Chamber of Commerce of the United States of America

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VIA ELECTRONIC DELIVERY

September 2, 2021

Mr. Ali Khawar
Acting Assistant Secretary

U.S. Department of Labor
200 Constitution Ave NW
Suite N-5677
Washington, DC 20210

Dear Acting Secretary Khawar:

The U.S. Chamber of Commerce appreciates the Department of Labor (DOL) soliciting feedback regarding its project on the definition of investment advice fiduciary. The Chamber has been a strong advocate for regulatory policies that promote acting in clients' interests and ensuring access and choice to different types of financial services. Regulatory efforts that result in limiting choice, no matter how well intentioned, reduce access and increase costs for the people who most need financial assistance.

As explained in more detail below, we believe that after more than a decade of debate and regulatory initiatives regarding this issue, the DOL should allow firms to implement the current definition and interpretation of who is an investment advice fiduciary for providing recommendations to individuals and the related prohibited transaction exemptions (PTE) without layering additional, and possibly conflicting, regulations on firms so soon after the implementation of PTE 2020-02. If the DOL continues down the regulatory path as indicated in its most recent regulatory agenda,[1] we request that the DOL continue its current enforcement policy as articulated in FAB 2018-02 through the later of July 1, 2022 or the finalization of any additional guidance. At a minimum, we request that those firms that choose to rely on the exemption be allowed to include any communications required under PTE 2020-02 with end of year mailings rather than by December 20, 2021 to minimize confusion and cost for retirement investors. Outlined in more detail below are other recommendations related to the definition of investment advice fiduciary and ways to improve the implementation of PTE 2020-02 by firms and investment advisors.

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[1] Office of Information and Regulatory Affairs, RIN 1210-AC02, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1210-AC02

Background

As we consider any next steps by the DOL in revising the definition of investment advice fiduciary, it is helpful to first summarize the key actions DOL has taken since the Employee Retirement Income Security Act of 1974, as amended (ERISA) was enacted.

ERISA Section 3(21)(ii) defines a fiduciary (in relevant part), as a person with respect to a plan to the extent that the person "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".

In 1975, the DOL issued a regulation interpreting when a person is a fiduciary with respect to rendering investment advice for a fee. Specifically, a person is considered to provide investment advice if he or she meets all the following requirements (known as the five-part test):

- Renders any investment advice as to the value of securities or other property or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property;
- On a regular basis to the plan;
- Pursuant to a mutual agreement, arrangement or understanding;
- The advice is a primary basis for investment decisions with respect to plan assets; and
- The person renders individualized investment advice to the plan based on the needs of the plan.[2]

In 2005, the DOL issued Advisory Opinion 2005-23A (the Deseret Letter) in which the DOL stated in its answer to Question 2 that "It is the view of the Department that merely advising a plan participant to take an otherwise permissible plan distribution, even when that advice is combined with a recommendation as to how the distribution should be invested, does not constitute 'investment advice' within the meaning of the regulation (29 CFR § 2510-3.21(c))." In its answer to Question 3, the DOL stated an advisor who is not otherwise a plan fiduciary and who recommends that a participant withdraw funds from the plan and invest the funds in an Individual Retirement Account (IRA) is not a fiduciary because such a recommendation is not investment advice and such a recommendation, in and of itself, is not an exercise of authority or control over plan assets that would make a person a fiduciary within the meaning of ERISA section 3(21)(A). Therefore, such an advisor does not "engage in an act of self-dealing if he or she advises the participant to roll over his account balance from the plan to an IRA that will pay management or other investment fees to such person."[3]

In 2010, the DOL published a notice proposing to revise the 1975 regulation's five-part test for determining when a person "renders investment advice." The proposal eliminated the regular basis and primary basis prongs of the test. However, in 2011, the DOL withdrew that proposal following concerns that the proposal would limit investor choice. The proposal also received

[2] 29 CFR § 2510.3-21(c).
[3] Advisory Opinion 2005-23A, Q/A 3.

wide bipartisan opposition from Congress, and it was criticized for being unworkable and unjustifiably burdensome for financial institutions with no correlating investor benefit.

On April 20, 2015, the DOL issued a new proposal, which modified both the 1975 regulation and the relevant PTEs. As described in more detail below, in 2016, the DOL finalized that regulation, which significantly revised the 1975 definition of an investment advice fiduciary to plans, participants, beneficiaries, and IRA owners.[4] The regulation had an effective date of June 7, 2016 and an applicability date of April 10, 2017.

