Understanding The Unwinding Of DOL's Fiduciary Rule

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In this article, we discuss the implications of the Fifth Circuit's vacatur of the U.S. Department of Labor's fiduciary rule,[1] best interest contract and principal transactions exemptions,[2] and related amendments to other prohibited transaction exemptions, or PTEs, in Chamber of Commerce of the United States v. United States Department of Labor.[3]

By replacing a less restrictive five-part test regulating the scope of persons who fit the definition of an "investment advice fiduciary" under Section 3(21) of the Employee Retirement Income Security Act and Internal Revenue Code Section 4975, the fiduciary rule expanded the types of activities that are considered investment advice subject to ERISA and the prohibited transaction provisions of the Internal Revenue Code. The new PTEs and amendments published along with the fiduciary rule were designed to avoid conflicts of interest and ensure that retirement industry professionals who provide investment advice (including, for the first time, to owners of individual retirement accounts, or IRAs) do so in the "best interest" of their clients.

In response to the fiduciary rule, the retirement industry spent millions of dollars in preparation for compliance. However, after the Fifth's Circuit's entering of its mandate on June 21, 2018, ERISA's definition of investment advice fiduciaries reverted to the original 1975 regulation's five-part test. For a discussion of the 1975 regulation, see "Investment Advice Fiduciaries and the DOL Regulations on Fiduciary Status" in ERISA Fiduciary Duties—Types of ERISA Plan Fiduciaries, available in Lexis Practice Advisor's Employee Benefits & Executive Compensation practice area.

Grounds for Vacating the Fiduciary Rule

The court determined that the fiduciary rule conflicts with the statutory text of ERISA Section 3(21) and with the counterpart provision in Internal Revenue Code Section 4975. The court vacated the fiduciary rule on the basis that the common law meaning of the word "fiduciary" requires a relationship of trust and confidence, and that Congress codified that common law meaning in the statutory text. It reasoned that by attempting to broadly expand the universe of persons to whom fiduciary status is assigned to include ordinary salespersons, such as many broker-dealers and insurance agents, the fiduciary rule conflicted with the underlying statutory text.[4]

Retention of ERISA Fiduciary Status Post-Fiduciary Rule

Many service providers that were fiduciaries under the fiduciary rule are likely to retain fiduciary status after the vacatur. ERISA provides a functional test for determining whether a person becomes a fiduciary meaning that there are several avenues to a service provider

becoming a fiduciary. Specifically, ERISA provides that a person is a fiduciary of a plan to the extent that person:

- Exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets;

- Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or as any authority or responsibility to do so; or

- Has any discretionary authority or discretionary responsibility in the administration of such plan.[5]

The court's ruling affected the DOL's definition of a fiduciary providing investment advice under ERISA Section 3(21). However, the ruling did not affect service providers who are fiduciaries under other prongs of the statute. For example, discretionary asset managers that maintain discretionary control respecting the disposition of the plan's assets or an outsourced plan administrator that maintains discretionary authority respecting the administration of the plan will remain unaffected by the Fifth Circuit's ruling.

The status of service providers that make investment recommendations to plans or IRAs may change with the return to the five-part test of the 1975 regulation. Under the five-part test, a person would be deemed to provide investment advice under ERISA Section 3(21) where the person (1) makes recommendations 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; (2) on a regular basis; (3) pursuant to a mutual understanding; (4) that such advice will be a primary basis for investment decisions; and (5) that the advice will be individualized to the plan.[6]

In most cases, investment advisers will remain fiduciaries as they most likely will satisfy the five-part test because they are generally hired to provide investment recommendations and monitoring services on a regular basis, and it is understood that such advice is individualized to the plan. Whether the adviser acts as a fiduciary under the five-part test for purposes of rollover decisions will depend on the status of the Deseret opinion[7] (discussed below).

