Proskauer

The U.S. Department of Labor's New Proposed Rules Defining Fiduciary Investment Advice

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On April 14, 2015, the U.S. Department of Labor (DOL) issued its highly anticipated re-proposed regulation addressing when a person providing investment advice with respect to an employee benefit plan or individual retirement account (IRA) is considered to be a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). As discussed below, the new proposal (available here) offers a general definition of fiduciary investment advice that would expand the group of people who would be considered fiduciaries. The proposal contains a number of carve-outs for particular types of communications that the DOL does not consider to be fiduciary in nature. The DOL also has proposed a new set of prohibited transaction exemptions and certain amendments to existing class exemptions applicable to fiduciaries that would allow certain broker-dealers, insurance agents and others who provide investment advice to continue to engage in certain transactions and to receive common forms of compensation that would otherwise be prohibited as conflicts of interest.

Background

ERISA provides that "a person is a fiduciary with respect to a plan to the extent . . . he 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." ERISA § 3(21)(A)(ii). Pursuant to a 1975 regulation, in order for a person to be held to ERISA's fiduciary standards with respect to investment advice for a fee, such person must: (i) make recommendations as to investing in, purchasing or selling securities or other property, or give advice as to their value, (ii) on a regular basis, (iii) pursuant to a mutual understanding that the advice, (iv) will serve as a primary basis for investment decisions with respect to plan assets, and (v) will be individualized to the particular needs of the plan.

The DOL first published a new proposed regulation on October 22, 2010. In doing so, the DOL stated its belief that the current regulatory scheme no longer adequately protects plans, participants and beneficiaries. The DOL's initial proposal would have broadened significantly the scope of individuals considered to be fiduciaries under ERISA. (*See* Proskauer's client alert available here.) Facing immense pressure, on September 19, 2011, the DOL stated that the proposal would be withdrawn and that a new proposal would be issued at a later date. Since then, lobbyists on both sides of the issue have been voicing their concerns and views about the DOL's proposal.

Now, nearly four years later, the DOL has proposed a new set of rules. The DOL has stated that the new proposal is necessary because the current regulatory scheme no longer adequately protects plans, participants, beneficiaries, and, in particular, IRA owners (to which ERISA's current fiduciary rules regarding prudence and loyalty do not apply) from conflicts of interest, imprudence and disloyalty. The DOL explained that many investment professionals are not subject to ERISA's fiduciary standards and thus, in its view, have the ability to operate with undisclosed conflicts of interest. Addressing concerns raised over the past several years, the DOL stated that it has consulted with other federal regulators, including the Securities Exchange Commission (SEC), concerning whether the proposal would subject investment professionals who provide investment advice to requirements that are overly burdensome or conflict with their obligations under other federal laws.

The Proposed Regulation

The proposal consists of: (i) a delineation of categories of advice that could be considered fiduciary conduct; (ii) specific carve-outs from the definition of investment advice; and (iii) new and amended prohibited transaction exemptions.

Categories Of Advice

The proposal provides that certain types of advice described below, which, when provided in exchange for a fee or other compensation, directly or indirectly, and given under certain circumstances (described below) would be "investment advice." Except with respect to the category covering appraisals and valuations, the proposed regulation is structured so that a communication must constitute a "recommendation"[1] in order to be treated as fiduciary investment advice.[2] The DOL has requested comments on whether it should adopt all or some of the standards developed by the Financial Industry Regulatory Authority, Inc. for determining whether a communication rises to the level of a recommendation (*e.g.*, FINRA Policy Statement 01-23, which sets forth guidelines to assist brokers in evaluating whether a particular communication could be viewed as a recommendation).

1. ***Investment Recommendations.*** "*A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA.*"

   Unlike the 2010 proposal and contrary to **Advisory Opinion 2005-23A**, the new proposal provides that recommendations to take distributions or entrust plan or IRA assets to particular advisers would fall within the scope of covered advice. If the proposal is adopted, it would supersede the Advisory Opinion. The proposal makes clear, however, that a person does not act as a fiduciary merely by providing participants with information about plan or IRA distribution options, including the consequences associated with the available types of benefit distributions. It thus draws an important distinction between investment advice and investment education.