The 2016 rule provided that:

A person is deemed to render investment advice with respect to moneys or other property of a plan or IRA … if the person provides to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner the following types of advice for a fee or other compensation, direct or indirect:

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after being rolled over, transferred, or distributed from the plan or IRA;

- A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.

In addition, the investment advice recommendation must be made either directly or indirectly (e.g., through or together with any affiliate) by a person who:

- Represents or acknowledges that it is acting as a fiduciary;

- Renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the investment needs of the advice recipient; or

- Directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

In the preamble to the 2016 final rule, the DOL noted that:

> The 1975 regulation was adopted prior to the existence of participant-directed 401(k) plans, the widespread use of IRAs, and the now commonplace rollover of plan assets from ERISA-protected plans to IRAs. Today, as a result of the five-part test, many

[4] 81 Fed. Reg. 20946 (Apr. 8, 2016).

> investment professionals, consultants, and advisers have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments. [5]

Because the expanded fiduciary definition swept in individuals and institutions that were not considered fiduciaries under the 1975 regulation, the DOL revised several existing PTEs and issued new ones.

One of these exemptions was the "Best Interest Contract Exemption" (BIC Exemption), which required that:

- Financial institutions acknowledge their and their advisers' fiduciary status in writing;
- The financial institution and advisers adhere to the Impartial Conduct Standards;
- Compensation is not in excess of what is considered reasonable;
- Financial institutions adopt policies and procedures to ensure that advisers adhere to the Impartial Conduct Standards;
- Financial institutions disclose fees, compensation, and Material Conflicts of Interest;
- Financial Institutions retain records demonstrating compliance with the exemption; and
- In the case of IRAs and non-ERISA plans, the standards are set forth in an enforceable contract with the retirement investor.

The Impartial Conduct Standards required that:

- Investment advice must the in the "Best Interest" [6] of the retirement investor;
- The recommended transaction will not cause the financial institution, adviser or affiliates to receive compensation that is in excess of reasonable compensation; and
- The financial institution and its advisers' statements are not materially misleading.

On June 1, 2016, the U.S. Chamber of Commerce, along with other organizations, filed a complaint in the United States District Court for the Northern District of Texas asserting claims under the Administrative Procedure Act and the First Amendment of the Constitution of the United States that the regulation and PTEs "overstep the Department's authority, create unwarranted burdens and liabilities, undermine the interests of retirement savers, and are contrary to law."[7]

In a memorandum to the Secretary of Labor, dated February 3, 2017, President Donald Trump directed DOL to "examine the Fiduciary Duty Rule to determine whether it may adversely affect

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[5] Id.

[6] ERISA does not require a fiduciary to act in the best interest of participants and beneficiaries, rather in the sole interest. See ERISA § 404(a)(1) requiring a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries…"

[7] Complaint at paragraph 1 available at https://www.chamberlitigation.com/sites/default/files/cases/files/16161616/DOL%20Fiduciary%20Rule%20Complaint.pdf

the ability of Americans to gain access to retirement information and financial advice." [8] It also required the DOL to prepare an updated economic and legal analysis concerning the likely impact of the rule.

On February 8, 2017, the United States District Court for the Northern District of Texas denied plaintiffs' motion for summary judgement on all counts, and plaintiffs appealed that decision.

On March 2, 2017, the DOL proposed a 60-day delay of the applicability date, requested comments on questions in the February 3, 2017 memorandum, and questions of law and policy concerning the final regulation and PTEs.[9]

On April 7, 2017 the DOL extended the applicability date for the fiduciary rule and BIC Exemption for 60 days and provided that compliance with other requirements such as the disclosures would not be required until January 1, 2018. [10] The DOL also announced it would not pursue claims through January 1, 2018 against fiduciaries who were working in good faith toward complying with the fiduciary rule and PTEs.[11]

On March 15, 2018, the Fifth Circuit Court of Appeals issued its decision in which it vacated the District Court's decision. In its decision, the Fifth Circuit stated that "[f]iduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and the client."[12] And, "[n]otably, DOL does not dispute that a relationship of trust and confidence is the sine qua non of fiduciary status."[13] The Court found that the fiduciary rule's interpretation of investment advice fiduciary "fatally conflicts with the statutory text and contemporary understandings" because "had Congress intended to abrogate both the cornerstone of fiduciary status – the relationship of trust and confidence – and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so."[14]

The Court went on to reject the BIC Exemption as well as the fiduciary rule when stating:

