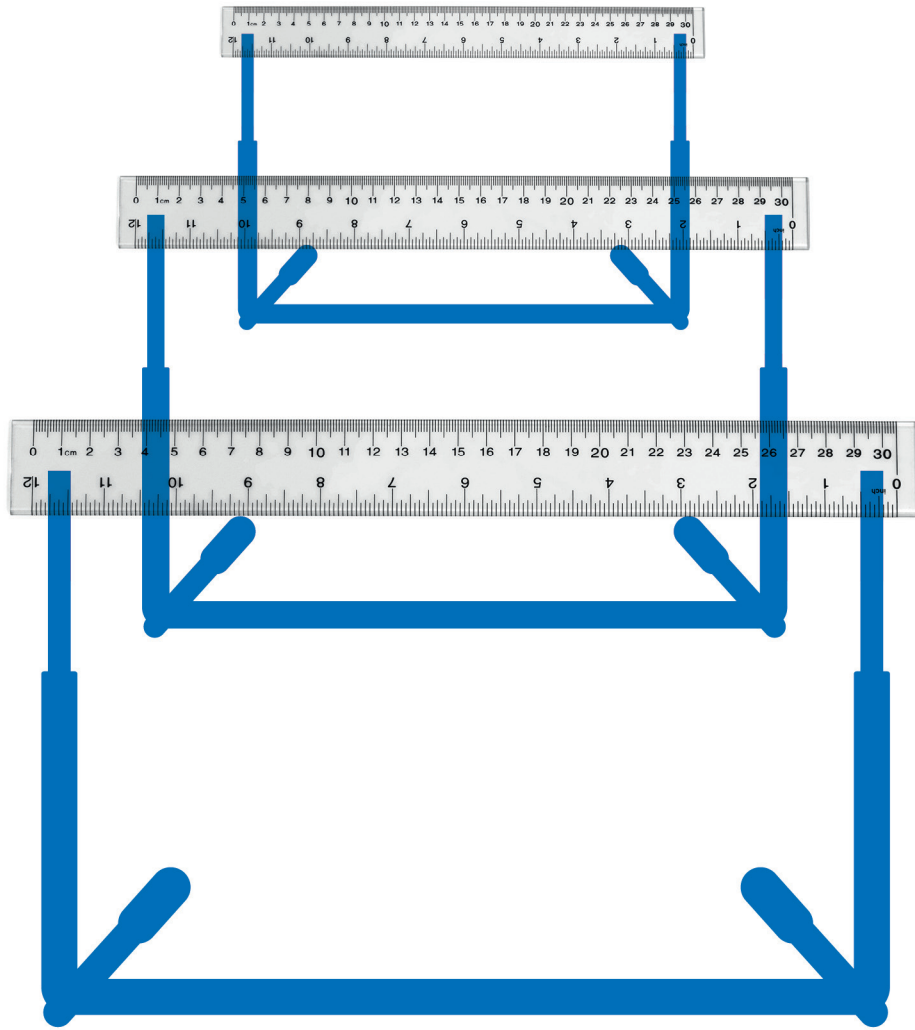


Department of Labor's Fiduciary Rule 3.0

Exemption and investment advice
fiduciary definition



Introduction

On December 18, 2020, the US Department of Labor (DOL or Department) [adopted with limited changes](#) its Proposal 3.0 regarding ERISA fiduciary investment advice, focused on the fiduciary status of rollover advice and a "best interest" prohibited transaction exemption (PTE) for conflicted advice aligned with the primary regulation of various types of financial services providers. It seems entirely doubtful, however, that this guidance will be the final word on these issues.

Key Changes from Proposal 3.0

While the final guidance broadly retains the structure and approach of Proposal 3.0, DOL incorporated the following important changes in response to comments.

- DOL further explicated and tightened its discussion of the circumstances in which it will consider rollover advice to be fiduciary "investment advice," under a new interpretation of the 1975 5-part test.
- Where rollover advice is conflicted fiduciary advice that requires the relief of the new PTE, DOL added as a condition written disclosure to Retirement Investors of the reasons that a rollover recommendation is in their best interest.
- Also in the PTE, as applicable in the rollover setting or other occurrences of conflicted advice including certain principal transactions with a compensatory element, DOL:
 - Narrowed the recordkeeping requirement to limit access to regulators, and not to plan fiduciaries and participants;
 - Permitted the certification of the retroactive compliance review to be made by any Senior Executive Officer, as opposed to only by the CEO; and
 - Added a self-correction provision.
- As to timing, DOL announced:
 - A February 16, 2021, effective date for the new PTE and sunset date for reliance on DOL's prior guidance on rollover advice,
 - An initial compliance assistance approach to enforcement, and
 - A December 20, 2021, sunset date for its temporary enforcement policy adopted after vacatur of Final Rule 2.0.

Did you know?

3,134

Public comment letters filed with DOL on Proposal 2.0 in 2015

106

Public comment letters filed with DOL on Proposal 3.0 in 2020

\$798 million

Estimated incremental PTE compliance costs for the first ten years



For more information

For resources and commentary regarding this regulatory process, visit Eversheds Sutherland's [dolfiduciaryrule.com](https://www.dolfiduciaryrule.com).

- Text of and supporting materials for Proposal 1.0, Proposal 2.0/Final Rule, and Proposal 3.0
- Pleadings in the litigations challenging Final Rule 2.0
- Articles, presentations and client alerts
- Videocasts about Final Rule 2.0 and other matters

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2010	2011	2015	2016	2017	2018	2019	2020
Oct -DOL issues Proposal 1.0	Mar -DOL holds hearings on Proposal 1.0 Sept -DOL announces withdrawal of Proposal 1.0	April -DOL releases Proposal 2.0 Aug -DOL holds hearings on Proposal 2.0	April -DOL adopts Final Rule 2.0 and exemptions DOL issues FAQs in Oct 2016, Jan 2017 and Aug 2017	Jan -DOL proposes insurance intermediary exemption Feb -White House directs DOL to restudy Final Rule 2.0 April -DOL delays compliance date for 60 days June -Initial compliance date June - DOL issues RFI for additional public comments Nov -DOL extends BICE transition period to July 2019	March -Fifth Circuit vacates Final Rule 2.0 May -DOL announces temporary non-enforcement policy	June -SEC adopts Regulation Best Interest	June -Regulation BI compliance date June -DOL issues Proposal 3.0 Aug -DOL holds hearings on Proposal 3.0 Dec -DOL adopts Rule 3.0 in the form of interpretive positions and an exemption

Context and next steps

We are now in Year 11 of DOL's undertaking to expand the circumstances in which financial intermediaries act as "investment advice fiduciaries" under the Employee Retirement Income Security Act of 1974, as amended (ERISA) and to set the standards for exemptions that permit fiduciaries to provide conflicted investment advice.