2. ***Investment Management Recommendations.*** "*A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA.*"

   The proposal defines investment advice as including individualized advice or recommendations as to the exercise of proxy or other ownership rights. However, investment advice does not include guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy, and which are not directed or presented as a recommended policy for the plan or IRA to adopt. In addition, a recommendation addressed to all shareholders in a proxy statement would not constitute investment advice.

3. ***Appraisals Of Investments.*** "*An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA.*"

   This provision differs from the 2010 proposal in several respects. First, it is narrower in that it covers only those appraisals, fairness opinions, and similar statements that relate to a particular transaction. Second, the DOL expanded the 2010 proposal's carve-out for general reports or statements of value provided to satisfy required reporting and disclosure rules under ERISA and the Code to include any federal or state law, rule, regulation or self-regulatory organization. Third, the proposal limits what constitutes investment advice addressing valuations or appraisals provided to an investment fund, in that a person providing an appraisal, fairness opinion, or statement of value to a collective investment fund or pooled separate account, in which more than one unaffiliated plan has an investment or which holds "plan assets" of more than one unaffiliated plan under the DOL's plan assets regulation will not be considered to be providing investment advice.[3] Fourth, the proposal does not extend fiduciary coverage to valuations or appraisals for employee stock ownership plans. The DOL stated that while it remains concerned about the potential for abuse in this context, these concerns raise unique issues more appropriately addressed in a separate regulatory initiative.

4. ***Recommendations Of Persons To Provide Investment Advice For A Fee Or To Manage Plan Assets.*** "*A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described [above].*"

   In the DOL's view, the current regulation already treats as fiduciary conduct a recommendation of a person who also is going to receive a fee or other compensation for providing any of the types of investment advice, and this provision is being proposed "to remove any possible ambiguity." The DOL stated that this category includes recommendations of persons to perform asset management services or to make investment recommendations. However, general advice as to the types of quantitative and qualitative criteria to consider in hiring an investment manager would not rise to the level of investment advice, nor would a trade journal's endorsement of an investment manager. Recommendations of administrative service providers, property managers, or other service providers who do not provide investment services also would not be covered.

The Circumstances Under Which Advice Is Provided

Unless a carve-out (discussed below) applies, a category of advice described above would constitute "investment advice" if the person providing the advice, either directly or indirectly (*e.g.*, through or together with any affiliate):

1. Represents or acknowledges that he or she is acting as a fiduciary within the meaning of ERISA or the Code with respect to the advice described above; or

2. Renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is individualized, or that such advice is specifically directed to the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

The proposal elaborates on this provision in several respects. First, advisers who claim fiduciary status may not later argue that their advice was not fiduciary in nature. They also would not be able to rely on any of the carve-outs provided in the proposal. Second, unlike the 2010 proposal, which provided that investment recommendations provided by an investment adviser under the Investment Advisers Act of 1940 would, absent an applicable carve-out, be automatically treated as investment advice, the new proposal dropped this provision in favor of a "functional approach" to fiduciary status. Third, the proposal avoids treating recommendations made to the general public, or to no one in particular (*e.g.*, the general circulation of newsletters, television talk show commentary, or remarks made in speeches and presentations at financial industry education conferences) as investment advice. Fourth, the proposal does not require a meeting of the minds as to the extent to which the recipient will actually rely on the advice, but the parties must agree or understand that the advice is individualized or specifically directed to the particular advice recipient for consideration in making investment decisions. In this regard, unlike the 2010 proposal, there is no requirement that the advice be specific to the needs of the plan, participant or beneficiary or IRA owner; rather, the advice only needs to be specifically directed to such recipient. Lastly, there is no requirement that the advice be provided on a regular basis.

