

FIRMA National Training Conference

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ERISA Update

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Agenda

PTE 2020-02 and Fiduciary Rule Developments

Fee Litigation

Private Equity & Cryptocurrency in Retirement Plans

Regulation & Enforcement

Investment Advice

- Trump Administration
 - Reinstated 1975 definition of investment advice under ERISA
 - Reinterpreted definition to be more inclusive of rollover recommendations
 - Abandoned Deseret Advisory Opinion
 - Granted PTE 2020-02 to permit receipt of compensation in connection with certain investment advice (e.g., rollover recommendations)

Investment Advice

- Biden Administration DOL retained PTE 2020-02 and indicated:
 - New Fiduciary rule
 - Changes to PTE 2020-02 and other key exemptions likely
- Timing:
 - Officials repeatedly expressed desire to move this year, but:
 - No fiduciary rule or other changes likely before EBSA Asst. Secretary is confirmed by Senate and timing of confirmation is uncertain
 - Election may also impact timing or even whether a rule is issued

Investment Advice

- What is happening now?
 - PTE 2020-02 is seen as extremely burdensome and investment in compliance processes has been slow
 - Lack of clarity about future of rule contributes to disparate approaches to advice / rollovers
 - As of June 30, 2022, those relying on the exemption must provide documentation of basis for rollover advice
 - SEC staff bulletin on standards of conduct for broker-dealer and investment adviser account recommendations for retail investors (Mar. 29, 2022)

Investment Advice Takeaways

- Litigation likely
 - Already two lawsuits challenging DOL re-interpretation of 1975 rule.
- SEC continuing to press on standards of conduct and considerations when making account type and rollover recommendations
- Near-term DOL action looks much more uncertain than it did 6 months ago

Litigation – *Hughes v. Northwestern*

- 7th Cir. Decision
 - Plaintiff cannot state a plausible claim based on the inclusion of a few imprudent options if the lineup offered diverse, prudent options
- Supreme Court – vacated and remanded (unanimous)
 - Largely reiterated prior holdings
 - Each investment offered must be prudent
 - Declined to opine on procedural issues that could have slowed fee litigation
- A few lower courts have already revived cases or denied motions to dismiss based on *Hughes*

Litigation – *Anderson v. Intel Corp.*

- District Court – N.D. California
- Alleging ERISA fiduciary breach
 - TDF allocated 37.2% to non-traditional assets
 - Other investment allocated 56.22% to non-traditional assets
- Not *per se* imprudent to include alternatives *even in substantial concentrations*
 - Noting that non-traditional assets used to reduce risk
 - “[F]iduciaries are not required to adopt a riskier strategy [stocks and bonds only] simply because that strategy may increase returns.”

Litigation Takeaways

- Supreme Court declined to take steps to slow, stop fee litigation
 - Each investment option must be prudent
 - Cannot rely on prudent lineup defense
- The use of alternatives is not *per se* imprudent
 - Even if in high concentrations
 - Prudence depends on returns *and* risk
- Pace of litigation continues to be brisk

June 3, 2020 Information Letter - PE

- Provided DOL's views on use of PE investments in DC plans
- Establishes a framework of factors plan fiduciaries should consider to demonstrate prudence
 - Diversification and expected return net of fees
 - Ability to oversee investments
 - Percentage allocation (noting SEC's 15% limit on illiquid assets)
 - Liquidity and valuation issues
 - Disclosures
- Limited to use of PE in “asset allocation funds” (*e.g.*, TDFs)

DOL Supplemental Statement - PE

- Justifications
 - “Concerns” from (unnamed) stakeholders
 - SEC Risk Alert
- Largely reiterates fiduciary issues discussed in Info Letter
- Clarifications
 - Info Letter “not balanced with counter-arguments”
 - Info Letter intended for large plan fiduciaries with experience with PE

Compliance Assistance Release 2022-01

- Focus on digital assets in DC plans
 - Primarily cryptocurrency but applicable to NFTs, etc.
- Seems to create a presumption of imprudence
 - Concerns with speculative nature of asset class
 - Threat to investigate fiduciaries who invest in digital assets
- Investment through a brokerage window
 - DOL arguably takes a new position
 - Has implications for other alternatives

Compliance Assistance Release 2022-01

- DOL Investigations will require fiduciaries to justify “allowing” investments in “cryptocurrencies and related products” through self-directed brokerage accounts.
- Fiduciaries “should expect to be questioned about how they can square their actions with their duties of prudence and loyalty” in light of risks associated with cryptocurrencies and related products.
- April 12 2022 Letter to EBSA from joint trades asks for withdrawal of CAR; complains of trend away from notice and comment rulemaking.

DOL Guidance Takeaways

- No actual change in DOL's position with respect to PE
 - DC investment in PE not *per se* imprudent
 - List of factors to consider
- Same concepts, considerations apply to other alternatives
 - *E.g.*, real estate
- DOL may be shifting its view on brokerage windows
 - May push fiduciaries to further curate windows or to abandon them

Regulation and Enforcement

ESG and Proxy Voting

- Trump Administration
 - Finalized ESG, proxy voting rule in December 2021
 - Skeptical of economic value of ESG, proxy voting
- Biden Administration
 - Non-enforcement policy
 - Proposed ESG, proxy voting rule – more sympathetic to ESG factors and shareholder engagement
 - Climate RFI

Regulation and Enforcement

- Proposed amendments to the process for prohibited transaction exemption applications
- Changes would impose additional requirements on those seeking an exemption from one or more of ERISA's prohibited transaction provisions
- DOL grants only a handful of exemptions annually
 - 1997-2001: average of 90 PTEs issued annually
 - 2017-2021: average fewer than 10 (3 in 2021)

Regulation and Enforcement

- Proposed amendments would, to some extent, codify the “desk drawer” rules DOL has sought to utilize in recent years, but additional requirements are likely to make it even less likely that plan sponsors and providers will seek exemptions – even if doing so would benefit the plan
 - “No names” conferences now part of administrative record
 - Limitations on indemnities and liability limits for independent fiduciaries and appraisers (by any party)
 - “business interest” in future similar transactions can bar IF and appraiser

Regulation and Enforcement

- Proposed amendments to exemption procedures (cont.):
 - Impartial Conduct Standards presumptively included in every exemption (even those already subject to ERISA duties)
 - Significant additional information required in each application –
 - Material benefits to non-plan parties (even those with no duty to the plan)
 - Description of potential alternatives considered and why not pursued
 - Costs and benefits of transaction to plans
 - Ongoing reporting to DOL after grant of exemption
 - Plans generally may not bear costs of exemption transactions

Regulation and Enforcement

- DOL enforcement focus continues:
 - Primary investigation targets – recordkeepers, asset managers
 - Key issues – missing participants, conflicts of interest, cybersecurity

	EBSA Cases Closed	Cases with Monetary Results	Total Recovery
FY 2018	1,329	64.7%	\$1.6 billion
FY 2019	1,146	67%	\$2.57 billion
FY 2020	1,122	67%	\$3.12 billion

In 2020, EBSA recovered approximately \$1.48 billion in payments in connection with its missing participant investigations.



Questions?