- DOL's [Proposal 1.0](#), released in October 2010 and limited to an expansion of fiduciary status beyond that specified in a 1975 ERISA regulation, was substantially informed by inward-looking considerations. DOL's experience was that the 5-part test adopted in the 1975 regulation unduly impeded its ability to prosecute ERISA enforcement matters in a manner it deemed appropriate. (In the most aggravating example, DOL and the US Securities and Exchange Commission (SEC) had a joint enforcement matter that the SEC resolved in months but that took DOL years to conclude because of issues around fiduciary status.) DOL also argued that the shift in the private retirement system from predominantly defined benefit to predominantly defined contribution plans justified an expansion of that definition. Proposal 1.0 was criticized from a variety of perspectives, and DOL abandoned it in September 2011.
 - [Proposal 2.0](#), introduced in April 2015, was far more ambitious. Defended essentially as broad consumer protection against conflicted interests on the part of investment intermediaries, it constituted no less than an undertaking by DOL to restructure the banking, insurance and securities industries at least as they did business with retirement plans and investors, without reference to the pattern of heavy regulation established by statute for and to the rules adopted by the primary regulators of those industries. This proposal extended fiduciary status in unprecedented ways, announced "best interest" standards with which fiduciaries generally were obliged to comply as a practical matter, and created private rights of actions for individual retirement account (IRA) investors that did not exist under ERISA. Proposal 2.0 became the single most politicized issue under ERISA since the enactment of that law. The [Final Rule 2.0](#) implementing the proposal was adopted in April 2016 with an initial compliance date of June 2017. The financial services industries spent billions of dollars restructuring their business models and compliance processes before the Final Rule 2.0 was [vacated by the US Fifth Circuit Court of Appeals](#) in March 2018 as regulatory overreach.
 - As discussed in more detail below, [Proposal 3.0](#), offered in June 2020, formally reinstated the 5-part test, but accompanied by new and aggressive interpretive positions that would extend the reach of that test particularly in the rollover setting. DOL also proposed and has now adopted a new class PTE 2020-02 that allows investment advice fiduciaries to receive compensation when providing conflicted advice and to engage in certain principal transactions with a compensatory element, subject to impartial conduct standards intended to align with other bodies of regulation, advance disclosure requirements, conflict mitigation policies, retrospective compliance reviews, and other conditions. Final Rule 3.0 was supported by a [news release](#), a [fact sheet](#), and a *Wall Street Journal* op-ed authored by DOL Secretary Scalia and SEC Chair Clayton.
- For a variety of historical and analytic resources following these developments, please visit our [DOLFiduciaryRule.com](https://www.dol.gov/eisapolicy/FiduciaryRule30) website.
- Fiduciary Rule 3.0 inarguably institutes meaningful consumer protections incremental to any other regulatory regime to which Financial Institutions are subject. Because DOL took this action so late in the current Administration, however, it is susceptible to reversal in the coming months.
- Under the Congressional Review Act (CRA), Congress may overturn a rule within 60 days of adoption. Before a rule can take effect, the CRA requires the issuing agency to submit certain materials about the rule to Congress, including the proposed effective date of the rule. Congress then may act under special "fast track" procedures to pass in both houses a joint resolution of disapproval and send that resolution to the President for signature or veto. If the President vetoes the resolution, Congress may vote to override the veto. If that procedure is duly followed, the CRA provides that a disapproved rule "shall not take effect (or continue)." Depending notably on the outcome of the pending Georgia Senate runoff election and the priorities of the next Congress, it is possible that the CRA could be invoked.
 - It is more probable that the incoming Administration will implement the customary "midnight regulation" protocol and, shortly after the inauguration, instruct federal agencies to withdraw any pending rule proposals and to extend for 60 days the effective date of any recently adopted rules that have been published in the Federal Register but not yet taken effect. For example, PTE 2020-02 would be within scope of any such instruction, while the SEC's Regulation Best Interest (BI) would not. The incoming appointees to DOL might then use the Department's rulemaking authority to reopen the public comment process and then to rescind the PTE, without initiating a new Administrative Procedure Act process. (For example, in 2009 and at the instruction of the Obama White House, DOL deferred the effective date of and ultimately withdrew a Bush Administration regulation implementing and extending the ERISA participant investment advice exemptions enacted in the Pension Protection Act of 2006.) The retirement security plank in the Democratic Party's 2020 platform specifically provides that:

when workers are saving for retirement, the financial advisors they consult should be legally obligated to put their client's best interests first. We will take immediate action to reverse the Trump Administration's regulations allowing financial advisors to prioritize their self-interest over their clients' financial well-being.

Inasmuch as PTE 2020-02 explicitly requires conflicted advisers not to place their own interests ahead of the interests of the Retirement Investor or to subordinate the Retirement Investor's interests to their own, it is unclear what approach the President-elect might prefer, within the parameters allowed by the Fifth Circuit's opinion.

- There is certainly an argument that the private retirement system would be better served by letting the new guidance stand for a test period and empirically evaluating its efficacy, before resuming the disruption and cost to the system of having this issue continuously in play.
- And it is beyond question that, at this point, public and private resources would be far better spent on issues far more material to the success of the private retirement system than on competing initiatives about conflicted investment advice (which, by DOL's estimate in 2016, costs the retirement system no more than 0.0025% of assets annually), such as, in no particular order after #1:
 1. Expanding the coverage of that system, and increasing the level of contributions particularly for lower- and middle-income workers;
 2. Improving the efficiency with which plan sponsors and providers may operate plans, thereby reducing the friction directly or indirectly borne by plan participants;
 3. Addressing the funding crisis in multiemployer plans;

4. Professionalizing retirement plan administration and investment;
5. Effectuating the use of lifetime income guarantees in defined contribution plans; and
6. Improving the financial literacy of plan participants.

Investing resources in any or all of those issues has more retirement security bang for the buck than continuing to compete on conflicted advice initiatives from Administration to Administration. The conflicted advice issue has drawn the attention of political actors, however, and there is no reason to expect them to disengage anytime soon. Accordingly, the next step for the regulated community likely will be responding to a request for another round of public comment letters – which would be, by our count, the 12th such (largely repetitive) request since DOL launched this undertaking in 2010.

Given the uncertainty about the future of PTE 2020-02, it seems improbable that Financial Institutions will rush to operationalize it in replacement of existing compliance solutions. The difficult case may be in the rollover setting, where DOL is creating a new fiduciary conflict problem for which PTE 2020-02 may be the only sanctioned solution, depending on the circumstances. Should PTE 2020-02 be rescinded as a midnight regulation or otherwise, at a minimum DOL will need to reinstate reliance on its prior rollover guidance and/or its temporary enforcement policy past their respective sunset dates.

History: When is a person acting as an ERISA investment advice fiduciary?

