and procedures, including an annual retrospective review, certified to by the CEO (or an equivalent officer) of the financial institution. In this section, I highlight the key takeaways from the Proposed Class Exemption.

Rollovers

In the preamble to the Proposed Class Exemption, the DOL expressed that rollover recommendations are a primary concern, as the decision to roll over plan assets to an IRA ''may be one of the most important financial decisions that retirement investors make, as it may have a long-term impact on their retirement security.''[33] Accordingly, the DOL stated its view that a recommendation that a plan participant take a rollover distribution from a 401(k) plan is a recommendation to invest, withdraw, or sell plan assets for purposes of the first prong of the five-part test, thus departing from its position expressed in the Deseret Letter—which was effectively withdrawn as of June 29, 2020.[34]

The DOL further stated that a rollover recommendation, in isolation, may not result in fiduciary status for a financial institution or investment professional.[35] Rather, it reemphasized the importance of satisfying all prongs of the five-part test before deeming a financial institution or investment professional an invest-

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[22] 81 Fed. Reg. 44,784, 44,791 (July 11, 2016).

[23] 81 Fed. Reg. 44,784, 44,791 (July 11, 2016).

[24] 81 Fed. Reg. 44,784, 44,786-44,787 (July 11, 2016).

[25] *Chamber of Commerce of the United States v. U.S. Department of Labor*, No. 17-10238 (5th Cir. filed June 21, 2018), https://www.groom.com/wp-content/uploads/2018/06/It%E2%80%99s_Over_Fifth_Circuit_Issues_-Mandate_Vacating_Fiduciary_Rule-17-10238_DocketEntry_06-21-2018_.pdf.

[26] 885 F.3d 360, 385 (5th Cir. 2018). As support for invalidating the Fiduciary Rule and its accompanying exemptions, the Fifth Circuit stated that the DOL's creation of a contractual private right of action for IRA owners, a right absent from Title II of ERISA, circumvented Congress' withholding of such regulatory authority from the DOL.

[27] DOL Field Assistance Bulletin No. 2018-02 (May 7, 2018).

[28] DOL Field Assistance Bulletin No. 2018-02 (May 7, 2018).

[29] DOL Field Assistance Bulletin No. 2018-02 (May 7, 2018).

[30] Proposed Class Exemption: Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 40,834, 40,862 (July 7, 2020).

[31] 85 Fed. Reg. 40,834, 40,862 (July 7, 2020).

[32] 85 Fed. Reg. 40,834, 40,862 (July 7, 2020).

[33] 85 Fed. Reg. 40,834, 40,845 (July 7, 2020).

[34] 85 Fed. Reg. 40834, 40,839 (July 7, 2020) (''In determining the fiduciary status of an investment advice provider in this context, the Department does not intend to apply the analysis in Advisory Opinion 2005-23A (the ''Deseret Letter''), which suggested that advice to roll assets out of a Plan did not generally constitute investment advice. The Department believes that the analysis in the Deseret Letter was incorrect and that advice to take a distribution of assets from an ERISA-covered Plan is actually advice to sell, withdraw, or transfer investment assets currently held in the Plan'').

[35] 85 Fed. Reg. 40,834, 40,839 (July 7, 2020).

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ment advice fiduciary.[36] Additionally, the DOL took the position that rollover recommendations warranted a broad interpretation and application of the five-part test.[37] Accordingly, the DOL expressed its view that an investment professional that provides an initial recommendation made in anticipation of establishing an ongoing advice relationship would satisfy the ''on a regular basis'' prong.[38] Also, the DOL clarified that the ''mutual understanding'' prong is based on the reasonable understanding of each party given the facts and circumstances, thus any written disclaimers to the contrary are not necessarily determinative.[39] Additionally, the DOL emphasized that the five-part test does not look at whether the advice serves as *the* primary basis of an investment decision, but rather whether it serves as *a* primary basis.[40] Furthermore, the DOL addressed the compensation aspect of §3(21)(A)(ii) of ERISA and §4975(e)(3)(B), reemphasizing its position that the compensation requirement covers ''all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered,'' and clarifying that fees and compensation received from transactions involving rollover assets would be incident to the advice to take a distribution from the plan and to roll over the assets to an IRA.[41]

