

LEGAL UPDATE

Retaining an Independent Fiduciary to Address Prohibited Transactions or Enable Plan Fiduciaries to Appropriately Allocate Risk

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The retention of an independent fiduciary plays a critical role not only to resolve a conflict in a prohibited transaction sense, but to provide an appropriate method of effective risk allocation to plan fiduciaries who must otherwise discharge investment and other transactional duties (often quite complex in nature) in a prudent fashion. Under ERISA and the benefit plans it governs, certain financial transactions and activities require the appointment of an independent fiduciary to mitigate potential conflicts of interest or to ensure an additional level of independent oversight, enhancing the protections for plan participants and beneficiaries.

While not explicitly defined in ERISA, the use of an “independent fiduciary” goes back many years to the days when the Department of Labor, in concert with the court, would require the appointment of a plan trustee or an otherwise independent fiduciary to take over a plan’s affairs as part of a settlement arrangement – it was the appointment of a referee or fiduciary steward whose sole purpose was to act in the best interest of plan participants. The concept of fiduciary independence is also outlined in various statutory and individual prohibited transaction exemptions. The prohibited transaction exemption procedures, as amended in January 2024 (“PT Procedures”), currently provide a number of elements to the definition of an independent fiduciary (as well as an independent appraiser or auditor) for purposes of the prohibited transaction exemption application process, which underscore how the Department of Labor (DOL) currently defines “independent fiduciary” in its broadest sense.

ERISA requires the appointment of an independent fiduciary in certain transactions involving plans governed by ERISA. The qualifications and independence criteria for fiduciaries, based on the PT Procedures, include that independent fiduciaries must possess the necessary training, experience, and facilities to act on behalf of the plan while remaining free from relationships that could compromise their judgment. The DOL evaluates independence based on factors such as revenue sources and relationships with parties involved in the transaction. Additionally, the PT Procedures (which are quite specific and detailed) outline the information fiduciaries must provide when applying for individual prohibited transaction exemptions, including their qualifications, relationships with parties in interest, fiduciary insurance, and an acknowledgment of their fiduciary duties under ERISA.

A specific statutory prohibited transaction exemption where independent fiduciaries are required involves transactions executed through electronic communication networks. The proper settlement and allocation of settlement proceeds is an example of where a prohibited transaction class exemption requires the use of an independent fiduciary. There have been many transactions or exemption applications where an independent fiduciary addresses or could address potential conflicts of interest (*e.g.*, where companies offer employee ownership through company stock in their defined contribution plans, including 401(k) plans and employee stock ownership plans), as well as matters involving corporate insiders, tender offers, and excessive fees in health plans. Our most recent experience with serving as an independent fiduciary

involved not only the traditional role of supporting an individual or class prohibited transaction exemption, but also serving as the independent fiduciary on behalf of ERISA plans that are engaged in complex relationships with a pharmacy benefit manager (PBM).

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