1975 – “5-Part test”	Proposal 1.0		Proposal 2.0		Proposal 3.0
	2015 – Proposed “3 x 4 definition”		2016 – Final “3 x 3 definition”		2020 – Reinstatement of “5-Part test”
For a direct or indirect fee, a person:	Person meets at least one in each column, for a direct/indirect fee		Person meets at least one in each column, for a direct/indirect fee (including to an affiliate)		
	Service	Status	Service	Status	
<ol style="list-style-type: none"> 1. Renders advice as to the value of securities/property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property 2. On a regular basis 3. Pursuant to a mutual agreement arrangement or understanding with a plan fiduciary, that 4. Advice will serve as a primary basis for investment of plan assets, and 5. Advice will be individualized to particular needs of the plan 	<ol style="list-style-type: none"> 1. Provides valuation advice or opinion 2. Makes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property 3. Provides advice or makes recommendations as to the management of securities or other property 	<ol style="list-style-type: none"> 1. Admitted fiduciary 2. Otherwise an ERISA plan administration or discretionary asset management fiduciary 3. Registered investment adviser 4. Provides service pursuant to an agreement, arrangement or understanding with a plan fiduciary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan or participant 	<p>Makes a recommendation regarding:</p> <ol style="list-style-type: none"> 1. Acquiring, holding, disposing of or exchanging an investment in a plan/IRA 2. How an investment should be invested after rollover, transfer or distribution from a plan/IRA 3. Management of an investment in a plan/IRA 	<ol style="list-style-type: none"> 1. Admitted fiduciary 2. Provides advice pursuant to written or verbal agreement, arrangement or understanding that the advice is based on the needs of the recipient 3. Directs advice to a recipient regarding a particular management or investment decision 	5-Part test is reinstated, with new commentary on rollover advice and other matters

The scope of "investment advice" fiduciary status

In its preamble to PTE 2020-02, DOL discussed the public comments offered on its new interpretive position under the 5-part test of "investment advice" fiduciary status in the rollover setting, and articulated a "Final Interpretation" to express more definitively its new position. In general, this discussion clarified and tightened certain of the views expressed in Proposal 3.0, particularly with respect to the "regular basis" and "primary basis" prongs of that test. Among other things:

- DOL confirmed that not all rollover interactions would constitute fiduciary investment advice. Effectuating a rollover instruction determined independently by the Retirement Investor, without a recommendation from the Financial Institution, would not entail fiduciary advice. Similarly, rollover interactions that are one-time sales transactions, or at most are part of a sporadic relationship with the Retirement Investor, would not rise to the level of fiduciary advice.
 - DOL persisted, however, in its new view that rollover advice that meets all five prongs of the 1975 regulation would be fiduciary investment advice, that is, in the qualified plan to IRA setting, (i) advice to liquidate existing plan holdings, which is subject to ERISA fiduciary and prohibited transaction standards, and (ii) advice to acquire the new IRA investments, which is subject to the Internal Revenue Code (Code) prohibited transaction standards. Considerable preamble discussion was dedicated to defending this approach from various criticisms in the comment letters.
 - DOL also reiterated that this would be a facts and circumstances determination. As a general matter, the Final Interpretation appears to walk back evidentiary presumptions suggested in Proposal 3.0 – e.g., that an interaction with a financial professional subject to regulatory standards of conduct would always meet the "primary basis" prong of the 5-part definition – and declined to articulate any additional presumptions either way as to fiduciary status, instead relying on the facts and circumstances approach. DOL did not directly respond to comments asking whether compliance with Regulation BI or other regulatory standards automatically crossed the line for any of the prongs of the 5-part test.
 - Further with respect to the "primary basis" prong, DOL to no surprise maintained its long-standing position that a recommendation comprising "a" primary basis for the investment decision sufficed to satisfy the prong, and need not be "the" primary basis.
 - With respect to "regular basis," DOL tightened its view in explaining that prong contemplates a "recurring, non-sporadic, and expected this to continue" relationship between the financial services provider and the individual Retirement Investor with respect to the investment of ERISA plan and/or IRA assets. Thus, the Final Interpretation (i) did not adopt suggestions in Proposal 3.0 that "regular basis" could be established through plan-level relationships that did not entail advice to the individual Retirement Investor or through advisory relationships with respect to non-"plan" assets, but (ii) did take the position that "regular basis" is determined at the investor level and not account by account.
 - DOL also said that "regular basis" would be judged on the basis of the parties' intentions at the time the rollover advice is provided.
 - If the parties, as indicated by all the facts and circumstances, did not intend a regular, recurring relationship at the time of the rollover, then the rollover advice would not satisfy the regular basis prong even if such a relationship later emerged in the management of the IRA.
 - If instead the parties intend that the rollover advice will be the first interaction in a recurring relationship, the regular basis prong would be satisfied.
- DOL intends this approach to avoid the "springing" or "retroactive" fiduciary problem created by Proposal 3.0. It seems inevitable, though, that if a recurring relationship emerges, it will be cited as evidence of the parties' intent at the time of rollover. It is unclear what position DOL would take if the rollover was the parties' first interaction and they intended a recurring relationship, but that relationship does not develop and the rollover advice proves to be a one-time interaction.
- Trail commissions for insurance products will not, of themselves, satisfy the "regular basis" prong, which instead will depend on whether the financial professional is or is not providing ongoing advice to the Retirement Investor.
 - The discussion in the Final Interpretation of the interaction of (i) the "mutual agreement, arrangement or understanding" language of the 5-part definition, with (ii) the "regular basis" and "primary basis" prongs, was new and interesting.
 - A written agreement or arrangement on regular basis and/or primary basis will be relevant but not determinative. DOL will also evaluate whether this writing is consistent with statements made in marketing and with the actual performance of the parties. According to DOL, when Financial Institutions disclaim regular basis or primary basis, "they must do so clearly and act accordingly" to perfect their position.
 - Absent a written agreement or arrangement, DOL will look to the *reasonable* expectations of the parties, as shown by the objective evidence, to ascertain their mutual understanding of regular basis and primary basis.
- That is, the Final Interpretation explicitly limited the "reasonable" gloss of Proposal 3.0 to "understandings" and substituted a "clear and consistent" gloss for "agreements" and "arrangements."
- With respect to solicitation, DOL explained that its statements in Proposal 3.0 were intended to prevent firms from taking the position that the activities of a paid solicitor were distinct from any resultant ongoing relationship with the firm, but not to treat the solicitor that makes a one-time recommendation as a fiduciary if an ongoing relationship develops with even an affiliated firm.