Fee Or Other Compensation

Fiduciary status under ERISA requires that the investment advice be provided for a "fee or other compensation, direct or indirect." The proposed regulation defines this phrase to mean "any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered." "Fee or compensation" includes, but is not limited to, brokerage fees, mutual fund sales, and insurance sales commissions. "Direct or indirect compensation" includes any compensation received by affiliates of the adviser that is connected to the transaction in which the advice was provided.

Carve-Outs From Definition Of Investment Advice

Acknowledging that the proposed categories of investment advice, standing alone, could sweep in certain relationships that are not appropriately considered fiduciary in nature, the DOL included a number of specific carve-outs in the proposal.

1. **Seller's and Swap Carve-Outs**

Seller's Carve-Out

Under the seller's carve-out, the proposal would not treat incidental advice and recommendations made to an expert plan adviser in an arm's-length transaction where there is generally no expectation of fiduciary investment advice as imposing fiduciary status. This carve-out is subject to several conditions. First, the person must provide advice to an ERISA plan fiduciary, who is independent of such person, and who exercises authority or control with respect to the management or disposition of plan assets, with respect to an arm's-length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such transaction. Second, either of two alternative sets of conditions must be met.

Under the first alternative, prior to providing any recommendation with respect to the transaction, such person:

1. Obtains a written representation from the plan fiduciary that he or she is a fiduciary who exercises authority or control with respect to the management or disposition of plan assets, that the plan has 100 or more participants, and that the fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial advice, or to give advice in a fiduciary capacity;

2. Fairly informs the plan fiduciary of the existence and nature of the person's financial interests in the transaction;

3. Does not receive a fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice in connection with the transaction (this does not preclude a person from receiving a fee or compensation for other services); and

4. Knows or reasonably believes that the plan fiduciary has sufficient expertise to evaluate the transaction and determine whether it is prudent and in the best interest of participants (a written representation from the plan or plan fiduciary is sufficient).

The second alternative applies if the person knows or reasonably believes that the fiduciary has responsibility for managing at least $100 million in plan assets (information on an individual plan's most recent Form 5500 can be relied upon, and, in the case of a fiduciary acting as an asset manager for multiple plans, representations from the fiduciary as to the value of plan assets under management may be relied upon). In this case, no written representations are required, but the adviser must fairly inform the fiduciary that the adviser is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, and the adviser may not receive a fee or compensation directly from the plan or the plan fiduciary for the provision of investment advice in connection with the transaction.

This carve-out is significantly different from the 2010 proposal. The changes reflect the DOL's desire to ensure that it appropriately distinguishes between incidental advice as part of an arm's-length transaction, with no expectation of trust or acting in the customer's best interest, from those instances where a customer may be expecting unbiased investment advice that is in its best interest.

Notably, this carve-out does not apply to recommendations to retail investors, including "small" plans (less than 100 participants), IRA owners and plan participants and beneficiaries. The DOL believes that recommendations to retail investors and small plan providers are generally not "arm's-length" and are presented routinely as advice, consulting, or financial planning services.

Swap Carve-Out

The swap carve-out relates to advice and other communications by counterparties in connection with certain swap or security-based swap transactions under the Commodity Exchange Act or Securities Exchange Act. The carve-out would allow swap dealers, security-based swap dealers, major swap participants and security-based major swap participants who make recommendations to plans to avoid becoming ERISA fiduciaries when acting as counterparties to a swap or security-based swap transaction. In order to qualify for the carve-out, if the person providing recommendations is a swap dealer or security-based swap dealer, it must not be acting as an adviser to the plan with respect to the transaction or in connection with the transaction within the meaning of the applicable regulations of the Commodities Futures Trading Commission or the SEC. In addition, before providing any recommendations with respect to the transaction, the person must obtain a written representation from the plan fiduciary that the fiduciary will not rely on the recommendations provided.

