

Improving investment advice for workers and retirees amid ever-changing regulations

Introduction

Investment fiduciary status under ERISA and the Code continues to be impacted by courts in Texas. In July 2024, two separate Texas courts issued rulings that placed the DOL's Retirement Security Rule, amendments to PTEs 20-02 and 84-24 and the mass amendments to other PTEs on hold pending resolution of the underlying cases or an appeal. While we await more news, below is a summary of what this means going forward.

It is critical to understand that the stays only affect the new definition of investment advice and amended PTEs. ERISA and Code fiduciaries are still subject to the same standards and the existing conditions of PTE 20-02 and 84-24 remain in effect. That said, the status quo is quite nuanced and worthy of a refresher.

Current definition of Investment Advice under ERISA and the Code

To begin, the 1975 regulation's definition of investment advice (a.k.a. the five-part test) will continue to determine fiduciary status under ERISA and the Code. According to the regulation, an individual will be deemed to be rendering fiduciary investment advice if, for a fee or other compensation: 1) he/she renders advice to a plan or IRA as to the value of, or advisability of investing in, securities or other property; 2) on a regular basis; 3) pursuant to a mutual agreement; 4) that the advice will serve as a primary basis for investment decisions with respect to plan or IRA assets; and 5) that the advice will be individualized based on the needs of the plan or IRA.

The application of the five-part test to advice provided within the same account type is straightforward; regular basis means what it sounds like, not sporadic or episodic. When it comes to rollovers, transfers and/or changes to account type, however, we must look to two additional sources to fully understand what the status quo entails:

- DOL interpretations of the "regular basis" prong set forth in the preamble to PTE 20-02 and related FAQs; and
- A Florida district court's ruling in Feb. 2023 partially vacating the DOL's 20-02-related interpretations.

DOL PTE 20-02 Interpretations

In the preamble to PTE 20-02 and subsequent FAQs, the DOL took the position that a "regular basis" relationship could be established across two different accounts (i.e., commission- vs. fee-based) and even two different plan types (i.e., ERISA plan to IRA). The DOL's interpretation of a regular basis relationship, therefore, includes one where the financial professional provided "investment advice" to a retirement investor concerning his/her retirement account and then makes a one-time recommendation to roll over, transfer or otherwise change the account. The DOL views the one-time recommendation as an extension of the preexisting fiduciary advice relationship.

The DOL went on to declare that even if the financial professional did not have a preexisting investment advice relationship with respect to the subject account, but reasonably expected to have one in the recommended account, it would consider the one-time recommendation (e.g., to roll over, transfer or change account types) to be the first instance of "regular basis" advice – making the financial professional a fiduciary with respect to the transaction.

These interpretations are significant given that it is generally the one-time recommendation (e.g., to roll over, transfer, etc.) that is the source of a financial conflict of interest between the advice provider and the retirement investor. The DOL's expansive interpretations mean that a broader category of fiduciary recommendations will necessitate the use of a PTE.

The Partial Vacatur in 2023

In February of 2023, a district court in Florida disagreed with part of the DOL's above-referenced interpretation. In ruling that **a regular basis advice relationship cannot be established between an ERISA-covered plan and an IRA**, the court partially vacated the DOL's PTE 20-02 interpretation. On the other hand, if there is no change in plan type (e.g., IRA-to-IRA rollover or transfer or change in account type), the DOL's interpretation stands.

For example, when recommending a plan-to-plan rollover, fiduciary status will attach if either: 1) there was a preexisting regular basis advice relationship regarding the current plan

account; or 2) it is reasonably expected that a regular basis advice relationship will be established in the new plan account. The same is true for IRA-to-IRA rollovers, transfers and changes to account type because the plan type remains the same before and after the recommendation.

The effect of the partial vacatur, which remains in place today, is that – **absent a preexisting ERISA fiduciary relationship with the plan participant – a one-time recommendation to rollover his/her account to an IRA will not be considered fiduciary advice, even if a regular basis advice relationship is expected to be established with respect to the rollover IRA.**

What's Next?

There are a few different scenarios that could play out over the next several months or even years. First, the DOL could defend the cases and win – meaning that the fiduciary rule and amended exemptions will become effective once all appeals are exhausted. Alternatively, the plaintiffs could win on the merits, including any appeals by DOL – meaning that the status quo remains in effect indefinitely.

Another possibility is that the amendments to PTE 20-02 are segregated and allowed to go into effect while the challenges to the fiduciary rule and PTE 84-24 continue to be litigated. Indeed, the plaintiffs' core contention is that the definition of investment advice is overly broad and arbitrarily makes salespeople fiduciaries under ERISA and the Code. Once fiduciaries, they argue that the significant amendments to PTE 84-24 will require overly burdensome changes to their businesses.

Conversely, PTE 20-02 is already “on the books” with substantially similar requirements. The changes merely seek to modify the existing PTE that has already (partially) survived its own litigation.

Rollover Recommendations Still Require Compliance

If a recommendation to a retirement investor is considered fiduciary investment advice, then DOL PTE 20-02 remains applicable. Compliance with all conditions of the exemption is required to permit receipt of otherwise prohibited compensation. Those conditions include, at a minimum, that firms:

- Have policies and procedures designed to promote compliance with the exemption
- Provide required disclosures to retirement investors

- Comply with the Impartial Conduct Standards
- Conduct an annual Retrospective Review designed to detect and prevent violations of the Impartial Conduct Standards and related compliance procedures, including mitigating conflicts of interest.

In addition, SEC Reg BI and the investment adviser fiduciary standards remain applicable, and Broadridge is aware of firms that are being asked by FINRA, SEC and banking regulators to produce records similar to that which are required by DOL, such that it is reasonable to expect that regulators may shift their priorities from rule-making to enforcement of the rules that are on the books today.

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