> Together, the Fiduciary Rule and the BIC Exemption circumvent Congress' withholding from DOL of regulatory authority over IRA plans. The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transaction penalties is unreasonable and arbitrary and capricious.[15]

The United States declined to appeal the Fifth Circuit's decision, and on May 7, 2018 in response to the Fifth Circuit's decision, the DOL issued Field Assistance Bulletin 2018-02 in which it announced that from June 9, 2017 until after guidance is issued, the DOL will not pursue

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[8] "Presidential Memorandum on Fiduciary Duty Rule" dated Feb. 3, 2017, available at https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-fiduciary-duty-rule/

[9] 82 Fed. Reg. 12319 (Mar. 2, 2017).

[10] 82 Fed. Reg. 16902, 16905 (Apr. 7, 2017).

[11] FAB 2017-02 (May 22, 2017), p. 2 available at https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02.pdf.

[12] Chamber of Commerce of the United States v. Acosta, 885 F.3d 360, 391 (5th Cir. 2018).

[13] Id. at 371.

[14] Id. at 376.

[15] Id. at 384.

prohibited transaction claims against investment advice fiduciaries who are working in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption.

On June 5, 2019, the Securities and Exchange Commission (SEC) adopted Regulation Best Interest (Reg BI) to enhance the standards of conduct for financial professionals and protect retail investors, and Form CRS to require broker-dealers and investment advisers to provide retail investors with a brief relationship summary. [16] Reg BI represents the culmination of Congressional directive, study, and regulatory expertise. The Reg BI framework sets a consistent national standard that prohibits broker-dealers from placing their own interests ahead of their clients' interests. Reg BI requires a consideration of costs and emphasizes the deliberation by a broker-dealer of reasonably available alternatives. Further, the SEC stated that the best interest standard applies to account type recommendations, which includes "recommendations to roll over or transfer assets from one type of account to another (e.g., a workplace retirement plan account to an IRA)."[17]

Reg BI also requires transparency focused on ensuring investors are informed of the services, fees and conflicts. The new Form CRS requires the following information that is presented in a way to help investors compare information about different firms:

- Firm registration information (including whether the firm is registered as a broker-dealer, investment advisor, or both);
- A description of all services offered by the firm;
- Information regarding fees and costs (including principal fees and costs, custodian fees, account maintenance fees, and others);
- Information regarding conflicts of interest (including policies and procedures to mitigate conflicts, prevent material limitations on offerings, and eliminate sales contests, sales quotas, bonuses, and non-cash compensation based on the sale of specific securities);
- A summary of the firm and advisor's disciplinary history; and
- "Conversation starters" for customers to ask their advisor or point of contact.

As the SEC noted in its adopting release, the final Form CRS rule was informed by extensive feedback from retail investors, financial institutions, consumer advocacy groups, and the SEC's Investor Advisory Committee.[18] The SEC incorporated this feedback into Form CRS to help create a disclosure framework that is both meaningful and understandable for investors.

Reg BI went into effect on June 30, 2020. Subsequent rulemakings from the Financial Industry Regulatory Authority (FINRA) and Municipal Securities Rulemaking Board (MSRB) also implemented changes to their rules to align their organizations' standards with Reg BI to bring greater clarity to investment professionals and investors.[19]

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[16] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019).
[17] SEC's Adopting Release No. 34-86031, 84 Fed. Reg. 33318, 33339 (July 12, 2019).
[18] 84 Fed. Reg. 33318 (July 12, 2019).
[19] Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change to Align Certain MSRB Rules to Securities Exchange Act Rule 15l-1, Regulation Best Interest, Release No. 34-89154; File No. SR-MSRB-2020-02 (June 25, 2020) and Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment

On July 7, 2020, the DOL published guidance related to the Fifth Circuit's decision. It reinstated the 1975 five-part test and removed PTE 2016-01 and 02 and reinstated PTEs 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128. It also reinstated Interpretive Bulletin 96-1.[20]

On that same day, the DOL also issued a notice of a proposed voluntary exemption that would:

> [A]llow investment advice fiduciaries under both ERISA and the Code to receive compensation, including as a result of advice to roll over assets from a Plan to an IRA, and to engage in principal transactions, that would otherwise violate the prohibited transaction provisions of ERISA and the Code. The exemption would apply to registered investment advisers, broker dealers, banks, insurance companies, and their employees, agents, and representatives that are investment advice fiduciaries.[21]

In the preamble, the DOL stated that in determining whether someone were a fiduciary with respect to investment advice to rollover money from an ERISA plan, it did not intend to apply the analysis in Advisory Opinion 2005–23A (the Deseret Letter). The DOL stated that after 15 years it "believes that the analysis in the Deseret Letter was incorrect and that advice to take a distribution of assets from an ERISA-covered Plan is actually advice to sell, withdraw, or transfer investment assets currently held in the Plan."[22] The DOL acknowledged that all prongs of the now restored five-part test must be met, including the regular basis test, and that "advice to take a distribution from a Plan and roll over the assets may be an isolated and independent transaction that would fail to meet the regular basis prong."