2. **Employees of Plan Sponsor**

Employees of a plan sponsor of an ERISA plan will not be given fiduciary status with respect to advice they provide to the fiduciaries of the sponsor's plan as long as they do not receive compensation for the advice beyond their normal compensation. This would protect internal employees, such as human resources professionals, who routinely may develop reports and recommendations for investment committees and other named fiduciaries of sponsors' plans.

3. **Platform Providers/Selection and Monitoring Assistance**

These related carve-outs are intended to cover service providers, such as record-keepers and third party administrators, that offer a "platform" or selection of investment vehicles to participant-directed individual account ERISA plans. The proposal makes clear that persons would not be providing investment advice by marketing or making available to a plan specific investment alternatives to be made available to participants, without regard to the individualized needs of the plan or its participants and beneficiaries, as long as they disclose in writing that they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

Similarly, the carve-out covers certain common activities that platform providers may carry out to assist plan fiduciaries in selecting and monitoring investment alternatives that they offer to participants. Merely identifying investment alternatives meeting objective criteria specified by the plan fiduciary (*e.g.*, expense ratios, fund size, or asset type specified by the plan fiduciary) or providing objective financial data regarding available alternatives to the plan fiduciary would not constitute the rendering of investment advice.

In response to comments about the 2010 proposal, the DOL confirmed that the platform provider carve-out is available in the 403(b) plan marketplace, but does not extend to IRAs and other non-ERISA plans, since there typically is no separate independent plan fiduciary to interact with the platform provider.

4. **Investment Education**

The investment education carve-out makes clear that the furnishing or making available of specified categories of information and materials to a plan, plan fiduciary, participant, beneficiary or IRA owner will not constitute the provision of investment advice, regardless of who provides the information (*e.g.*, plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which it is provided (*e.g.*, on an individual or group basis, in writing or orally, via a call center, or by way of video or computer software), and whether an identified category of information and materials is provided or made available alone or in combination with other categories identified, or the type of plan or IRA involved.

The proposal incorporates much of **DOL Interpretive Bulletin 96-1** (IB 96-1). For example, similar to IB 96-1, the categories of investment education information and materials include, but are not limited to: (i) plan information; (ii) general financial, investment and retirement information; (iii) asset allocation models; and (iv) interactive investment materials.

There are, however, several exceptions and, if the proposal is adopted, it would result in IB 96-1 being superseded. First, a new condition of the carve-out is that the information and materials may not include advice or recommendations as to specific investment products, specific investment managers, or the value of particular securities or other property. Second, the proposal includes a new provision clarifying that the distribution of certain general information that helps an individual assess and understand retirement income needs past retirement and associated risks, or explains general methods for the individual to manage those risks both within and outside the plan, would not result in fiduciary status. Third, asset allocation models and interactive investment materials that refer to specific investment products available under the plan or IRA would now be considered individualized investment recommendations, rather than investment education, even when accompanied by a statement that other similar investment alternatives may be available.

New Prohibited Transaction Class Exemptions and Amendments to Existing Class Exemptions

The DOL's proposal also includes two new prohibited transaction class exemptions, as well as amendments to several existing class exemptions, that are intended to preserve the ability of certain fiduciary advisers, broker-dealers and insurance agents to continue to receive common forms of compensation that would otherwise be prohibited as conflicts of interest. In addition, the DOL proposed to revoke certain parts of existing class exemptions in recognition that the transaction would be covered by one of the new exemptions or proposed amendments to other existing class exemptions. The DOL intends to make the new and amended exemptions available at the same time as the regulatory proposal becomes effective. Set forth below is a summary of certain material aspects of the proposed exemptions and amendments. It is important to emphasize that compliance with these (and other) prohibited transaction exemptions requires a comprehensive analysis of the applicable facts and circumstances as well as satisfaction of all applicable conditions of the exemption.

