



August 5, 2020

Employee Benefits Administration  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, D.C.

Re: Comment on Improving Investment Advice for Workers and Retirees/ Proposed Class Exemption

Docket ID Number: EBSA-2020-0003  
Submitted Electronically - No paper copy to follow

Dear Sir/Madam:

**Background:** Alerus Financial, N.A. is a national bank which provides retirement plan services to approximately 7,500 employers nationwide. Employers may choose ala carte from a list of fiduciary and non-fiduciary services offered by Alerus including trust, custody, recordkeeping, third party administration and investment advice or management. In many cases, Alerus serves as a directed trustee to the plan with no other fiduciary role.

Also, Alerus provides custody and investment management for IRAs. Our business model includes offering IRAs to plan participants who are rollover eligible.

**The Issue:** Section I(c) excludes certain persons and entities from the PTE. Specifically, the proposed PTE does not apply to a named fiduciary or plan administrator unless an independent fiduciary selected them to provide investment advice. We request clarification regarding the application of the exclusion to directed trustees who solicit IRA rollovers.

**Analysis:** The exclusion language of section I(c)(1) creates a pre-condition that non-investment fiduciaries must meet to solicit rollovers. The non-investment fiduciary is excluded from using the PTE unless it is selected by an independent fiduciary to provide investment advice. In the absence of authorization, the non-investment fiduciary could not rely on the PTE. This requirement places an undue burden on banks which serve as a directed trustee.

For example, assume the plan sponsor appoints a bank as a directed trustee with no other fiduciary role. The bank has no authorization to manage or control plan investments. It does not provide investment advice. Nevertheless, the bank is a "named fiduciary" as defined by ERISA 402(a)(2) since it is a "fiduciary named in the plan instrument ... by a person who is an employer." If the bank solicits rollovers and meets the Five Part Test, then it becomes an investment fiduciary. But in order to use the PTE, section 1(c)(1)(B) requires that the bank must be "selected to provide advice to the Plan" by an independent fiduciary. In the absence of plan sponsor authorization to solicit rollovers, the bank would not be able to rely upon the PTE. It would be a fiduciary who acted on its own volition to provide advice (i.e. the rollover solicitation).

The exclusionary language is too broad and creates a trap for the unwary. It permits an investment fiduciary, for example, the plan's investment advisor, to rely on the PTE if soliciting rollovers. No need for the advisor to be separately "selected" in order to solicit. In contrast, in order to use the PTE, a non-investment fiduciary must be authorized (i.e. selected) by the plan sponsor (i.e. an independent fiduciary) to solicit a rollover (i.e. provide advice).

The PTE should encourage the implementation of consistent process and procedures to conduct business in the interests of plan participants. The exclusion under I(c)(1)(B) creates an unnecessary administrative burden on the non-investment fiduciary. They will need plan sponsor (an independent fiduciary) authorization to solicit a rollover. In comparison, advisors and brokers will be able to use the PTE without any need to obtain an independent fiduciary's okay to do the same activity. Banks and investment firms should be on the same footing.

In addition, banks may serve in solely non-fiduciary roles, such as the plan's TPA, recordkeeper or custodian (roles that Alerus often has). The bank's access to participant information is the same whether it serves as a non-fiduciary or a directed trustee or 3(16) plan administrator. However, if it has no fiduciary role prior to the rollover solicitation, the bank could rely upon the PTE without being "selected" by the employer to provide advice. The bank would not have this option if it served as a directed trustee or plan administrator. This creates an inconsistency that banks would have to monitor on a plan by plan basis.

The PTE should have broad uniform application. Most non-investment fiduciaries should be able to use the PTE without an artificial requirement to be "selected" to provide rollover advice.

**Proposed Change:** Did the Department intend that all non-investment fiduciaries, such as directed trustees, obtain prior authorization before soliciting IRA rollovers? If authorization is necessary, then the proposal should be amended to explicitly describe that pre-condition for using the PTE. The current language of I(c)(1)(B) is unclear.

If that is not the intention, then the Department should remove section I(c)(1)(B). The change would permit all plan fiduciaries, other than Financial Institutions who are the plan sponsor, to rely on the PTE.

We appreciate the opportunity to comment. We look forward to the Department's final PTE.

Sincerely,



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