Similarly, depending on the services that a broker-dealer provides to ERISA-covered plans or IRAs, they may or may not be deemed a fiduciary under ERISA or the Code. For instance, broker-dealers that provide ongoing investment recommendations to retirement plans or IRAs will likely be fiduciaries under the five-part test. This may be a surprise to broker-dealers that believed that they were not acting as fiduciaries prior to the DOL's issuance of the fiduciary rule.

Products and Services Lending Themselves to Fiduciary Status

Service providers should evaluate any product or service that provides ongoing investment recommendations to retirement plans, participants or IRAs and other accounts subject to

Internal Revenue Code Section 4975 where they receive direct or indirect compensation. This includes robo-advisers or investment education providers as it is not uncommon for those vendors to provide advice under the five-part test without being aware of their status as a fiduciary.

Status of Policies and Procedures Adopted to Comply With the Fiduciary Rule

Service providers should review any and all policies and procedures implemented as a result of the fiduciary rule to determine whether their ongoing implementation makes sense. Notwithstanding the vacatur of the fiduciary rule, there is a risk that other regulators could enforce a service providers' policies to the extent that they're not followed internally. For instance, the enforcement section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth filed a Scottrade-Administrative-Complaint-E-2017-0045.pdf" target="_blank">complaint against a service provider based on alleged violations of their internal policies and procedures adopted in light of the fiduciary rule. Importantly, that complaint alleged violations of Massachusetts state law, not the fiduciary rule.[8]

Certain service providers may decide to keep in place certain policies implemented in response to the fiduciary rule. For instance, firms expecting to take advantage of the DOL's temporary nonenforcement policy (discussed below) may keep policies and procedures in place for the time being to demonstrate compliance with the temporary nonenforcement policy. Moreover, as discussed below, we suspect that the best interest concept is not going away any time soon, meaning that policies and procedures employed by service providers to ensure that brokers and advisers make best interest recommendations may be required by other laws in the future.

SEC's Proposed Regulation Best Interest Versus the Fiduciary Rule and Best Interest Contract Exemption

The U.S. Securities and Exchange Commission was substantially influenced by the DOL in its promulgation of its proposed regulation (regulation best interest), as the SEC cited to the best interest contract exemption, or BIC exemption, 340 times within the preamble to regulation best interest. While regulation best interest largely tracks existing suitability requirements, it also incorporates several concepts raised by the DOL under the BIC exemption. Having said that, the SEC's effort provides an arguably reduced standard of care and maintains less extensive disclosure obligations than the BIC exemption.[9]

Regulation best interest would require that broker-dealers and their associated persons "act in the best interest of the retail customer at the time the recommendation is made without placing the financial or other interest of the broker-dealer or natural person who is an associated person making the recommendation ahead of the interest of the retail customer."[10]

Unlike the fiduciary rule and BIC exemption, the SEC's best interest standard of care does not require that the recommendation be made "without regard to the financial or other interests" of the broker-dealer.[11]

A broker-dealer is deemed to comply with regulation best interest if it satisfies the regulation's three core obligations: (1) the care obligation, (2) the conflict of interest

obligation, and (3) the disclosure obligation.[12] These obligations are discussed below.

Care Obligation

The care obligation requires that broker-dealers exercise reasonable diligence, care, skill and prudence to:

- Understand the potential risks and rewards associated with a recommendation and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;

- Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on the retail customer's investment profile and the potential risk and rewards associated with the recommendation; and

- Have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile.[13]

While the care obligation largely tracks existing suitability rules under the Financial Industry Regulatory Authority in that it would require that broker-dealers continue to abide by reasonable basis suitability, customer-specific suitability and quantitative suitability, the proposed rule does include what can be described as a process element similar to that found under DOL rules and regulations.[14] The inclusion of the term "prudence" for instance, is not found under existing securities rules.[15]

Conflict of Interest Obligation

The SEC's conflict of interest obligation requires that broker-dealers (1) establish, maintain and enforce written policies and procedures reasonably designed to identify, and at a minimum disclose, or eliminate, all material conflicts of interest that are associated with recommendations covered by regulation best interest, and (2) establish, maintain and enforce written policies and procedures reasonably designed to identify, and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations.[16]

The SEC's interpretation of the term "financial incentive" is very broad. For example, the SEC described material conflicts that arise from financial incentives to include the following:

- Compensation practices established by the broker-dealer including fees and charges for products sold.