Proposed "Best Interest Contract Exemption"

The Best Interest Contract Exemption is designed to promote the provision of investment advice that is in the best interest of retail investors, including plan participants and beneficiaries, IRA owners and "small" plans (less than 100 participants) (collectively referred to in the proposal as "retirement investors"). The proposed exemption represents a departure from the typical DOL class exemption model in that it is intended to provide relief for a broad range of current business practices, rather than being transaction-specific.

ERISA and the Code prohibit fiduciary advisers to plans and IRAs from receiving compensation that varies based on their investment recommendations and from receiving compensation from third parties in connection with their advice. The exemption would permit certain investment advice fiduciaries (and their affiliates and related entities) to receive common forms of such "prohibited compensation" for services provided in connection with the purchase, sale or holding of certain "assets" by plans, participants, beneficiaries and IRAs in accordance with the advice provided by the investment advice fiduciary, provided that all applicable conditions of the exemption are satisfied. Under the exemption, (a) the common forms of "prohibited compensation" contemplated are commissions paid by a plan, participant or beneficiary, or IRA owner, and commissions, sales loads, 12b-1 fees, revenue sharing and other payments from third parties that provide investment products; and (b) "assets" are defined to include bank deposits, CDs, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs and funds and certain exchange-traded equity securities, certain corporate bonds, agency debt securities and Treasury securities, insurance and annuity contracts and guaranteed investment contracts.

Among other things, the exemption would require the adviser to:

1. contractually acknowledge its status as a fiduciary;

2. contractually agree to, and comply with, certain "impartial conduct standards," which include (a) only providing advice that is in the "best interest" of the retirement investor (generally, a standard similar to the ERISA duties of prudence and loyalty), (b) avoiding misleading statements, and (c) receiving no more than reasonable compensation;

3. contractually warrant that it will comply with all applicable laws governing the provision of investment advice and that it has adopted written policies and procedures reasonably designed to mitigate the impact of conflicts of interest;

4. provide certain disclosures relating to material conflicts of interest, including informing the retirement investor of its right to obtain information in regards to the adviser's direct and indirect fees; and

5. provide certain initial and annual financial/transaction disclosures, comply with certain recordkeeping requirements, and provide advance notification to the DOL of the adviser's intention to rely on the exemption.

Importantly, the proposed exemption does not allow the investment advice contract between the adviser and the retirement investor to provide for the retirement investor's waiver of its right to bring a class action lawsuit in court to resolve disputes or to include any exculpatory provisions disclaiming or limiting the adviser's liability for violation of the contract.

The "best interest" standard of the exemption is particularly important for IRA owners. Fiduciaries to ERISA-covered plans are already subject to duties of prudence and loyalty, but IRA fiduciaries are not subject to similar standards under the Code. By requiring the "best interest" standard to be included within the investment advice contract as an exemption condition, the exemption would provide IRA owners a private right of action for the adviser's failure to comply with such standard, which would not otherwise be available.

The exemption separately provides relief with respect to certain purchases of insurance or annuity contracts by a retirement investor from an insurance company that is a "party in interest" or "disqualified person," where the transaction is for cash, in the ordinary course of business and the insurance company's fees are reasonable.

The exemption also provides relief to advisers with respect to compensation received in connection with the purchase, sale or holding of a covered asset (defined above) pursuant to an agreement or arrangement that was entered into prior to the effective date of the new rules, provided additional advice with respect to the asset is not provided after the effective date and the transaction was not a "prohibited transaction" on the date it occurred.

Lastly, the DOL noted that it also is considering, and seeking public input in regards to, a separate streamlined exemption that would allow advisers to receive otherwise prohibited compensation in connection with plan, participant and beneficiary accounts, and IRA investments in certain high-quality, low-fee investments with minimal potential for material conflicts of interest, subject to fewer conditions.

