

The Fiduciary Saga Continues

Allie Itami

Kevin Walsh

Agenda

- Background & Context
- Revised Investment Advice Definition
- PTE 2020-02
- Other Exemptions
- Path Forward

Background & Context

- Goals
 - Capture rollover recommendations.
 - Prevent “fine print,” other disclaimers of fiduciary status.
 - Create a “uniform” standard for retirement accounts.
 - Fill regulatory “gaps,” particularly with insurance.
- Back to the Future!
 - While marketed as “tailored,” it is ambitious and largely a reprisal of 2016
 - Moves from bright-line test to fact specific test.
 - DOL “rejects the purported dichotomy” between sales and advice.
 - Specifically targets rollover transactions.

Revised Investment Advice Definition

“Recommendations”

- Broadly defined
 - Based on SEC definition
 - “Suggestions” to do or not do something
- Includes
 - Investment strategy involving securities, property
 - Investment policies
 - Distributions, rollovers
 - Account type choice
 - Proxies

1975 Rule

1. Make recommendations to purchase or sell a security or other property
2. On a regular basis
3. Pursuant to a mutual agreement
4. Advice serves as a primary basis for investment decision
5. Advice is individualized based on the particular needs

v. Proposal

1. Makes recommendation to a retirement investor
2. Makes recommendations on a regular basis *as part of firm's business*
3. May be relied upon as a basis for investment decision
4. Based on particular needs, individual circumstances

Observations

- DOL purports to retain much of the five-part test while proposing a rule more akin to the 2016 rule
- Likely an attempt to bolster litigation position
 - But watered down or eliminated regular basis, mutual understanding and primary basis — key elements of the Fifth Circuit’s analysis for a “trust and confidence” type relationship
- Fiduciary status analysis highly dependent on —
 - Precise wording of communication
 - Reasonable (arguably subjective) investor expectations
- Affiliate activities aggregated for applying advice definition
- Written fiduciary disclaimers overridden by actions

Observations

- New rule lacks many of the explicit carve-outs, clarifications from 2016
 - *E.g.*, no explicit platform exception, exception based on investor size or sophistication
 - If you are subject to Reg BI or an RIA you are an adviser
- Concerns will be raised about typical marketing activities including —
 - “Hire me” — recommending yourself
 - “Hire them” — recommending others, particularly managers
 - Platforms
 - Select lists
 - Communications with “groups” could be advice
 - Labels of your workforce — e.g., financial planners are advisers

Proposed Retirement Security Rule: Definition of Investment Advice Fiduciary

A Person Is an Investment Advice Fiduciary with respect to Moneys or other Property of a Plan or IRA if, for a Fee, They:

Make a Covered Recommendation

A recommendation of:

- a securities transaction;
- another investment transaction;

OR

- an investment strategy involving securities or investment property

To a “Retirement Investor”

- ERISA Plan
- ERISA Plan fiduciary
- ERISA Plan participant or beneficiary
- IRA
- IRA fiduciary
- IRA owner or beneficiary

Where advice is directed to a plan or IRA fiduciary, the plan or IRA and the fiduciary are each “retirement investors”

And are a Person Who:

Directly or indirectly has discretionary control with respect to purchasing or selling securities or other investment property for the retirement investor

OR

Directly or indirectly makes investment recommendations to investors:

- On a regular basis
 - As part of their business; AND
 - The recommendation is provided under circumstances indicating it is:
 - based on the particular needs or individual circumstances of the retirement investor
- AND
- may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest

OR

Represents or acknowledges that they are acting as a fiduciary when making investment recommendations

Broad Definition of “Fee or Compensation”: Any fee or compensation from any source: explicitly for the advice; or which would not have been paid but for the advice or the recommended purchase, sale or holding of securities or other property. Includes but is not limited to: commissions, loads, finder’s fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, shelf-space payments to brokerage firms, recruitment compensation, expense reimbursements, gifts, gratuities or other non-cash compensation.

Disclaimers Will Not Control: A written disclaimer of fiduciary status under ERISA or the Code or a disclaimer as to whether the person makes recommendations to investors on a regular basis, as a part of their business or of the circumstances around the recommendation will not control if inconsistent with the person’s oral communications, marketing materials, applicable law or other interactions with the Retirement Investor

PTE 2020-02

PTE 2020-02 at a Glance

- DOL would like firms to “rely solely” on PTE 2020-02.
- Continues to provide broad exemptive relief in connection with the provision of non-discretionary investment advice
- Relies on:
 - Impartial conduct standards
 - Policies and Procedures
 - Disclosures
 - Retrospective review

Proposed Changes to PTE 2020-02

- Covers robo-advice arrangements.
- Affirmatively requires financial institutions to correct, report to IRS, and pay excise taxes in connection with non-exempt prohibited transactions engaged in as a result of providing fiduciary investment advice
- Increases disclosure and documentation requirements, including with respect to standard of care, compensation, and conflicts of interest
- Expands to QPAM like disqualifications
- Fiduciary acknowledgement cannot be “to the extent”

PTE 84-24

PTE 84-24 Proposed Changes

- Replaces almost all of the conditions of PTE 84-24 with conditions that mirror PTE 2020-02's
- Significantly narrowed by prospectively limiting the universe of investment advice fiduciaries who are eligible for relief under the exemption to “Independent Producers”
 - “Independent Producers” are defined as persons or entities licensed to sell, solicit or negotiate insurance contracts who sell products of multiple unaffiliated insurance companies and who are not insurance company employees, including Code section 3121 statutory employees

PTE 84-24 Proposed Changes

- Insurance company issuing a contract is not required to acknowledge fiduciary status, but would need to supervise and perform retrospective reviews
- Largely prohibits trips
- Limits the type of compensation covered
- Increases required disclosures and documentation, including that an Independent Producer must document conclusions as to whether rollovers and sales of annuities are in a Retirement Investor's Best Interest

Other Exemptions

PTEs 75-1, 77-4, 80-83, 83-1, and 86-128

- Each PTE no longer provides relief for investment advice arrangements
 - Investment advice fiduciaries would rely on PTE 2020-02 instead

Path Forward

Path Forward

- Appropriation Riders?
- Final Rule?
 - Litigation
 - Congressional Review Act

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Questions?