Eversheds Sutherland commentary

- ▶▶ While DOL argues to the contrary (as it must), the Final Interpretation remains susceptible to the charge that DOL is undertaking to resurrect by interpretation the expansion of the fiduciary definition vacated by the Fifth Circuit as regulatory overreach, at least as applied to rollovers. This position on rollovers has now been adopted by DOL in both Democratic and Republican Administrations, and there is substance to the policy considerations underlying that position. If there is bipartisan agreement on this point, a targeted legislative amendment to the ERISA section 3(21) statutory definition would provide the most constructive path forward. Absent legislation, litigation on this issue seems inevitable if DOL follows through on taking this position in its enforcement activities.
- ▶▶ In general, the Final Interpretation tightens up the most aggressive views, and appears to supersede any broader or contrary views, expressed in Proposal 3.0.
- ▶▶ DOL's decision to walk back evidentiary presumptions in applying the 5-part test to rollover advice, and to leave such matters to the courts or future guidance, both is appropriate and leaves uncertainties about the application of the Final Interpretation to the guidance or enforcement process.
- ▶▶ DOL has more work to do in closing the loop on "hire me" interactions. In the preamble, it falls back on the distinction, familiar from Final Rule 2.0, that an interaction about engaging a financial services provider and choosing among the products or services it offers cannot become fiduciary advice under the 5-part test unless and until "an investment recommendation, such as a recommendation to invest in a particular fund or security" is made. In practice, that can be a blurry distinction. There is also a single, unelaborated suggestion that changing account types may be fiduciary advice. It is entirely predictable that, if this guidance is not rescinded, DOL will be asked for more insight into these points.
- ▶▶ DOL did not elaborate its prior guidance on the distinction between investment advice and investment education, including on noncontroversial points that were swept up in the vacatur of Final Rule 2.0.
- ▶▶ More broadly, the emerging theme from the discussion of the 5-part test in the preamble is that DOL is most exercised by what it perceives as the "bait and switch" problem – allegedly, that financial intermediaries promote that they will act as trusted advisers to Retirement Investors and then disclaim ERISA fiduciary status "in the fine print" of the governing documents. The general trend in the financial services industries does seek to assist individuals with a range of financial and life choices over a period of years, so care will be required to appropriately structure, market and document arrangements (including, we would recommend, outside the rollover setting) where ERISA fiduciary status is neither intended nor warranted.
- ▶▶ Indeed, it is welcome that DOL, after years of informally disparaging written disclaimers of fiduciary status, is now prepared to accept them as usefully informing the Retirement Investor of what he or she can expect from the financial services provider, at least where the disclaimer is made in an appropriately clear manner and is consistent with the marketing and actions of the provider. The preamble more than once encourages providers to clearly specify in writing to Retirement Investors whether or not they intend to act as ERISA fiduciaries.
- ▶▶ DOL did not explain how it would identify and resolve a perceived inconsistency between marketing materials, a written agreement or arrangement, and performance. For example, would DOL see the following fact patterns similarly or differently on these points?
 - ▶ A broker-dealer firm's marketing reflects that it will comply with Regulation BI, its customer agreement with a Retirement Investor clearly disclaims regular basis, and the firm's activities comport with the disclaimer.
 - ▶ A broker-dealer firm's marketing reflects that it intends to comply with Regulation BI and to provide recommendations that an investor can trust, its customer agreement with a Retirement Investor clearly disclaims regular basis and primary basis, and the firm's activities comport with the regular basis disclaimer.
 - ▶ A broker-dealer firm's marketing reflects that it intends to comply with Regulation BI and to provide recommendations that an investor can trust, its customer agreement with a Retirement Investor clearly disclaims regular basis and primary basis, and the firm's activities comport with the regular basis disclaimer but the Retirement Investor of her own accord regularly returns to consult with the firm.
 - ▶ A broker-dealer firm's marketing reflects that it intends to comply with Regulation BI and to provide recommendations that an investor can trust, its customer agreement with a Retirement Investor clearly disclaims regular basis and primary basis, and the firm's activities do not comport with the regular basis disclaimer.
- ▶▶ Again, it appears the clarification of these matters will be left to enforcement and litigation. On a related matter, it seems inevitable, though, that if a recurring relationship emerges, it will be cited as evidence of the parties' intent at the time of rollover.
- ▶▶ It is unclear what position DOL would take if the rollover was the parties' first interaction and they intended a recurring relationship, but that relationship does not develop and the rollover advice proves to be a one-time interaction.
- ▶▶ Providers should evaluate whether, in light of the Final Interpretation, any change is required to existing ERISA section 408(b)(2) disclosures for plan sponsors with respect to fiduciary status and to coordinate that existing disclosure with any new disclosures required under PTE 2020-02 (as applicable).

PTE 2020-02: Relief for conflicted fiduciary advice

ERISA's conflict of interest prohibited transactions, applicable to fiduciaries of both ERISA plans and IRAs (through largely parallel provisions of the Code), prohibit a fiduciary from dealing with the plan's assets for its own interest or with a conflicted interest, or from receiving compensation from a third party with regard to those assets. As a result, fiduciaries (including IRA fiduciaries) commit a prohibited transaction if they cause themselves or their Affiliates to receive additional compensation (whether paid directly from the plan or by a third party). To avoid what would otherwise be a violation of ERISA, the fiduciary must comply with the terms of a prohibited transaction exemption.

PTE 2020-02 is structured in the same general format as other class exemptions. It begins by identifying the "covered transactions," i.e., the transactions for which the exemption provides relief. It then sets forth a number of conditions that must be met in order to rely on the transaction. If any of the conditions are not met, the exemption is unavailable and the underlying transaction is prohibited (unless another exemption is available). On the other hand, PTE 2020-02 differs from the typical class exemption both in terms of the breadth of the covered exemption – most exemptions cover a specific type of financial transaction – and in the nature of the conditions for relief.

Covered transactions

Instead of identifying a specific financial transaction or form of compensation, the exemption covers reasonable compensation paid to "Financial Institutions" and "Investment Professionals" as well as their "Affiliates" and "Related Entities" in connection with two types of transactions:

- Investment advice provided to "Retirement Investors," and
- "Riskless" and "Covered" Principal Transactions.

1. Investment Advice to Retirement Investors

PTE 2020-02 permits the receipt of all forms of compensation paid in connection with fiduciary investment advice, specifically including investment advice to take a distribution from a plan or to roll over the assets to an IRA, or from investment advice regarding other similar transactions including (but not limited to) rollovers from one Plan to another Plan, one IRA to another IRA, or from one type of account to another account (e.g., from a commission-based account to a fee-based account), all limited to the extent such rollovers are permitted under applicable law.

This covered transaction approach, while intentionally broad, requires the entities involved to meet certain definitions.

Financial Institution	<p>An entity that:</p> <ul style="list-style-type: none">(i) is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization);(ii) employs the Investment Professional or otherwise retains such individual as an independent contractor, agent or registered representative, and(iii) is:<ul style="list-style-type: none">• registered as an investment adviser under the Investment Advisers Act of 1940 or under state law;• a bank or similar Financial Institution supervised by the United States or a state, or a savings association;• an insurance company qualified to do business under the laws of a state, provided that it (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended, (B) undergoes an annual examination by an independent certified public accountant or has undergone a financial examination by the state's insurance commissioner within the preceding five years, and (C) is domiciled in a state whose law requires an annual actuarial review of reserves to be reported to the appropriate regulatory authority; or• a broker or dealer registered under the Securities Exchange Act of 1934.
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Investment Professional	A fiduciary of a Plan or IRA by reason of the provision of investment advice with respect to the assets of the Plan or IRA involved in the recommended transaction, who: <ul style="list-style-type: none"> – is an employee, independent contractor, agent, or representative of a Financial Institution, and – satisfies the federal and state regulatory and licensing requirements of insurance, banking, or securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable, and is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization).
Retirement Investor	<ul style="list-style-type: none"> – A participant or beneficiary of a Plan with authority to direct the investment of assets in his or her account or to take a distribution, – The beneficial owner of an IRA acting on behalf of the IRA, or – A fiduciary of a Plan or an IRA.
Plan	<ul style="list-style-type: none"> – Any employee benefit plan described in ERISA section 3(3) and – Any plan described in Code section 4975(e)(1)(A).
IRA	– Any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

2. Covered Principal Transactions

The exemption covers certain transactions where the Financial Institution engages in a purchase or sale of an investment with a Retirement Investor and receives a markup or a markdown or similar payment on the transaction. Because additional conditions and limitations are imposed on these covered transactions, it is important to note that certain transactions are not considered principal transactions for purposes of the exemption, and so can occur under the more general conditions. These include the sale of an insurance or annuity contract, or a mutual fund transaction.

The exemption extends to both Riskless Principal Transactions and Covered Principal Transactions. Principal transactions that are not riskless and that do not fall within the definition of Covered Principal Transaction are not covered by the exemption.