Impartial Conduct Standards

The Proposed Class Exemption would also require investment advice fiduciaries to comply with certain specific standards of conduct (the ''Proposed Impartial Conduct Standards'') in order to rely on the exemption.[42] Similar to the 2016 Impartial Conduct Standards, the Proposed Impartial Conduct Standards require that fiduciaries act in the best interest of the retirement investor, accept no more than reasonable compensation, and refrain from making misleading statements about investment transactions and other relevant matters.[43] The Proposed Class Exemption would further require investment advice fiduciaries to seek to obtain the best execution for investment transactions.[44]

Best Interest

Under the Proposed Class Exemption and Proposed Impartial Conduct Standards, advice would satisfy the best interest standard if it ''reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use . . . based on the investment objectives, risk tolerance, financial circumstances, and needs of the [r]etirement [i]nvestor, and does not place the financial or other interests of the [i]nvestment [p]rofessional, [f]inancial [i]nstitution or any affiliate, related entity, or other party ahead of the interests of the [r]etirement [i]nvestor, or subordinate the [r]etirement [i]nvestor's interests to their own.''[45] Unlike the best interest standard found in the 2016 Impartial Conduct Standards, the proposed best interest standard does not contain language stating that advice be provided ''without regard to'' the interests of the investment professional or financial institution.[46] Rather, the DOL emphasized in the preamble to this Proposed Class Exemption that the financial professional's or institution's interest may be considered, so long as it is not placed ahead of the retirement investor's interest.[47] The best interest standard is intended to be interpreted and applied consistent with the standard set forth in the SEC's Regulation Best Interest and the SEC's interpretation regarding the conduct standard for registered investment advisers.[48]

For rollover recommendations, financial institutions and investment professionals would have to document reasons why the advice to roll over plan assets would be in the retirement investor's best interest.[49] The DOL believes that prudent rollover recommendations would consider and document the following: (1) the retirement investor's alternatives to a rollover, including leaving the money in his or her current employer's plan, if permitted, and selecting different investment options; (2) the fees and expenses associated with both the plan and the IRA; (3) whether the employer pays for some or all of the plan's administrative expenses; and (4) the different levels of services and investments available under the plan and the IRA.[50]

Reasonable Compensation

According to the DOL, assessing the reasonableness of compensation would be a market-based test, to be interpreted in a similar fashion as §408(b)(2) of ERISA and §4975(d)(2).[51] In the preamble, the DOL stated that an investment professional and financial institution do not necessarily have to recommend a transaction that is the lowest cost or that generates the lowest fees, and that selection of an investment solely because it offers the lowest cost, without considering other factors, may violate the best interest standard.[52]

Misleading Statements

The Proposed Class Exemption would require that, at the time of the recommendation, financial profes-

[36] 85 Fed. Reg. 40,834, 40,839 (July 7, 2020).

[37] 85 Fed. Reg. 40,834, 40,839-40,840 (July 7, 2020).

[38] 85 Fed. Reg. 40,834, 40,839-40,840 (July 7, 2020).

[39] 85 Fed. Reg. 40,834, 40,839-40,840 (July 7, 2020).

[40] 85 Fed. Reg. 40,834, 40,839-40,840 (July 7, 2020).

[41] 85 Fed. Reg. 40,834, 40,839-40,840 (July 7, 2020).

[42] 85 Fed. Reg. 40,834, 40,836 (July 7, 2020).

[43] 85 Fed. Reg. 40,834, 40,842 (July 7, 2020).

[44] 85 Fed. Reg. 40,834, 40,842 (July 7, 2020).

[45] 85 Fed. Reg. 40,834, 40,842 (July 7, 2020).

[46] 85 Fed. Reg. 40,834, 40,842 (July 7, 2020); See Note 17, above.

[47] 85 Fed. Reg. 40,834, 40,843 (July 7, 2020).