Contrary to the analysis in the Deseret Letter, the preamble to the PTE provided that the DOL now intends to apply a facts and circumstances test. The DOL stated that:

> [A]dvice to roll over Plan assets can occur as part of an ongoing relationship or an anticipated ongoing relationship that an individual enjoys with his or her advice provider. For example, in circumstances in which the advice provider has been giving financial advice to the individual about investing in, purchasing, or selling securities or other financial instruments, the advice to roll assets out of a Plan is part of an ongoing advice relationship that satisfies the 'regular basis' requirement. Similarly, advice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the 'regular basis' requirement. In these scenarios, there is advice to the Plan—meaning the Plan participant or beneficiary—on a regular basis.[23]

No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to FINRA's Suitability, Non-Cash Compensation and Capital Acquisition Broker (CAB) Rules in Response to Regulation Best Interest, Release No. 34-89091; File No. SR-FINRA-2020-007 (June 18, 2020).

[20] 85 Fed. Reg. 40589 (July 7, 2020).

[21] 85 Fed. Reg. 40834 (July 7, 2020).

[22] Id. at 40839.

[23] Id.

However, the DOL failed to acknowledge that the relationship either pre- or post-rollover does not involve ERISA plan assets and that only one instance is actual advice regarding ERISA plan assets. Furthermore, the DOL reissued the 1975 regulation related to the definition of investment advice fiduciary on the same day as the exemption, but with no discussion of its new interpretation.

According to the DOL:

> "In light of potential conflicts of interest related to rollovers from Plans to IRAs, ERISA and the Code prohibit an investment advice fiduciary from receiving fees resulting from investment advice to Plan participants to roll over assets from a Plan to an IRA, unless an exemption applies. The proposed exemption would provide relief, as needed, for this prohibited transaction, if the Financial Institution and Investment Professional provide investment advice that satisfies the Impartial Conduct Standards and they comply with the other applicable conditions…."[24]

The Impartial Conduct Standards, which are nearly the same as the requirements in the BIC Exemption that the Fifth Circuit invalidated, would require that the fiduciary act in the "best interest" of the retirement investor, charge only reasonable compensation, not make any materially misleading statements about the investment transaction and other relevant matters, and obtain the best execution of the investment transaction reasonably available under the circumstances, as required by the federal securities laws.

On December 18, 2020, the DOL published the final exemption (PTE 2020-02), which was substantially similar to the proposed exemption. Like the proposed rule, the preamble to the final exemption contained the DOL's new interpretation of fiduciary status vis-a-vis rollovers. Specifically, the exemption requires compliance with the Impartial Conduct Standards; disclosures, including a written acknowledgment of fiduciary status and why a rollover is in the retirement investor's best interest; policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and that mitigate conflicts of interest; and a retrospective compliance review. Finally, the DOL extended the FAB 2018-02 enforcement policy through December 20, 2021, the date of implementation of PTE 2020-02.

The exemption went into effect on February 16, 2021, and two months later, on April 13, 2021, the DOL issued a series of FAQs, one aimed at individuals and one aimed at investment advice providers who are planning on relying on the exemption. Of particular importance to service providers was FAQ 5 which provides:

> The Department is reviewing issues of fact, law, and policy related to PTE 2020-02, and more generally, its regulation of fiduciary investment advice. The Department anticipates taking further regulatory and sub-regulatory actions, as appropriate, including amending the investment advice fiduciary regulation, amending PTE 2020-02, and amending or revoking some of the other existing class exemptions available to investment advice fiduciaries. Regulatory actions will be preceded by notice and an opportunity for public comment. Additionally, although future actions are under consideration to improve the

[24] Id.

> exemption, the Department believes that core components of PTE 2020-02, including the Impartial Conduct Standards and the requirement for strong policies and procedures, are fundamental investor protections which should not be delayed while the Department considers additional protections or clarifications.[25]

Recommendations

We offer the following recommendations as the DOL considers any next steps.