- Employee compensation or employment incentives (e.g., quotas, bonuses, sales contests, or special awards, differential or variable compensation, and incentives tied to appraisals or performance reviews).

- Compensation practices involving third parties, including compensation for sub-accounting or administrative services to a mutual fund, receipt of commissions or sales charges, or other differential or variable compensation, whether paid by the retail customer or a third party.

- Sales of propriety products or services or products of affiliates and principal transactions.[17]

In the case of material conflicts of interests associated with financial incentives, the proposal would require broker-dealers to either eliminate the conflict entirely, or mitigate the conflict in addition to providing disclosure. The SEC described that material conflicts of interests could be mitigated through various conflict mitigation strategies.[18]

Notwithstanding the foregoing, the SEC did describe that certain material conflicts of interest arising from financial incentives may be difficult to mitigate and may be more appropriately avoided in their entirety. Those practices include the payment or receipt of certain noncash compensation taking the form of "sales contests, trips, prizes and other similar bonuses based on sales of certain securities or accumulation of assets under management."[19] As described below, many of these conflicts of interest were also of interest to the DOL when issuing the fiduciary rule and BIC exemption. For instance, the SEC's statements that certain conflicts are so pervasive that they may be difficult to mitigate is consistent with the DOL's prohibition against the use of quotas, appraisals, bonuses and sales contests within the warranty sections of the BIC exemption.[20]

Under the regulation best interest, broker-dealers would be permitted to exercise their judgment to determine whether a conflict can be effectively disclosed or require some other conflict mitigation strategy. Importantly, the SEC stated that it would be reasonable for a broker-dealer to use a risk-based compliance and supervisory system that would allow the broker-dealer to focus on specific areas of their business that pose the greatest risk of noncompliance.[21] Thus, unlike the BIC exemption's warranty requirements, which strictly prohibited certain conflicts of interest, the SEC rules require only that the broker-dealer enforce written policies and procedures to mitigate or eliminate such conflicts.

Disclosure Obligation

Regulation best interest also requires that broker-dealers satisfy the disclosure obligation. Importantly, a broker-dealer's disclosure obligation is in addition to and distinct from the Form CRS obligation which must be satisfied by both broker-dealers and registered investment advisers.[22]

The disclosure obligation requires that, prior to or at the time of a recommendation, the broker-dealer, or a or natural person who is an associated person of a broker or dealer, "reasonably disclose to the retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest associated with the recommendation."[23] At the outset, the SEC notes that broker-dealers "should have the flexibility to make disclosures by various means."[24]

The "material facts" relating to the scope of the relationship and which must be disclosed would include the following:

- That the broker-dealer is acting in a broker-dealer capacity with respect to the recommendation.
- The fees and charges that apply to the retail customer's transactions, holdings and accounts.
- The type and scope of services provided by the broker-dealer, including monitoring the performance of the retail customer's account.[25]

Additionally, the disclosure obligation requires that the broker-dealer explicitly disclose all material conflicts of interest associated with the recommendation. Interestingly, the SEC highlighted that firms are only required to "reasonably disclose" material conflicts of interest. In the SEC's view, this means that compliance with the disclosure obligation will be measured against a negligence standard as opposed to the strict liability standard generally associated with the BIC exemption.[26]