Riskless Principal Transaction	A Financial Institution, after having received an order from a Retirement Investor to buy or sell an investment product, purchases or sells the same investment product for the Financial Institution's own account to offset the contemporaneous transaction with the Retirement Investor.
Covered Principal Transaction	<p>For purchases from a Plan or an IRA: any security or other investment property.</p> <p>For sales to a Plan or an IRA, transactions involving:</p> <ul style="list-style-type: none"> – US dollar denominated corporate debt securities offered pursuant to a registration statement under the Securities Act of 1933, – US Treasury securities, debt securities issued or guaranteed by a US federal government agency other than the US Department of the Treasury, – debt securities issued or guaranteed by a government-sponsored enterprise, – municipal securities, – certificates of deposit, – interests in Unit Investment Trusts.

For sales of a debt security to a Plan or an IRA, the definition of Covered Principal Transaction requires the Financial Institution to adopt written policies and procedures related to credit quality and liquidity.

Eversheds Sutherland Commentary

- ▶ Note that even though the defined term is a "Retirement Investor," the definitions of "Plan" and "IRA" are broader and encompass plans other than retirement plans. Therefore, the exemption is available to welfare benefit plans (as defined in section 3(3)(a) of ERISA) and any plan subject to the prohibited transaction provisions of the Code (e.g., Coverdell Education Accounts and Health Savings Accounts (HSA)).
- ▶ DOL noted that the Covered Principal Transaction definition is intentionally narrow and in that respect differs from Regulation

BI, which does not include any limitations on principal transactions. DOL rejected comments that requested the inclusion of additional investments, including foreign debt, structured notes, corporate debt in the secondary market, equity securities (including initial public offerings and national market system securities), new issues, issuers other than corporations, foreign currency, foreign securities, and closed-end funds. DOL explained that a Financial Institution could instead request an individual prohibited transaction in those situations.

► The exemption covers principal transactions involving municipal bonds, including tax-exempt municipal bonds. The Department cautioned, however, that Financial Institutions and Investment Professionals should take special care when recommending that

Retirement Investors invest in municipal bonds, arguing that tax-exempt municipal bonds are typically a poor choice for investors in ERISA Plans and IRAs that are already tax-advantaged.

Conditions

1. Impartial Conduct Standards

The primary condition for reliance on the Final Exemption is that fiduciaries will be required to provide investment advice according to impartial conduct standards, consisting of a best interest standard plus additional conduct-related components. The Final Exemption largely tracks the language in the Proposed Exemption, and DOL reiterates many of its finer points in the preamble to the exemption.

- In the preamble, DOL emphasizes that the Final Exemption's Impartial Conduct Standards are strong fiduciary standards based on long-standing concepts under ERISA and the common law of trusts.
- The Final Exemption's best interest requirement aligns with regulatory conduct standards under various securities laws, which DOL believes will facilitate providing investment advice to Retirement Investors and reduce compliance costs leading to lower fees overall.
- However, DOL declined requests to include a safe harbor provision based on regulatory conduct standards under federal or state securities laws or the NAIC Model Regulation. To address concerns that this would result in duplicative/inconsistent enforcement efforts, DOL indicated that it will coordinate with other regulators but emphasized that it retains full interpretative responsibility for the terms of the exemption and the ERISA and Code provisions at issue.
- The Final Exemption does not include a provision permitting IRA owners to enforce the Impartial Conduct Standards.

As with Proposal 3.0, there are three components to the Impartial Conduct Standards, starting with a best interest standard.

Best Interest Standard	Advice that "reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor," and
	"does not place the financial or other interest of the Investment Professional, Financial Institution or any Affiliate, Related Entity or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own."

Advice is in the best interest of the Retirement Investor if it satisfies a prudent expert standard measured at the time the advice is rendered and does not place the interests of the adviser or other party ahead of the interests of the Retirement Investor.

- The preamble to the final exemption points out that the standard is based on fiduciary concepts developed under the common law of trusts – the basis of ERISA itself – and is intended to be consistent with the duty of care and loyalty requirements under ERISA section 404.
- Nevertheless, DOL rejected concerns that the standard was duplicative or confusing as built into the exemption. Incorporating the Impartial Conduct Standards as conditions of the exemption requires Financial Institutions to demonstrate compliance with the standards and increases the consequence of noncompliance because of the excise tax. This creates an important incentive for Financial Institutions to ensure compliance with the standards. For that reason, the Department does not believe the standards are unnecessary or duplicative for those Retirement Investors who are Title I Plan participants or beneficiaries.
- The best interest standard in the final exemption was not altered from the one in the proposed exemption, including with respect to its application to IRAs. Some commentators argued that the Fifth Circuit's *Chambers* opinion rejected the imposition of the Impartial Conduct Standards as an exemption condition for IRAs. DOL disagreed, noting that, unlike the 2016 proposal in *Chambers*, the final exemption applies to a narrow group already deemed as fiduciaries and does not impose contract or warranty requirements on IRA fiduciaries.
- The preamble provides that the best interest standard does not require advisers to identify the single best investment and does not preclude Financial Institutions from having a financial stake or other interest in the transaction, so long as the Retirement Investor's interests are paramount. Like in the preamble to the proposed exemption, DOL again notes that this standard is to be interpreted and applied consistently with the standard set forth in the Regulation BI and the SEC's interpretation regarding the conduct standard for registered investment advisers.
- With respect to the best interest standard, DOL further explained:
 - Financial Institutions looking to comply with the ERISA section 404 standard and the Impartial Conduct Standards should adopt rigorous policies and procedures to align the interests of advisers and Retirement Investors, refrain from creating incentives for advisers to violate the Impartial Conduct Standards, and prudently oversee the implementation and enforcement of the policies and procedures.
 - Advisers should comply with the Financial Institution's policies and procedures, engage in a prudent process in recommending investment products, and ensure that their advice does not put any party's interests ahead of the Retirement Investor's.

- As stated in Proposal 3.0, DOL confirmed that some investments by their nature might require monitoring in order to be prudent. DOL did not provide guidance on identifying which products will require monitoring, noting that advisers will need to make these decisions on a case-by-case basis

based on their expertise and all of the facts and circumstances. It rejected any concerns about monitoring being inconsistent with a broker-dealer's obligations and limitations under the securities laws.

Reasonable Compensation	<ul style="list-style-type: none"> – Compensation received by the Financial Institution, the Investment Professional, and any Affiliates and Related Entities must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2). – If applicable, the Financial Institution and Investment Professional must seek to obtain best execution (as required by securities laws) as part of the "reasonable compensation" requirement.
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Eversheds Sutherland Commentary

- ▶ *The reasonable compensation requirement is the second of the three Impartial Conduct Standards.*
- ▶ *PTE 2020-02 continues to have the same flaw that has been present in all the latest rounds of rulemaking – the preamble confirms that the Financial Institution and Investment Professionals are charged with making the determination that their own compensation is reasonable. Traditionally this responsibility has fallen to the plan-level fiduciary, who has the incentive and the ability to request competitive bids or perform other market-based analyses. Indeed, the purpose of the 408(b)(2) disclosure requirements is to ensure that the plan fiduciaries have the information needed to make the determination as to the reasonableness of the fees.*
- ▶ *DOL did reiterate several useful points in making the reasonable compensation determination:*
 - ▶ *The reasonableness of compensation is a facts and circumstances determination, measured at the time of the recommendation. DOL remarked that the reasonableness of a fee is based on the nature of the services provided, the market price of the particular services rendered, the complexity of the product, and the scope of monitoring being provided, with no single factor being determinative.*
 - ▶ *Reasonable compensation does not necessarily mean the lowest cost, and consideration of cost alone could actually violate the conditions of the exemption.*
 - ▶ *With regard to bundled products/services including annuities, it is appropriate to consider the value of any guarantees or other benefits under the contract as well as the value of the services.*
- ▶ *Undertaken in a rigorous manner, however, a reasonable compensation determination by a financial services provider can be an unexpectedly difficult and expensive undertaking, as compared to a similar determination by a plan-level fiduciary.*