1. DOL should not take further action with respect to the fiduciary investment advice regulation.

The regulatory landscape has changed significantly in the 10 years since the DOL started its fiduciary investment advice initiative. IRAs have been at the heart of this initiative by the DOL, even though it has limited jurisdiction over them.[26] However, the SEC, as the appropriate regulator for this space, is fully committed on the issue by means of Reg BI[27] and its enforcement.[28] The SEC has long-standing expertise and jurisdiction in regulating the securities markets and activities of broker-dealers and investment advisors. It is the agency best positioned to implement and enforce rules that apply to securities transactions in investment accounts, including IRAs. A recent SEC and New York State settlement is suggestive of the seriousness with which the SEC plans to enforce Reg BI.[29] Not only is the DOL's jurisdiction to further

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[25] See "New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions", April 2021, FAQ 5, available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.

[26] With respect to the DOL's concern about the lack of fiduciary safeguards in Title II with respect to IRAs, the Fifth Circuit noted that this

> [W]as present when the statue was enacted, but Congress chose not to require adviser to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA account have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived 'need' does not empower DOL to craft de facto statutory amendments or to act beyond its expressly defined authority.

Chamber of Commerce of the United States v. Acosta, 885 F.3d U.S. at 379.

[27] As noted in footnote 35 in the preamble to the final PTE 2020-02 "[s]imilarly, the SEC and FINRA have each recognized that recommendations to roll over Plan assets to an IRA will almost always involve a securities transaction." See Regulation Best Interest Release, 84 Fed. Reg. 33339; FINRA Regulatory Notice 13– 45 Rollovers to Individual Retirement Accounts (December 2013), available at www.finra.org/sites/default/files/NoticeDocument/p418695.pdf

[28] With respect to DOL's authority to regulate brokers and dealers, the Fifth Circuit noted that "The SEC has the expertise and authority to regulate brokers and dealers uniformly. DOL has no such statutory warrant…. Rather than infringing on SEC turf, DOL ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors." Chamber of Commerce of the United States v. Acosta, 885 F.3d U.S. at 385-386.

[29] See "TIAA Unit To Pay $97M Over Retirement Rollover Advice", Sarah Jarvis, Law 360 (TIAA to pay $97 million to investors to settle allegations that from January 1, 2013 to March 30, 2018 the company violated the Investment Advisers Act by not adequately disclosing their conflicts of interest in recommending clients roll over their retirement assets into a managed account program and by not adopting and implementing written policies and procedures to prevent violations of the Investment Advisers Act regarding rollover recommendations) available at https://www.law360.com/benefits/articles/1402623/tiaa-unit-to-pay-97m-over-retirement-rollover-advice?nl_pk=7de76492-5ba6-4e09-9e02-55c1a8a97efe&utm_source=newsletter&utm_medium=email&utm_campaign=benefits?copied=1

regulate in this area legally questionable, it is unnecessary. Moreover, we hope that the DOL will abide by Secretary Walsh's commitment, in responses to members of the Senate during his nomination process, to consult with the SEC on areas of shared jurisdiction to ensure an appropriate balance is struck. It is essential that regulators continue to prioritize consistency in standards and avoid duplicative or contradictory standards.

While additional regulation by the DOL is not necessary, it may, however, be helpful for the DOL to provide technical clarity on specific issues – for instance including examples pursuant to FAQ 18 of how insurance companies can use intermediaries to comply with PTE 2020-02.

2. DOL should extend the enforcement policy until the later of July 1, 2022 or finalization of all formal rulemaking and changes to any relevant PTEs.

As noted above, in the preamble to the final PTE 2020-02, the DOL extended the enforcement policy in FAB 2018-02 to December 20, 2021(presumably one year after the PTE was released). Although firms who choose to use the voluntary exemption have been working diligently to be compliant by that date, a substantial portion will need, or greatly benefit from, an extension to manage the new compliance requirements from PTE 2020-02 while they continue to respond to the pandemic. In particular, in the second half of 2021, some firms are simultaneously under pressure to navigate a safe and efficient return to working in their offices while also complying with PTE 2020-02, which requires significant staff training and updates to systems, processes, and procedures. More specifically, while many organizations had planned for a return to office this Fall, the rapidly developing concerns related to the Delta variant of Covid-19, and changing CDC guidance, presents new challenges to established return plans and has the potential to strain organizational resources.

