

MEMO# 33873

October 28, 2021

DOL Announces Extension of Enforcement Policy for Fiduciary Advice Exemption

[33873]

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Announces Extension of Enforcement Policy for Fiduciary Advice Exemption

On October 25, 2021, the Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2021-02,[\[1\]](#) announcing an extension of the temporary enforcement policy related to its prohibited transaction exemption for investment advice fiduciaries, PTE 2020-02.[\[2\]](#) Under the temporary enforcement policy, as explained in PTE 2020-02 and FAB 2018-02,[\[3\]](#) DOL will not pursue prohibited transaction claims against advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards.[\[4\]](#) FAB 2021-02 temporarily extends through January 31, 2022 all aspects of the enforcement policy, which otherwise was set to expire on December 20, 2021.

FAB 2021-02 also provides a longer extension—through June 30, 2022—of the enforcement relief, specifically for complying with the documentation and disclosure requirements for rollovers as set forth in PTE 2020-02.[\[5\]](#) Under those requirements, an advice fiduciary must document the specific reasons that any rollover recommendation is in the best interest of the retirement investor and provide that documentation to the investor.

The FAB specifies that all other conditions of the exemption (besides the rollover documentation and disclosure requirements) will be subject to full enforcement as of February 1, 2022.

The operative language from FAB 2021-02 provides that:

[F]or the period from December 21, 2021 through January 31, 2022, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that are exempted in PTE 2020-02 or treat such fiduciaries as violating the applicable prohibited transaction rules.

In addition, from December 21, 2021 through June 30, 2022, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are otherwise in compliance with PTE 2020-02 based solely on their failure to comply with the disclosure and documentation requirements set forth in Sections II(b)(3) and (c)(3) of that exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.

Finally, the FAB confirms that the Treasury Department and IRS will continue to apply their previously announced relief from prohibited transaction excise taxes and associated reporting obligations, with respect to transactions subject to DOL's temporary enforcement policy.^[6]

The FAB indicates that the extension is intended to make it easier for financial institutions to provide the exemption's disclosures in line with their regular distribution cycles for disclosures, and to perform the retrospective review on a calendar year basis. The special longer extension for rollover documentation and disclosures reflects stakeholder input that, for some firms, the tools or systems changes needed to meet the rollover conditions are still in development. In September 2021, the ICI, together with several other trade groups, asked DOL for an extension of the temporary enforcement policy by at least six to twelve months beyond December 20, 2021 (or even longer if DOL proceeds with further fiduciary advice rulemaking as contemplated by its current regulatory agenda). A copy of that letter is attached.

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endnotes

^[1] FAB 2021-02 is available here:
<https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-02>.

^[2] For an overview of PTE 2020-02, see ICI Memorandum No. 32999, dated December 18, 2020, available at <https://www.ici.org/memo32999>.

^[3] For a summary of FAB 2018-02, see ICI Memorandum No. 31200, dated May 7, 2018, available at <https://www.ici.org/memo31200>.

^[4] The impartial conduct standards include a best interest standard; a reasonable compensation standard; and a requirement to make no materially misleading statements about recommended investment transactions and other relevant matters).

^[5] PTE 2020-02 Sections II(b)(3) and (c)(3).

^[6] See ICI Memorandum No. 31200, dated May 7, 2018, available at <https://www.ici.org/memo31200>.

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