Proposed "Principal Transaction Exemption"

"Principal transactions," *i.e.*, transactions in which a fiduciary is acting on behalf of its own account, generally are prohibited under ERISA and the Code, absent an exemption. The Principal Transaction Exemption would permit certain broker-dealers and other advisers to engage in "principal transactions" involving certain widely-held debt securities[4] that possess moderate credit risk when the transaction is a result of the adviser's advice (*e.g.*, the adviser's sale of a debt security to a plan out of the adviser's own inventory). The proposed exemption includes all of the contract requirements of the proposed Best Interest Contract Exemption (described above), and further requires, among other things, that the written contract disclose the material conflicts of interest involved and set forth the retirement investor's written consent to such transactions (only prospectively), which must be terminable at will at any time without penalty. The exemption also includes certain pricing conditions, pre-transaction and annual disclosure requirements and recordkeeping requirements.

Proposed Amendments to Prohibited Transaction Exemptions (PTE) 86-128 and 75-1 (Parts I(b) and (c) and II(2))

ERISA and the Code generally prohibit a fiduciary from using its authority to affect or increase its own compensation, absent an exemption. PTE 86-128 currently contains two covered transactions: (i) it allows a fiduciary, including an investment advice fiduciary, to cause a plan or IRA to pay it, or its affiliate, a fee for effecting or executing securities transactions as agent under certain circumstances, and (ii) it allows a fiduciary to act as an agent in an "agency cross transaction" for both the plan and its counterparty and to receive a reasonable fee from the counterparty in connection with the agency cross transaction.

The DOL is proposing to amend PTE 86-128 to require all fiduciaries (not only investment advice fiduciaries) relying on the exemption to adhere to the "impartial conduct standards" required in the proposed Best Interest Contract Exemption (described above).

In addition, the amendment would add a third covered transaction to PTE 86-128 for fiduciaries who sell mutual fund shares out of their own inventory to plans and IRAs and receive commissions in connection with such transactions. While these transactions are currently the subject of another exemption, PTE 75-1 (Part II(2)), the DOL stated they are more accurately described as "riskless principal" transactions that are most similar to the agency transactions already covered by PTE 86-128. That exemption permits a fiduciary to use its authority to receive a commission for effecting or executing a plan's or IRA's securities transactions on an agency basis. As a corollary to moving the mutual fund exemption to PTE 86-128, the DOL also is proposing to remove it from PTE 75-1 (Part II(2)).

The amendment also would provide that an investment advice fiduciary to an IRA would not be able to rely on PTE 86-128. Instead, such fiduciaries would be required to rely on the Best Interest Contract Exemption. However, a fiduciary with full investment discretion over an IRA (*i.e.*, an investment manager) would still be able to rely on PTE 86-128, although the DOL proposes to require such fiduciaries to comply with all of the exemption conditions (including those to which they are not currently subject, *e.g.*, prior written authorization and certain disclosures and quarterly and annual reporting).

Finally, the DOL proposes to revoke Parts I(b) and (c) of PTE 75-1, which currently provide exemptive relief for certain non-fiduciary services (*e.g.*, effecting securities transactions on an agency basis (other than by a fiduciary), including clearance, settlement or custodial functions, and furnishing advice regarding securities or other property under circumstances which do not make such party a fiduciary) to plans and IRAs. The DOL is proposing to require reliance on the existing statutory exemptions under ERISA Section 408(b)(2) and Code Section 4975(d)(2) and the DOL's regulations thereunder to exempt these services.

Proposed Amendment to PTE 75-1 (Part V)

PTE 75-1 (Part V) currently permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities. As a practical matter, the exemption permits broker-dealers to extend credit to a plan or IRA as a normal part of the execution of securities transactions; for example, so as to permit settlement within the customary settlement period, purchases of securities on margin, short sales and the writing of options contracts. However, the exemption does not permit broker-dealers that are fiduciaries with respect to the plan assets involved in the transaction to receive compensation for such an extension of credit. The DOL is proposing to amend PTE 75-1 (Part V) to permit investment advice fiduciaries to receive compensation for lending money or otherwise extending credit to plans or IRAs, but only for the limited purpose of avoiding a failed securities transaction, provided that the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's-length transaction between unrelated parties and the plan or IRA receives certain written disclosures prior to the extension of credit.

