

Executive Summary: Investment Management and Employee Benefits

**Godfrey & Kahn Attorneys
Responsible for this Executive
Summary:**

Susan M. Hoaglund

262.951.7136

shoaglund@gklaw.com

Michael W. Taibleson

414.287.9384

mtaibleson@gklaw.com

Final DOL Exemption and Guidance on Fiduciary Investment Advice in Connection with Rollover Recommendations

In December 2020, the U.S. Department of Labor (DOL) issued final prohibited transaction exemption (PTE) 2020-02, "Improving Investment Advice for Workers & Retirees" (exemption). The DOL also provided its final interpretation of when advice to roll over plan assets to an IRA will be considered fiduciary investment advice under the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code of 1986, as amended (Code). The exemption allows investment advice fiduciaries to receive compensation, including as a result of advice to roll over assets from an ERISA plan to an IRA. The exemption went into effect February 16, 2021. The DOL is expected to publish related guidance for retirement investors, employee benefit plans and investment advice providers. Below is a summary of where things stand now for investment advisers.

Transition Period

- The new exemption replaces the DOL's 2016 fiduciary rule and Best Interest Contract Exemption, which were vacated in 2018. After the vacatur, the DOL issued a temporary non-enforcement policy providing that it would not pursue prohibited transaction claims against investment advice fiduciaries who worked diligently and in good faith to comply with the Impartial Conduct Standards, which require investment advisers to:
 - Give prudent advice that is in the retirement investor's best interest (i.e., based on the investment objectives, risk tolerance, financial circumstances and needs of the retirement investor, without regard to financial or other interests of the investment adviser or investment adviser representative);
 - Charge no more than reasonable compensation; and
 - Avoid making misleading statements.
- The non-enforcement policy will remain in effect until December 20, 2021 and provide a transition period for investment advisers to comply with the provisions in the new exemption, provided they comply with the Impartial Conduct Standards in the interim.

Rollovers

- Investment advisers with discretionary authority over IRAs and ERISA plans are and always have been investment advice fiduciaries under the Code and ERISA, as applicable. Investment advisers with non-discretionary authority, on the other hand, were previously able to take the position that they were not fiduciaries under the Code or ERISA when they gave rollover advice. The DOL, however, has changed its position regarding fiduciary status in the context of rollover recommendations and, as a result, non-discretionary investment advisers who give rollover advice are now investment advice fiduciaries under the Code and ERISA, provided they intend to have an ongoing relationship with the retirement investor.

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

- Both discretionary and non-discretionary investment advisers who recommend rollovers will need to rely on the new exemption beginning December 21, 2021 to continue providing rollover recommendations. They will need to satisfy all the conditions of the exemption, including: satisfying the Impartial Conduct Standards; providing written disclosure to clients; providing retirement investors with documentation of the specific reasons that a rollover recommendation is in their best interest; adopting new policies and procedures; and conducting annual compliance reviews.
- A “rollover” means a retirement investor rolls over assets from a plan to another plan, a plan to an IRA, an IRA to a plan, or an IRA to another IRA. Before making a recommendation to roll over assets from a plan to an IRA, the new exemption requires an investment adviser representative to consider and document the following: the retirement investor’s alternatives to a rollover, including leaving the money in his or her current employer’s plan, if permitted, and selecting different investment options; the fees and expenses associated with both the plan and the IRA; whether the employer pays for some or all of the plan’s administrative expenses; and the different levels of services and investments available under the plan and the IRA.
- If investment advisers do not already document the fact that they have a reasonable basis for their rollover recommendations, they should consider starting that practice now and may wish to dust off their rollover checklists from 2016. In the *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, the SEC notes that an investment adviser’s fiduciary duty applies to advice about rollovers so it would be prudent under both the SEC and ERISA fiduciary standards for investment advisers to have documentation supporting rollover recommendations even during the current transition period. Moreover, Regulation Best Interest has required broker-dealers to do a comparative analysis of plans and IRAs before making a recommendation to roll over plan assets into an IRA since June 2020.
- If an investment adviser decides not to comply with the exemption for rollovers, the adviser must refrain from making rollover recommendations and limit its practices to only “hire me” communications and investment education.

Ongoing Management of IRAs or ERISA Plans

- The exemption only covers non-discretionary advice so its only application for investment advisers with discretionary authority is limited to advice about rollovers. Investment advisers with discretionary authority over an IRA or ERISA plan may not rely on the exemption for ongoing management and must avoid all conflicts of interest and prohibited compensation and not engage in principal transactions. Discretionary investment advisers may still rely on current PTEs and advisory opinions if needed. For example, in reliance on PTE 77-4, investment advisers typically waive their advisory fee for any portion of an IRA that is invested in proprietary mutual funds.
- The exemption allows investment advisers with non-discretionary authority over IRAs or ERISA plans to engage in principal transactions and to receive otherwise prohibited compensation, including compensation in connection with proprietary mutual funds.
- The exemption also allows dual registrants with non-discretionary authority over IRAs or ERISA plans to receive commissions, 12b-1 fees, trailing commissions, sales loads, mark-ups and mark-downs or revenue sharing payments from investment providers or third parties.

Based on the current sunset date of the DOL’s temporary non-enforcement policy, investment advisers should evaluate how they are advising IRA owners and ERISA plan fiduciaries, participants and beneficiaries under the DOL’s new interpretation of fiduciary status. Investment advisers will need to either develop policies and procedures to be ready to comply with the conditions of the exemption by December 20th of this year (2021) or refrain from making rollover recommendations and limit their practices to only “hire me” communications and investment education.

Please see our complete discussion of this topic in the Investment Management and Employee Benefits Update on the Godfrey & Kahn website, available [here](#).

Source: *Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees (Dec. 18, 2020)*, available [here](#).