GODFREY & KAHN S.C.

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Investment Management and Employee Benefits Update

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DOL Delays PTE 2020-02 Compliance Dates

On October 25, 2021, the Department of Labor (DOL) announced two temporary delays of the compliance date for prohibited transaction exemption (PTE) 2020-02, "Improving Investment Advice for Workers & Retirees" (exemption).

First, the DOL extended the temporary non-enforcement policy that was set to expire December 20, 2021 to January 31, 2022. The policy provides that the DOL will not pursue prohibited transaction claims against investment advice fiduciaries who work diligently and in good faith to comply with the Impartial Conduct Standards, which require investment advisers to:

- Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components — prudence and loyalty:
    - Under the prudence standard, the advice must reflect the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor;" and
    - Under the loyalty standard, the advice must not place the financial or other interests of the representative, the investment adviser or any affiliate, related entity, or other party ahead of the interests of the retirement investor, or subordinate the retirement investor's interests to their own;
- Charge no more than reasonable compensation and comply with federal securities laws regarding "best execution;" and
- Make no misleading statements about investment transactions and other relevant matters.

As we indicated in our March 2021 Investment Management and Employee Benefits Update, we recommend investment advisers document the fact that they have a reasonable basis for their rollover recommendations (through the use of checklists or otherwise) to evidence they are working diligently and in good faith to comply with the Impartial Conduct Standards during the transition period.

Second, the DOL determined that it will not enforce the specific documentation and disclosure requirements for rollovers through June 30, 2022. This is the requirement that a representative must provide retirement investors, prior to engaging in a rollover, with documentation of the specific reasons that the rollover recommendation is in the best interest of the retirement investor.

All other requirements of the exemption, however, will be subject to full enforcement as of February 1, 2022. These include:

- Satisfying the Impartial Conduct Standards;
- Providing written disclosure to clients including a fiduciary acknowledgment and a description of the investment adviser's services and material conflicts of interest;
- Adopting policies and procedures to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest; and
- Conducting annual compliance reviews.

Please contact your Godfrey & Kahn investment management or employee benefits team attorney if we can be of assistance.

Sources: News Release, US Department of Labor Announces Temporary Enforcement Policy on Prohibited Transaction Rules Applicable to Investment Advice Fiduciaries (Oct. 25, 2021), available here; Field Assistance Bulletin 2021-02, Temporary Enforcement Policy on Prohibited Transaction Rules Applicable to Investment Advice Fiduciaries (Oct. 25, 2021), available here.