Proposed Amendment to PTE 84-24

PTE 84-24 currently provides relief for certain classes of transactions involving purchases with assets of a plan or IRA of insurance contracts, annuity contracts and securities issued by registered investment companies (*i.e.*, mutual funds), and the receipt of sales commissions in connection therewith by insurance agents, insurance brokers, pension consultants, and investment company principal underwriters (that, in each case, are "parties in interest," "disqualified persons" or fiduciaries to such plan or IRA). PTE 84-24 also provides relief for sales to a plan or IRA by an insurance company of an insurance or annuity contract and for sales by an investment company of mutual fund shares.

The amendment would require all fiduciaries relying on the exemption to adhere to the "impartial conduct standards" required in the proposed Best Interest Contract Exemption (described above), and would define more precisely the types of payments ("insurance commissions" and "mutual fund commissions") that are permitted under the exemption. The amendment also would provide that investment advice fiduciaries to IRA owners would no longer be able to rely on PTE 84-24 (and would have to instead rely on the proposed Best Interest Contract Exemption) with respect to transactions involving variable annuity contracts and other annuity contracts that constitute securities under federal securities laws, and mutual fund shares.

Proposed Amendments to PTEs 75-1 (Parts III and IV), 77-4, 80-83 and 83-1

The DOL is proposing to amend PTEs 75-1 (Parts III and IV), 77-4, 80-83 and 83-1to require all fiduciaries relying on the exemptions to adhere to the "impartial conduct standards" required in the Best Interest Contract Exemption (described above).

PTE 75-1 (Part III) permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary or its affiliate, when the fiduciary or affiliate is also a member (but not manager) of the syndicate.

PTE 75-1 (Part IV) permits a plan or IRA to purchase or sell securities in a principal transaction from or to a fiduciary that is a market-maker with respect to such securities.

PTE 77-4 permits a plan or IRA to purchase or sell open-end investment company shares (*e.g.*, mutual fund shares) where the mutual fund investment adviser is also a fiduciary to the plan or IRA (or an affiliate of such fiduciary).

PTE 80-83 provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary (or its affiliate).

PTE 83-1 permits the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee or insurer of the pool is a fiduciary with respect to the assets of the plan or IRA invested in such certificates.

Comment Period

Comments on the proposed regulation, the proposed class exemptions and the proposed amendments to existing class exemptions must be submitted on or before the day that is 75 days after the proposed regulation is published in the Federal Register.

[1] The proposal defines "recommendation" to mean "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."

[2] Consistent with the 1975 regulation, mere execution of a securities transaction at the direction of a plan or IRA owner is not considered fiduciary activity.

[3] The carve-out does not appear to apply to: (a) a "fund of one" or separate account, or (b) a fund holding "plan assets," but that had only one plan investor large enough to be over 25% of the interests.

[4] The DOL purposefully excluded from coverage under the exemption "principal transactions" involving other financial instruments and assets such as equity securities, futures, derivatives, and currencies because the DOL was not persuaded that an exemption would be in the best interests of, and protective of, retirement investors. Note, however, that other exemptions (*e.g.*, PTE 75-1 (Parts II and IV)), may be applicable to provide relief for the purchase or sale of certain securities under certain circumstances. In addition, transactions between a plan or IRA and a fiduciary that are "blind transactions" executed on an exchange may not need exemptive relief.

Related Professionals

- **Russell L. Hirschhorn**
  Partner
- **Pamela A. Onufer**
  Special Pension investment Counsel
- **Adam W. Scoll**
  Partner
- **Robert M. Projansky**
  Partner
- **Steven D. Weinstein**
  Partner
- **Ira G. Bogner**
  Managing Partner