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DOL finalizes more fiduciary investment guidance

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In this article

[Final regulations on proxy voting](#) | [Final PTE for investment advice](#) | [Related resources](#)

The Department of Labor (DOL) issued two significant and highly anticipated pieces of fiduciary investment guidance this month. A [final regulation](#) addresses ERISA fiduciaries' responsibilities when exercising proxy-voting rights. Another piece of guidance supplies a final class [prohibited-transaction exemption](#) (PTE) for ERISA fiduciaries providing investment advice and engaging in "principal transactions." This article provides a high-level overview of both pieces of guidance.

Final regulations on proxy voting

On Dec. 11, DOL issued its [final rule](#) on ERISA fiduciaries exercising proxy voting for stock held by a plan. The final rule, like the [original proposal](#), makes clear that fiduciaries aren't required to vote all proxies. But the final rule significantly revises the standards that fiduciaries must follow when deciding whether to vote.

The proposal would have required fiduciaries to determine if a proxy proposal would have an economic impact on the plan. If so, fiduciaries would have a responsibility to vote on the issue; if not, fiduciaries would have to abstain from voting. Commenters objected to this approach, arguing it required an unduly burdensome economic-impact analysis for every proxy. The final rule takes a principles-based approach that focuses instead on whether fiduciaries have a prudent process for deciding whether — but not how — to vote and provides safe harbors for making that determination.

Fiduciaries deciding whether to vote must act solely in the economic interests of the plan, without subordinating participants' interest in their retirement income to any nonpecuniary objective. In the preamble to the final rule, DOL cautions fiduciaries not to take an overly expansive view of what votes

and issues are in a plan's economic interest. This warning is consistent with the agency's recent [final regulation](#) requiring fiduciaries to make investment decisions for a plan based solely on pecuniary factors, without subordinating participants' interest to environmental, social and governance (ESG) or other nonpecuniary factors. The new proxy-voting rule will be added to the earlier regulation.

The final rule also clarifies that its proxy-voting requirements don't apply when plans pass voting rights on to participants — a concern that some practitioners had about the proposal.

The final rule is effective Jan. 15, 2021, and applies to proxy voting and other exercises of shareholder rights after that date. However, certain provisions aren't applicable until Jan. 31, 2022. For example, fiduciaries that aren't SEC-registered advisors have until the 2022 applicability date to comply with the rule's requirement to maintain records on proxy-voting activities. As another example, fiduciaries have until the later date to review a service provider's proxy-voting guidelines to ensure they are consistent with the final rule.

Final PTE for investment advice

On Dec. 18, DOL published a new final class [PTE](#) allowing investment advice fiduciaries to receive certain compensation for their advice — including advice to roll over ERISA-plan assets — that would otherwise result in a prohibited transaction under ERISA and the Internal Revenue Code. The PTE also allows investment advice fiduciaries to engage in “covered principal transactions” (i.e., the purchase or sale of certain securities and other investments) with ERISA plans and individual retirement accounts (IRAs). The PTE applies to SEC- and state-registered investment advisors, broker-dealers, banks and insurance companies that are investment advice fiduciaries under ERISA.

Impartial conduct standards. The PTE requires fiduciaries to meet the following “impartial conduct” standards:

- **Act in retiree's best interest.** Fiduciaries must act prudently when giving investment advice and not subordinate the retirement investor's interests to their own or that of any other investment professional, financial institution or any other party.
- **Charge reasonable compensation.** A fiduciary's compensation (both direct and indirect) for investment advice must be reasonable, reflecting the market value of the particular services, rights and benefits the fiduciary is delivering to the investor.
- **Make no misleading statements.** Fiduciaries must not make materially misleading statements about a recommended transaction or other relevant matters, including fees and compensation, material conflicts of interest, and any other fact that could reasonably be expected to affect a retirement investor's investment decisions.

Other requirements. Fiduciaries must also disclose their fiduciary status to investors, provide a written description of the services to be provided, have written procedures to comply with the impartial conduct standards and mitigate conflicts of interest, and review (at least annually) those procedures and the institution's compliance with the impartial conduct standards. Documentation demonstrating compliance must be maintained for six years. The exemption includes a self-correction mechanism so certain violations won't disqualify fiduciaries from the PTE's relief.

Fiduciary rule history. In 1975, DOL issued a five-prong test for determining investment fiduciary status. In 2016, DOL issued a new regulatory definition of investment fiduciary that would have resulted in more advisors acting as fiduciaries by eliminating the requirement that advice must be given on a regular basis (among other changes). DOL also issued a new fiduciary advice PTE at that time, known as the best-interest contract exemption (BICE), which introduced impartial conduct standards similar to those in the new PTE.

In 2018, a federal court vacated the 2016 fiduciary rule and BICE, immediately restoring the 1975 rule. However, many institutions had already taken steps to comply with the BICE's impartial conduct standards. DOL then issued temporary guidance in [Field Assistance Bulletin \(FAB\) 2018-02](#), which said the agency would not pursue prohibited-transaction claims against investment advice fiduciaries who worked in good faith to comply with the impartial conduct standards. Replacing the temporary FAB with a permanent exemption will "provide certainty and stability" to institutions that have been relying on the impartial conduct standards.

New position on rollover advice. In the preamble to the proposed PTE, DOL said it would no longer apply the position stated in Advisory Opinion [2005-23A](#) (the "Deseret letter") that advice to roll over assets from an ERISA plan is not investment advice with respect to the plan. DOL now believes that analysis was incorrect. The agency says such advice is a recommendation to liquidate or transfer plan assets because a rollover typically changes the assets, fees, asset management structure, investment options and investment service options. If an advisor recommending a rollover satisfies the five-prong test, the recommendation is investment fiduciary advice, and the advisor must satisfy the requirements of the new PTE. However, DOL will not pursue claims for breach of fiduciary duty or prohibited transactions between 2005 and Feb. 16, 2021, based on a rollover recommendation that would have been considered nonfiduciary advice under the Deseret letter.

Effective date and transition period. The new PTE is effective Feb. 16, 2021. In addition, FAB 2018-02 will remain in effect for one year to give institutions a transition period to develop procedures to comply with the new PTE.

Related resources

Non-Mercer resources

- [PTE 2020-02](#), Improving investment advice for workers and retirees (Federal Register, Dec. 18, 2020)
- [Final rule](#), Fiduciary duties regarding proxy voting and shareholder rights (Federal Register, Dec. 16, 2020)
- [Fact sheet](#), Improving investment advice for workers and retirees (DOL, Dec. 15, 2020)
- [News release](#) on PTE (DOL, Dec. 15, 2020)
- [News release](#) on proxy-voting rule (DOL, Dec. 11, 2020)
- [FAB 2018-02](#) (DOL, May 7, 2018)

Mercer Law & Policy resources

- [DOL finalizes rule on selecting plan investments](#) (Dec. 3, 2020)
- [DOL proposal would clarify proxy-voting rules](#) (Sept. 15, 2020)

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