Effect of the Fiduciary Rule on Financial Industry Compensation Structures

The fiduciary rule and interpretive guidance issued by the department affected compensation structures of financial professionals in a dramatic way. In this respect, the BIC exemption's warranty requirements required the financial institution to warrant that its policies and procedures did not permit the use or reliance upon "quotas, appraisals, performance or personnel actions, bonuses, contexts, special awards, differential compensation, or other actions or incentives that are intended or would reasonably be expected to cause advisers to make recommendations that are not in the best interest of the retirement investor."[27] The BIC exemption expressly described that differential compensation could be paid to financial professionals if it was based on neutral factors that resulted from different levels of service required in the delivery of different types of investments.[28]

The DOL issued additional guidance under the BIC exemption affecting broker-dealer compensation practices addressing, for example, certain back-end recruitment compensation paid to broker-dealers that were changing firms.[29] The DOL viewed large all or nothing arrangements that were contingent upon the adviser meeting a production or assets under management target as inconsistent with the warranty requirements under the BIC exemption.[30]

Similarly, firms relying on the BIC exemption were required to revisit escalating compensation grids. This is because under the BIC exemption's warranty provisions, questions were raised as to whether a firm could provide a greater proportion of revenue to advisers that were more productive. While the DOL answered that compensation grids were permitted, compensation grids were required to be tailored to avoid certain conflicts. For instance, the DOL warned that revenue that was fed into a compensation grid should be the same within product categories and that differentials between product categories must be justified by neutral factors. Grids were required to provide only for gradual increases in compensation and increases in compensation were unable to be retroactive. In the DOL's

view, retroactive grids were likely to create acute conflicts of interest.[31]

We expect that many firms will revert to prior arrangements as a result of the Fifth Circuit's vacatur of the fiduciary rule. However, many of these sales practices were also scrutinized by the SEC and specifically described as potentially problematic within its proposed regulation best interest. Therefore, it remains to be seen whether financial institutions will revert back to all compensation models that were in place prior to the fiduciary rule.

Changes to Service Provider Customer Agreements and Disclosures

Service providers should review all client-facing agreements to ensure that they reflect the current state of the law and have not inadvertently established a heightened standard of care through contract. Service providers should also establish a game plan in the event that they accepted fiduciary status via contract in response to the fiduciary rule.

Separately, those who revised agreements and issued disclosures to satisfy the exemption for independent fiduciaries with financial expertise that provided relief from the fiduciary rule should review those agreements and disclosures to determine whether some or all of the disclosures remain necessary.[32] In our experience, some of the disclosures provided in response to this exemption have been helpful in defining the relationship between the parties and have been retained within underlying agreements.

Status of Rollover Recommendations as Fiduciary Investment Advice

The answer to this issue is largely unclear. Much depends on whether the Deseret advisory opinion again constitutes the DOL's interpretation of the law. In a 2005 advisory opinion to Deseret Mutual Fund Administrators, the DOL concluded that an investment adviser who was not otherwise a fiduciary would not be deemed a fiduciary with respect to the ERISA plan solely on the basis of making a recommendation to a plan participant to take a plan distribution and invest it in an IRA, even if the adviser gave specific advice as to how to invest the distributed funds.[33] In reaching this conclusion, the DOL interpreted its pre-fiduciary rule investment advice regulation.[34] The Deseret advisory opinion stated further, however, that where a plan officer who is already a fiduciary to the plan responds to questions regarding a plan distribution or the investment of amounts withdrawn from the plan, such fiduciary would be exercising discretionary management over the plan.

With the fiduciary rule vacated, some have suggested that the Deseret advisory opinion is restored. We think the outcome is not entirely clear. This leaves open the very real possibility that, if the Deseret advisory opinion is restored, a court may defer to the DOL's reasoning resulting in the DOL's application of fiduciary status for a one-time rollover recommendation provided by a person who is already a fiduciary. However, the status of the law in this area is largely unclear.