[48] 85 Fed. Reg. 40,834, 40,842-40,843 (July 7, 2020).

[49] 85 Fed. Reg. 40,834, 40,863 (July 7, 2020).

[50] 85 Fed. Reg. 40,834, 40,845 (July 7, 2020).

[51] 85 Fed. Reg. 40,834, 40,843 (July 7, 2020).

[52] 85 Fed. Reg. 40,834, 40,843 (July 7, 2020).

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sionals and institutions refrain from making material misleading statements about the recommended transaction, and relevant matters such as fees, material conflicts of interest, and any other facts that would reasonably be expected to impact the retirement investor's decision.[53] In the preamble to the Proposed Class Exemption, the DOL stated that it may interpret the requirement to refrain from misleading statements broadly.[54] As evidence of such approach, the DOL stated that an indemnification or exculpatory clause in a contract that violates ERISA may be considered a misleading statement.[55]

Best Execution

Unlike the 2016 Impartial Conduct Standards, the Proposed Impartial Conduct Standards would require that financial institutions and investment professionals seek to obtain the best execution of the investment transaction reasonably available under the circumstances.[56] The DOL explained that it intends for the best execution standard to be applied consistent with the best execution requirements already applicable to certain financial institutions under the securities laws, including under FINRA, Municipal Securities Rulemaking Board, and the Investment Advisers Act rules.[57] Accordingly, a financial institution's compliance with the respective securities rules would satisfy the Proposed Impartial Conduct Standards' best execution standard.[58]

Additional Requirements

The Proposed Class Exemption additionally would require that a financial institution and investment professional, prior to executing the recommended transaction, provide written acknowledgement of their status as fiduciaries under ERISA and the I.R.C. and provide written disclosures on material aspects of their services to be provided, as well as conflicts of interests.[59] Taking heed of the Fifth Circuit's 2018 ruling, the DOL clarified that, unlike the BIC Exemption, this Proposed Class Exemption's written disclosure requirement is not intended to create a contractual private right of action in favor of the retirement investor.[60]

Additionally, the Proposed Class Exemption would require financial institutions to establish and maintain policies and procedures prudently designed to enforce compliance with the Proposed Impartial Conduct Standards, as well as conduct an annual retrospective review that is reasonably designed to assist financial institutions in detecting and preventing violations of, and achieving compliance with, the Proposed Impartial Conduct Standards.[61]

CONCLUSION

The Proposed Class Exemption represents a significant development in the retirement space, as it balances the financial interests of both retirement investors and financial institutions and investment professionals. For plan participants, the DOL has acknowledged and prioritized their financial interests in the context of rollovers to IRAs. For financial institutions, the DOL not only reemphasized the continued standing of the five-part test, but also clarified its application to rollover recommendations, in some ways marking a shift from its past views. Additionally, the Proposed Class Exemption should provide comfort to financial institutions in that it is one of a relatively few exemptions that allows investment advice fiduciaries to engage in what would otherwise be prohibited transactions, by providing standards that align well with other regulatory conduct standards. Given the history of the DOL's actions in this area and the fact that a national election is less than 100 days away, it would behoove financial institutions to pay close attention to the fate of the Proposed Class Exemption.

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[53] 85 Fed. Reg. 40,834, 40,844, 40,863 (July 7, 2020).

[54] 85 Fed. Reg. 40,834, 40,844 (July 7, 2020).

[55] 85 Fed. Reg. 40,834, 40,844 (July 7, 2020).

[56] 85 Fed. Reg. 40,834, 40,844 (July 7, 2020).

[57] 85 Fed. Reg. 40,834, 40,844 (July 7, 2020).

[58] 85 Fed. Reg. 40,834, 40,844 (July 7, 2020).

[59] 85 Fed. Reg. 40,834, 40,844 (July 7, 2020).

[60] 85 Fed. Reg. 40,834, 40,844 (July 7, 2020). See Note 25, above.

[61] 85 Fed. Reg. 40,834, 85 Fed. Reg. 40,835, 40,847-40,848 (July 7, 2020).

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