No Materially Misleading Statements	The provider must not make to the Retirement Investor materially misleading statements about the recommended transaction and other relevant matters at the time when the statements are made.
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Eversheds Sutherland Commentary

- ▶ *This third Impartial Conduct Standard apparently reflects in part DOL's bait and switch concern.*
- ▶ *The preamble articulates "other relevant matters" as including fees and compensation, material conflicts of interest, and any other fact that could reasonably be expected to affect the Retirement Investor's investment decisions. In particular, DOL would consider it materially misleading for the Financial Institution or Investment Professional to include in an arrangement with a Retirement Investor any exculpatory clauses or indemnification provisions that are prohibited by applicable law, including ERISA.*
- ▶ *The preamble also emphasizes the materiality component of the condition, as well as its interpretation that the act of misleading includes acts of omission (omitting a material fact necessary in order to make the statements not misleading).*

2. Disclosure

The final exemption retains the disclosure requirements of the proposed exemption and adds a requirement for disclosure regarding a rollover recommendation, if applicable. Three items must be included for all recommendations:

- Acknowledgement of the Financial Institution's and Investment Professional's fiduciary status under ERISA and/or the Code;
- The services to be provided; and
- Any material conflicts of interest.

In addition, in the case of a rollover recommendation covered by the exemption, the Retirement Investor must be provided documentation of the specific reasons for the rollover recommendation, as discussed further below.

The disclosure must be provided to the Retirement Investor prior to engaging in the covered transaction. Once the disclosure is provided, it does not have to be provided again except upon the investor's request or if the information has materially changed. Like the proposal, the final exemption does not provide a specific form for the disclosure. The preamble notes that any form of disclosure or combination of disclosures that is required by other regulators can comply, and that the disclosure must be provided in plain English, taking into account the Retirement Investor's financial experience.

Fiduciary Acknowledgement

The most significant and controversial piece of the proposed disclosure requirements – the acknowledgement of fiduciary status – was retained. In the preamble to the final exemption, the Department offers model language that can, but is not required to, be used for the acknowledgement of fiduciary status. The model wording describes the fiduciary standard as one “that requires us to act in your best interest and not put our interest ahead of yours.” This goes beyond the final exemption’s disclosure requirement, which only requires acknowledgement of fiduciary status and not an explanation of what that status means. The preamble also includes six “optional” brief bulleted statements that recapitulate the general conditions of the exemption and the Investment Professional’s role.

Model Disclosure	When we provide investment advice to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.
Additional Optional Bullet Points	Under this special rule’s provisions, we must: <ul style="list-style-type: none"> – meet a professional standard of care when making investment recommendations (give prudent advice); – never put our financial interests ahead of yours when making recommendations (give loyal advice); – avoid misleading statements about conflicts of interest, fees, and investments; – follow policies and procedures designed to ensure that we give advice that is in your best interest; – charge no more than is reasonable for our services; and – give you basic information about conflicts of interest.

Eversheds Sutherland Commentary

- ▶ *The Department recites in the preamble, but ultimately dismisses, the concerns of commenters regarding the fiduciary acknowledgement.*
- ▶ *Several commenters argued that Financial Institutions will not be fiduciaries for all purposes, including under securities laws, and that the acknowledgement could confuse investors and also potentially undermine the purpose of the SEC’s Form CRS as a comprehensive source of investor information. The Department was rather dismissive of this concern, explaining that it “does not believe that the possibility of investor confusion or lack of understanding of the term ‘fiduciary,’ or concerns about the interaction with SEC Form CRS, present sound bases for eliminating the requirement.”*
- ▶ *Other commenters argued that the fiduciary acknowledgement could create a unilateral contract between the Financial Institution and the Retirement Investor, which they said was also impermissible in light of the Fifth Circuit’s opinion. The Department responded by stating, without explanation, that it does not intend any new causes of action or enforceable agreements resulting from the exemption, and that the exemption does not require any contractual commitments. This statement is helpful, but of course the Department’s views will not bind any court faced with the issue.*
- ▶ *Query whether this provision will be legally challenged, but in any event IRA providers should carefully draft this disclosure with consideration of the possibility of contractual and other state law causes of action linked to the fiduciary acknowledgement.*
- ▶ *The Department also notes in the preamble that some commenters were concerned that the exemption would force them to acknowledge fiduciary status in circumstances in which that status was unclear, including where subsequent events might cause earlier advice to be fiduciary in nature. The Department explained that the exemption is not intended as a backstop, but rather is only available when the Investment Professional acknowledges that it is serving in a fiduciary capacity. In practice, this will leave advisers in a difficult position in some circumstances, including situations in which their status is not clear at the outset of the relationship.*
- ▶ *Providers relying on PTE 2020-02 for advice to the plan fiduciary might consider how this notice might be incorporated in their section 408(b)(2) disclosures; the Department helpfully noted this is a permissible approach. Similarly, the notice might be incorporated into other existing disclosures for plan participants and IRAs, e.g., the IRA disclosure statement where provided in advance of the relevant transaction.*

3. Policies and Procedures

The Final Exemption retains the requirement to adopt certain “prudently designed” policies and procedures, as detailed below. Despite commenters’ requests to provide further explanation regarding the meaning of “prudently designed” for these purposes (especially as compared to the “reasonably designed” standard that exists under the federal securities laws, and how the prudence standard might practically differ), DOL declined to do so. Instead, DOL stated that the prudence requirement for these purposes indicates a level of care, skill and diligence that a person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims – in other words, the traditional prudent expert standard.

The Financial Institution’s policies and procedures are expected to cover the following topics.

<p>Financial Institution and Investment Professional Compliance with the Impartial Conduct Standards</p>	<p>Section II(c)(1) of the final exemption establishes an overarching requirement that Financial Institutions establish, maintain and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions. Thus, these policies and procedures must be prudently designed to ensure that</p> <ul style="list-style-type: none"> – investment advice is, at the time it is provided, in the best interest of the Retirement Investor; – the compensation received, directly or indirectly, by the Financial Institution, Investment Professional, and their Affiliates and Related Entities for their services does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); – as required by the federal securities laws, the Financial Institution and Investment Professional seek to obtain the best execution of each investment transaction reasonably available under the circumstances; and – the Financial Institution's and its Investment Professionals' statements to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time statements are made, materially misleading.
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This component of the policies and procedures requirement was adopted as proposed.