Alternative Exemptive Relief Post-Vacatur of the BIC Exemption

The DOL has issued a temporary nonenforcement policy for those service providers who accepted fiduciary status under the fiduciary rule but may no longer rely on the BIC exemption as a result of the vacatur by the Fifth Circuit.[35] Field Assistance Bulletin 2018-02 effectively extended the initial transition relief under the BIC exemption on an ongoing

basis through a nonenforcement policy. While FAB 2018-02 is not an exemption and could be rescinded at any time by the DOL, it may be relied upon while it remains effective to the extent that there is an oversight in compliance with other available exemptions.

Otherwise, service providers should review how they are compensated and consider other available exemptions that may permit the receipt of compensation. Many exemptions which have been around for years prior to the fiduciary rule have been reinstated. Therefore, service providers should look to these exemptions (many of which are described below) in order to map out an effective exemption strategy.

Expanded Exemptive Relief Post-Vacatur of Amendments to Existing PTEs

As noted above, the result of the vacatur is that the DOL's changes to prohibited transaction exemptions under the fiduciary rule are also rescinded. While the DOL's changes to certain of the exemptions, including PTE 77-4, PTE 80-83, PTE, 83-1, were limited to the inclusion of the impartial conduct standards, other exemptions commonly relied on by the industry, including PTEs 84-24 and 86-128 were substantially modified and the broad relief previously available under these exemptions was no longer available.[36] The DOL's justification for these changes was that service providers would now have exemptive relief available to them for common brokerage and annuity transactions under the BIC exemption.[37]

For instance, under the fiduciary rule, the DOL amended PTE 84-24, making it inapplicable to mutual fund transactions for IRAs and limiting its application to certain annuity sales transactions.[38] Similarly, PTE 86-128 which was commonly relied upon in IRA transactions was largely rescinded. [39]These exemptions will likely be resurrected with the vacatur.

PTE 84-24 and 86-128 are discussed below.

PTE 84-24

The Fifth Circuit's decision will likely reverse these changes to PTE 84-24. Importantly, with the loss of the BIC exemption, it is important to focus on the types of transactions covered by PTE 84-24 and the terms and conditions under which relief will be available.

PTE 84-24 provides exemptive relief for the sale of shares, of a registered investment company (i.e., a mutual fund) if certain conditions are met.[40]

Specifically, regarding mutual fund shares PTE 84-24 exempts:

- The "effecting" of a plan's purchase of mutual fund shares by the mutual fund principal underwriter or its affiliates; and

- The receipt of sales commissions by the principal underwriter or its affiliates in connection with sales of shares of the mutual fund.[41]

In connection with plan purchases of insurance and annuity contracts, PTE 84-24 exempts:

- The plan’s purchase of an insurance or annuity contract from an insurance company;
- The effecting of the plan’s purchase of the insurance or annuity contract by an insurance agent or broker or their affiliates; and
- The receipt of sales commissions in connection with the sale of an insurance or annuity contract by an insurance agent or broker or their affiliates.[42]

The conditions under PTE 84-24 include, among others, certain "general" conditions, "relationship" conditions, as well as disclosure and approval conditions.

General Conditions: The general conditions under Section IV of PTE 84-24 require that:

- The transaction is effected in the ordinary course of business of the principal underwriter, insurance company, or insurance agent or broker
- The transaction is on arm's length terms; and
- The combined total of all fees, commissions and other consideration is reasonable.[43]

Relationship Conditions: The relationship conditions, under Section V(a) of PTE 84-24, prohibit the principal underwriter, insurance company, insurance agent or broker and any of their affiliates from having certain types of relationships with the plan. Specifically, they may not be:

- A trustee of the plan (other than a nondiscretionary trustee who does not render investment advice with respect to any assets of the plan);
- A plan administrator (within the meaning of ERISA Section 3(16) and Internal Revenue Code Section 414(g));
- An employer any of whose employees are covered by the plan; or
- A fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan on a discretionary basis.[44]