The firms who have chosen to rely on the exemption have developed plans and workflows designed to satisfy the conditions of PTE 2020-02 by the non-enforcement policy expiration, including actively reviewing data and vendor offerings. Many have determined services provided by an outside vendor, including information on plan costs with respect to the rollover comparison, is the most efficient path forward to attempt to meet the December deadline. However, vendors continue to refine offerings and firms cannot operationalize, update systems, processes, and train staff until vendor offerings and user interfaces are complete, making meeting the December deadline more difficult.

Another big challenge involves firms' reviews of technology, which includes making sure tools meet their standards for information security, resources are available to integrate the tools into systems, advisors are trained, and firms maintain consistency in their "know your client" standards. The challenge of consistency with "know your client" standards is related to the system integration challenge. Many firms have their own tools for profiling clients (*i.e.*, capturing investment objective risk tolerance, etc.), and vendors may not be able to fully integrate those tools in a way that is seamless for financial advisors.

The timeline for completing all necessary steps by December 20th, even assuming no technology issues, is extremely tight, if not impossible. Additional time is necessary to ensure those firms

relying on the exemption have the time needed to implement systems and supervisory structures that, ultimately, better serve participants and beneficiaries.

In its FAQs, the DOL stated that it intends not only to take further regulatory action, but it also intends to amend PTE 2020-02 and amend or revoke other related PTEs. However, at the same time, the DOL is requiring full compliance with PTE 2020-02, even though it likely will be subject to change. It is becoming increasingly difficult and expensive for investment professionals to comply with the DOL's new interpretation of when an individual is a fiduciary for purposes of a rollover and PTE 2020-02, and these costs should not be imposed when it is clear that these interpretations will change after the expiration of the enforcement policy. The DOL should also not attempt to bring back the elements of the vacated 2016 Rule through subsequent revisions to PTE 2020-02 or FAQs. It would be more efficient for firms and much less confusing to retirement investors if the DOL were to implement any changes at one time rather than incrementally. This is especially true when it appears that such changes may happen very soon after firms come into compliance with PTE 2020-02.[30] Assembling resources to make future changes after the December 20, 2021 date would lead to unnecessary costs and inefficiency.

3. DOL should allow disclosures to be sent with all other year end notices, disclosures, and statements.

Even if the DOL does not provide the requested, reasonable extension of the enforcement delay, the DOL should, at the very least, allow those firms relying upon the exemption to provide the first disclosures required to comply with PTE 2020-02 with other end-of-year notices and disclosures. Currently, the compliance date is an arbitrary date that the DOL presumably selected because it was one year after the PTE was released. However, this date would require firms to send out separate notices by that date and then send out other notices at year's end. To avoid confusion and make this administratively less burdensome, the DOL should allow any required PTE 2020-02 notices to be provided with other end-of-year notices, disclosures, and statements.

4. DOL should allow the Reg BI conflict standard as a safe harbor under PTE 2020-02.

PTE 2020-02 requires that a financial institution have policies and procedures that "mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interest of the Retirement Investor." In addition, FAQ 16 provides that the policies should be "designed to, among other things, protect retirement investors from recommendations to make excessive trades, to buy investment products, annuities, or riders that are not in the investor's best interest,

[30] "Agency Rule List", Spring 2021. Listing the definition of fiduciary in the proposed rule-making stage and the change would "amend the regulatory definition of the term fiduciary set forth at 29 CFR 2510.3-21(c) to more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code…. [To] take into account practices of investment advisers, and the expectations of plan officials and participants, and IRA owners who receive investment advice, as well as developments in the investment marketplace, including in the ways advisers are compensated that can subject advisers to harmful conflicts of interest." Available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1210-AC02.

or to allocate excessive amounts to illiquid or risky investments." Although the principles-based approach is appreciated, the DOL should also create a safe harbor by allowing financial institutions to meet the Reg BI conflict standard. Financial institutions have already been required to come into compliance with Reg BI's provisions, which we believe will prove effective in regulating conflicts of interest.

Conclusion

After over 10 years of regulatory initiatives with respect to the definition of fiduciary and investment advice, the DOL should allow the current rules and PTEs to go into effect, allowing an appropriate period of review and evaluation, before considering further substantive changes. With respect to IRAs, even assuming DOL has jurisdiction to regulate beyond granting PTEs, the SEC has already taken significant action with the issuance of Reg BI to protect investors, including IRAs.

We look forward to working with the DOL in implementing the current regulation and guidance.

Sincerely,

Tom Quaadman

Glenn Spencer