Eversheds Sutherland Commentary

- ▶ *DOL repeated its guidance from the preamble for the proposed exemption that insurance company Financial Institutions would be responsible only for an Investment Professional's recommendation and sale of products offered to Retirement Investors by the insurance company in conjunction with fiduciary investment advice, and not to product sales of unrelated and unaffiliated insurers. In the preamble to the final exemption, DOL allowed insurance company Financial Institutions to create a system of oversight and compliance by contracting with an insurance intermediary or other entity to implement policies and procedures designed to ensure that all of the agents associated with the intermediary adhere to the conditions of the Final Exemption. This approach aligns with the recently revised NAIC Model Best Interest Regulation for annuity transactions.*
- ▶ *Also in the preamble, the DOL laid out the governance process Financial Institutions should follow with respect to their policies and procedures, including the need to review policies and procedures periodically and reasonably revise them as necessary to ensure they continue to satisfy the conditions of the Final Exemption. Financial Institutions must be especially attuned to the impact of conflicts of interest on an ongoing basis to ensure that their policies and procedures are operating as intended. In addition, as Financial Institutions introduce new products, business lines or compensation programs, they should consider whether their policies and procedures continue to be appropriate and effective. In adopting Regulation BI, the SEC laid out similar governance processes. Accordingly, firms that adopted or amended the charters for their Product Review and Conflicts Committees in response to Regulation BI will be able to leverage that work for purposes of PTE 2020-02.*

<p>Conflict Mitigation</p>	<p>Section II(c)(2) of the final exemption requires Financial Institutions to have policies and procedures that mitigate conflicts of interest to such an 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.</p> <ul style="list-style-type: none"> – The standard does, however, retain the requirement that the policies and procedures and incentive practices must be viewed as a whole, meaning that Financial Institutions have flexibility in adopting practices that both mitigate compensation incentives and use supervisory oversight to prudently ensure that the standard is satisfied. In the preamble, DOL explains that policies and procedures should reflect an inverse relationship between the stringency of mitigation methods and supervisory oversight. Thus, for example, if a Financial Institution selects a relatively less stringent mitigation method to address a given Investment Professional-level conflict, it should adopt more stringent supervisory oversight practices over the investment advice associated with that conflict. – DOL acknowledges in the preamble that the best interest standard can be satisfied by Financial Institutions and Investment Professionals that provide investment advice on proprietary products or on a limited menu of investment options, including limitations to proprietary products and products that generate third-party payments. However, in recognition of the heightened conflicts of interest created by these types of arrangements, DOL states in the preamble that the final exemption is available in these circumstances only if the Financial Institution prudently concludes that its offering of proprietary products, or its limitations on investment product offerings, in conjunction with the policies and procedures, would not create an incentive for Financial Institutions or Investment Professionals to place their interests ahead of the interests of the Retirement Investor. While documentation of the basis behind this conclusion is not necessarily required by the final exemption, DOL does suggest in the preamble that such documentation would be a best practice, and in any case, DOL states in the preamble that it expects a Financial Institution would be able to explain clearly the process it used in making this determination.
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This component of the policies and procedures requirement was revised from the proposed exemption to more clearly communicate the intent of DOL that incentives must be mitigated, and provides a standard of mitigation based on the view of a "reasonable person."

Eversheds Sutherland Commentary

- ▶ *While the definition of "conflict of interest" for these purposes aligns with the definitions of this term under Regulation BI and the Investment Advisers Act of 1940, the final exemption does not perfectly align with Regulation BI's Conflict of Interest Obligation. For example, under PTE 2020-02, all conflicts, whether they arise at the Financial Institution or Investment Professional level, must be mitigated to some degree at a minimum, while under Regulation BI there is an acknowledgement that certain firm-level conflicts can be properly addressed through disclosure alone.*
- ▶ *In the preamble, DOL defers to other regulators on mitigation techniques. It then goes through the same list of non-exhaustive examples of mitigation techniques set forth in the Regulation BI adopting release. Financial Institutions are not required to undertake any specific mitigation measure, but rather have the option of selecting the approach that best suits their particular circumstances.*
- ▶ *Although the final exemption does not explicitly state that time-limited sales contests relating to specific securities or types of securities are inconsistent with the conflict mitigation requirement, DOL does state in the preamble that these types of incentive structures are too prone to abuse to be permitted as part of firm policies and procedures. Accordingly, PTE 2020-02 aligns with Regulation BI and the NAIC Model on the issue of impermissible time-limited product-specific sales contests.*

Documentation Requirements for Rollover Advice and Account Type Recommendations

- Policies and procedures must require documentation of the specific reasons why a rollover is in the best interests of a retirement plan investor. This documentation must reflect the following:
 - consideration of alternatives to the rollover, including leaving the account in the employer-sponsored plan, if permitted, and selecting different investment options;
 - the fees and expenses associated with both the plan and the IRA;
 - whether the employer pays for some or all of the plan's administrative expenses; and
 - the different levels of services and investments available under the plan and the IRA.
- Notably, this documentation requirement would also apply to a recommendation to move at least IRA assets from a commission-based to a fee-based account, or vice versa. For rollovers from another IRA or changes from a commission-based account to a fee-based arrangement (or vice versa), a prudent recommendation would include consideration and documentation of the services that would be provided under the new arrangement.
- The long-term impact of any increased costs and the reason(s) why the added benefits justify those added costs, as well as the impact of features such as surrender schedules and index annuity cap and participation rates, should also be considered as part of any rollover recommendation, as relevant.
- DOL expects Investment Professionals and Financial Institutions to make diligent and prudent efforts to obtain pertinent information about the plan. If that effort is unsuccessful, a reasonable estimation of expenses, asset values, risk and returns based on publicly available information should be made. In connection with such estimates, the Financial Institution and Investment Professional should document and explain the assumptions used and their limitations.
- The final exemption does not mandate that a Financial Institution review documentation of each and every rollover recommendation, but DOL states in the preamble that depending on the Financial Institution's business model and the other methods available to mitigate conflicts of interest, regular review of some or all rollover recommendations may be an effective approach to compliance with PTE 2020-02.

Eversheds Sutherland Commentary

- ▶ *These are requirements, not simply suggestions or best practices. In this respect, PTE 2020-02 is more demanding than Regulation BI.*
- ▶ *In particular, by specifically requiring documentation of pertinent information about the plan or, if not available, a reasonable estimate of such costs with documentation of the assumptions used and their limitations, the Final Exemption goes further than Regulation BI, which has no such explicit requirement.*

**Covered
Principal
Transactions**

If the recommended investment is a debt security sold in a principal transaction, the security must be recommended pursuant to written policies and procedures adopted by the Financial Institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time.

Eversheds Sutherland Commentary

▶ *As with IRA rollovers, substantive conditions are embedded in this element of the policies and procedures requirement.*

4. Retrospective Review

Like the proposed exemption, PTE 2020-02 requires the Financial Institution to conduct a retrospective compliance review at least annually, and document the methodology and results of that review in a written report to a "Senior Executive Officer." A Senior Executive Officer is defined to include the chief compliance officer, chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution. The Senior Executive Officer is required to certify that (i) the officer has reviewed the report of the retrospective review; (ii) the Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of the exemption; and (iii) the Financial Institution has in place a prudent process to modify such policies and procedures as business, regulatory, and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which are "reasonably" designed to ensure continuing compliance with the conditions of the exemption. This process must be completed within six months of the close of the review period.