Disclosure and Approval Conditions: The disclosure and approval conditions under Sections V(b) and (c) of PTE 84-24 require that, before the transaction is effected, an independent plan fiduciary receive certain information in writing, including information about sales commission, and any other charges, fees, discounts, penalties or adjustments that may be imposed in connection with the purchase, holding, exchange or sale of the recommended securities or annuity contract. In the case of sales of shares of mutual funds, the disclosure may be satisfied by distribution of the mutual fund prospectus if it contains the required information.[45]

Based on the disclosure, an independent plan fiduciary must approve the investment before

the transaction is executed. The independent plan fiduciary who approves the transaction may not be the principal underwriter of the mutual fund and may not receive, directly or indirectly, any compensation or consideration for his or her own personal account in connection with the plan's transaction. With respect to participant-directed plans, disclosures can be made to, and approval can be obtained from, plan participants.[46]

PTE 86-128

If required conditions are met, Section II(a) of PTE 86-128 exempts from ERISA Section 406(b) a plan fiduciary's (e.g., a plan investment manager's) use of its authority to cause a plan to pay a fee for effecting or executing securities transactions to itself or an affiliated broker-dealer. The language of PTE 86-128, Section II(a) exempts a plan fiduciary's causing a plan to pay fees for effecting securities transactions to that "person." Under Section I(a), the term "person" includes the affiliates of a person, including (among others) any person directly or indirectly controlled, controlling, controlled by, or under common control with the person. The exemption applies only to agency transactions and only to the extent that the transactions are not excessive under the circumstances, in either amount or frequency.[47]

Importantly, if securities transactions are effected under PTE 86-128 on behalf of IRAs that are not ERISA-covered plans, no additional conditions apply. However, additional conditions apply where an investment manager effects transactions for ERISA-covered plans through its affiliated broker-dealer, as follows:

- ***Relationship Conditions:*** The plan investment manager engaging in the securities transactions (or any of its affiliates) may not be the plan administrator, or an employer whose employees are covered by the plan.[48] Also, the exemption is not available if the investment manager or its affiliate is a discretionary plan trustee (i.e., a trustee other than a directed trustee), unless the plan has assets over $50 million and certain other conditions are met).[49]

- ***Advance Disclosure and Authorization:*** An independent fiduciary (which may be the plan sponsor or administrator, or, for a participant-directed plan, the individual participant) must give written authorization in advance of any securities transactions that would be covered by the exemption. [50]

  Within three months before this authorization is given, the investment manager must provide the independent fiduciary with any reasonably available information that the investment manager reasonably believes is necessary for the independent fiduciary to determine whether to make the authorization. This includes:

  - A copy of PTE 86-128;

  - A form for terminating the authorization;

  - A description of the investment manager's brokerage placement practices; and

    - Any other reasonably available information regarding the matter that the authorizing independent fiduciary requests.[51]

- ***Plan Termination Rights:*** The independent fiduciary's authorization must be terminable at will without any penalty to the plan. At least annually, the investment manager must provide the independent fiduciary written notice of the right to terminate, together with a form that can be used to terminate the authorization.[52]

- ***Periodic Reports:*** The investment manager (or its affiliated broker-dealer affiliate) must provide to the independent fiduciary either:

    - A confirmation slip within 10 business days of each covered securities transaction; or

    - A quarterly report of all securities transactions (whether executed by the affiliated broker-dealer or otherwise) specifically identifying the total compensation paid by the plan for securities transactions and the amount of such compensation retained by the affiliated broker-dealer.[53]

- ***Annual Summary:*** The independent fiduciary must receive an annual report that summarizes information previously provided in the confirmations or quarterly reports. The report must be provided within 45 days after the end of the period to which it relates, and must specifically include:

    - The total of all securities transaction-related charges incurred by the plan during the period;

    - The amount of the securities transaction-related charges retained by the investment manager and its affiliated broker-dealer and the amount paid over to other persons for execution and other services;

    - A description of the investment manager's broker placement practices, if the practices materially changed during the year; and

    - Disclosure of the plan's "portfolio turnover ratio" calculated in a manner reasonably designed to provide the independent fiduciary with the information needed to discharge its duty of prudence.[54]

PTE 86-128 only provides exemptive relief from ERISA Section 406(b). Because the provision of brokerage services by an affiliate of a plan fiduciary also involves possible prohibited transactions under ERISA Section 406(a), the brokerage transactions also must satisfy conditions under the statutory exemption under ERISA Section 408(b)(2), including the condition that fees paid by the plan for brokerage services are not more than reasonable.

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[1] 81 Fed. Reg. 20,946 (April 8, 2016).

[2] 81 Fed. Reg. 21,002 (April 8, 2016) as corrected at 81 Fed. Reg. 44,773 (July 11, 2016), and 81 Fed. Reg. 21,089 (April 8, 2016).

[3] Chamber of Commerce of the United States v. United States Dep't of Labor, 885 F.3d 360 (5th Cir. 2018).

[4] Chamber of Commerce, 885 F.3d at 369.

[5] ERISA § 3(21) (29 U.S.C. § 1002(21).

[6] 29 C.F.R. § 2510-3.21(c)(1)(ii)(B).

[7] Deseret Opinion (DOL Adv. Op. 2005-23A, 2005 ERISA LEXIS 24)

[8] Enforcement Section of the Mass. Secs. Div. of the Office of the Secy. of the Commonwealth v. Scottrade, Inc., 2018 U.S. Dist. LEXIS 138813 (D. Mass. 2018).

[9] See 83 Fed. Reg. 21,574 (May 9, 2018).

[10] Id. at 21,575.

[11] Id. at 21,586.

[12] Id. at 21,681–82.

[13] Id. at 21,681.

[14] See id. at 21, 613–15.

[15] See id. at 21, 609.

[16] Id. at 21,682.

[17] Id. at 21,618.

[18] Id. at 21,621–22.

[19] Id.

[20] Id. at 21,622.

[21] Id. at 21,618.

[22] See 83 Fed. Reg. 21,416 (May 9, 2018).

[23] 83 Fed. Reg. 21,574, 21,681.

[24] Id. at 21,605.

[25] Id. at 21,599.

[26] Id. at 21,604.

[27] 81 Fed. Reg. 21,002, 21,033.

[28] Id. at 21,037.

[29] Dep't of Labor, Employee Benefits Security Adm'n, Conflict of Interest FAQs (Part I-Exemptions) (2016), FAQ 12.

[30] Id.

[31] Id. at FAQ 9.

[32] See 81 Fed. Reg. 20,946, 20,999.

[33] DOL Adv. Op. 2005-23A (Dec. 7, 2005), 2005 ERISA LEXIS 24.

[34] 29 C.F.R. § 2510-3.21(c).

[35] Field Assistance Bulletin 2018-02.

[36] See 81 Fed. Reg. 21,208 (Apr. 8, 2016); 81 Fed. Reg. 21,147 (April 8, 2016); 81 Fed. Reg. 21,181 (April 8, 2016).

[37] Id.

[38] 81 Fed. Reg. 21,147.

[39] 81 Fed. Reg. 21,181.

[40] See 71 Fed. Reg. 5,887 (Feb. 3, 2006).

[41] Id. at 5,889.

[42] Id.

[43] Id.

[44] Id.

[45] Id. at 5,889–90.

[46] Id. at 5,890.

[47] See 51 Fed. Reg. 41,686 (Nov. 18, 1986), as amended by 67 Fed. Reg. 64,137 (Oct. 17, 2002) (permitting use of PTE 86-128 by discretionary trustees and their affiliates if they meet additional conditions).

[48] PTE 86-128, Section III(a).

[49] PTE 86-128, Section III(h).

[50] PTE 86-128, SectionIII(b).

[51] PTE 86-128, SectionIII(d).

[52] PTE 86-128, SectionIII(c).

[53] PTE 86-128, Section III(e).

[54] PTE 86-128, Section III(f). Id.