Eversheds Sutherland Commentary

- ▶ *The proposed exemption required the certification to be made by the CEO. In response to comments and recognizing that other officers could be better situated to make the assessment, the Department expanded this requirement to allow certification by a wider range of executives.*
- ▶ *Commenters indicated the review would be burdensome and unnecessary, as well as inconsistent with other class exemptions. DOL dismissed these assertions, stressing its judgment that the retrospective review is important to the functioning of the final exemption.*
- ▶ *The retrospective review requirement aligns with Regulation BI and FINRA rules in one way, but not in another. More specifically, the requirement to sample transactions for compliance with the best interest standard likely aligns with Regulation BI's compliance obligation and FINRA Rule 3120. The requirement to prepare a written report for presentation to a Senior Executive Officer, as well as that officer's annual certification, is an additional and unique requirement.*
- ▶ *The Department confirmed that signing the certification is not intended to confer special status on the officer that leads, in and of itself, to personal liability, outside of the officer's fiduciary status and general fiduciary requirements of ERISA.*
- ▶ *The Financial Institution must make the report, certification, and supporting data from up to the prior six years available to DOL within ten business days of any such request from DOL.*

5. Self-Correction

In response to commenters' questions about circumstances in which the retrospective review identified errors, as well as requests for an ability to "self-correct" potential errors in the use of the final exemption, the Department provided a new self-correction process in PTE 2020-02.

Under the self-correction program, a violation of the conditions of the exemption will not be considered to result in a non-exempt prohibited transaction if (1) either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses; (2) the Financial Institution corrects the violation and notifies the Department within 30 days of correction; (3) the correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and (4) the Financial Institution notifies the persons responsible for conducting the retrospective review and includes the violation and correction in the written report of the retrospective review.

Eversheds Sutherland Commentary

- ▶ *The self-correction program is a welcome improvement, especially given the prescriptive elements of the exemption. As with any correction program that involves notifying the regulator as a condition of use, providers that discover an error will need to weigh the certainty of using the correction program against other approaches that may not draw additional attention from the Department. This is particularly sensitive where the Department can pull eligibility to rely upon the exemption based on a pattern or practice of non-compliance.*
- ▶ *The requirement to correct within 90 days of the date the Financial Institution "reasonably should have learned of the violation" is intended to, and likely will, put additional pressure on establishing a rigorous retrospective review process, if the provider intends to use the correction program for any errors that are later discovered.*

Eligibility

Financial Institutions and Investment Professionals could lose eligibility to rely on the Final Exemption for a period of ten years upon conviction of certain crimes "arising out of the provision of advice" to Retirement Investors or upon DOL's finding of specified misconduct with respect to compliance with the Final Exemption.

DOL noted in the preamble to the final exemption that it intends that the phrase "arising out of the provision of advice to Retirement Investors" be broadly interpreted – for example, to cover a Financial Institution or Investment Professional embezzling money from the account of a Retirement Investor to whom they provide or have provided investment advice.

Disqualifying misconduct includes:

- a systemic pattern or practice of violating the conditions of PTE 2020-02;
- an intentional violation of the conditions of the exemption; and
- provision of materially misleading information to DOL with respect to compliance with the exemption.

Ineligibility would be triggered by the receipt of a written ineligibility notice. Before issuing the notice, DOL would issue a warning to the Financial Institution or Investment Professional and provide a six-month opportunity to cure. At the end of the six-month period, if DOL determines that the conduct continued, it would then provide an opportunity for the party to be heard, in person or in writing, before the notice is issued. The Final Exemption spells out procedural requirements around this determination.

For Investment Professionals, access to the Final Exemption would be automatically and immediately revoked in the specified circumstances. Financial Institutions would have a one-year transition period and an opportunity to petition DOL for continued reliance before they became ineligible for the exemption.

The final exemption generally mirrors the proposal with limited clarifications.

- The provision has been revised to state that DOL, rather than specifically the Director of the Office of Exemption Determination, will determine eligibility and issue the written ineligibility notices.
- The definition of "controlled group" was revised from describing an 80% threshold test to refer directly to how the terms "controlled group of corporations" and "under common control" are used under Code sections 414(b) and (c).
- Parties that become ineligible may rely on an otherwise available statutory exemption, as well as a separate administrative class exemption (the latter being the new clarification); ineligible parties may also apply for an individual prohibited transaction exemption.

Eversheds Sutherland Commentary

▶ *The preamble uses the term "egregious" to describe the non-criminal conduct that would trigger ineligibility, thus somewhat addressing concerns raised about inadvertent non-compliance with the exemption conditions. It further explains that "provided that a Financial Institution has established, maintained and enforced prudent policies and procedures as required by this exemption, a minor number of isolated violations of the conditions of the exemption does not constitute a systematic pattern or practice."*

▶ *On the other hand, DOL also expresses its view that there is no such thing as a mere "technical" violation of the terms of the exemption. Financial Institutions may want to focus on policies and procedures designed to minimize the total number of potential violations.*

Recordkeeping

In the usual manner, PTE 2020-02 requires Financial Institutions to maintain records of compliance for six years. To the extent a Financial Institution is leveraging compliance with standards promulgated by its principal regulator, it will need to take the PTE 2020-02 six year period into account in its document maintenance policy for that other compliance program. As noted above, and consistent with DOL's objective that compliance with the exemption not create a private right of action for IRA owners, access to these records pursuant to the authority of the exemption is limited to DOL and the IRS.

Effective dates and enforcement

In connection with the adoption of PTE 2020-02, DOL announced that (i) its temporary enforcement policy announced in [Field Assistance Bulletin 2018-02](#) after the vacatur of Final Rule 2.0 will sunset on December 20, 2021 (although for practical reasons this date surely should have been December 31), and (ii) it will initially approach PTE 2020-02 from a compliance assistance perspective for an unspecified period. Also, in light of concerns expressed about the possible retroactive assertion of its position on rollovers, DOL tied the sunset for reliance on its prior rollover guidance to the effective date of PTE 2020-02.

In respect to questions raised about how regulatory enforcement related to PTE 2020-02 will work when compliance with that exemption depends in part on compliance with Regulation BI or another standard of conduct promulgated by another regulator, DOL noted that it has a long history of coordinating with other agencies in enforcement matters but does not defer to other regulators on ERISA enforcement.

Eversheds Sutherland Commentary

- ▶ *While expected, DOL's decisions on its temporary enforcement policy and compliance assistance approach are appropriate and constructive.*
 - ▶ *Sixty days to come to terms with and operationalize compliance with DOL's rollover position as modified in the Final Interpretation is plainly inadequate, however, particularly in light of the uncertain future of PTE 2020-02. It is entirely predictable that DOL will need to consider this point further.*
 - ▶ *DOL's response on the interagency issue was fair enough, so far as it goes, and may realistically be the only answer it can give at this point. From the perspective of the regulated community,*
- however, it is an unhelpful complication not to reliably understand whether DOL or the promulgating agency will make the definitive determination of compliance for purposes of PTE 2020-02, which the preamble states will be determined on a "decidedly" case-by-case basis.*
- ▶ *It should also consider how that regulatory double duty functionally affects both the construction of compliance programs and the calculus of managing and settling examinations by either of the respective agencies. For more details, see the enforcement discussion in our [summary of Proposal 3.0](#).*

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"This is an exceptional team with strong legal experience and deep industry knowledge. They are extremely effective and achieve most results in minimal time."

– *Chambers USA 2020*

"Their advice was consistently timely, well thought out and practical. Their collective professionalism, industry knowledge and collaboration are their greatest strengths."

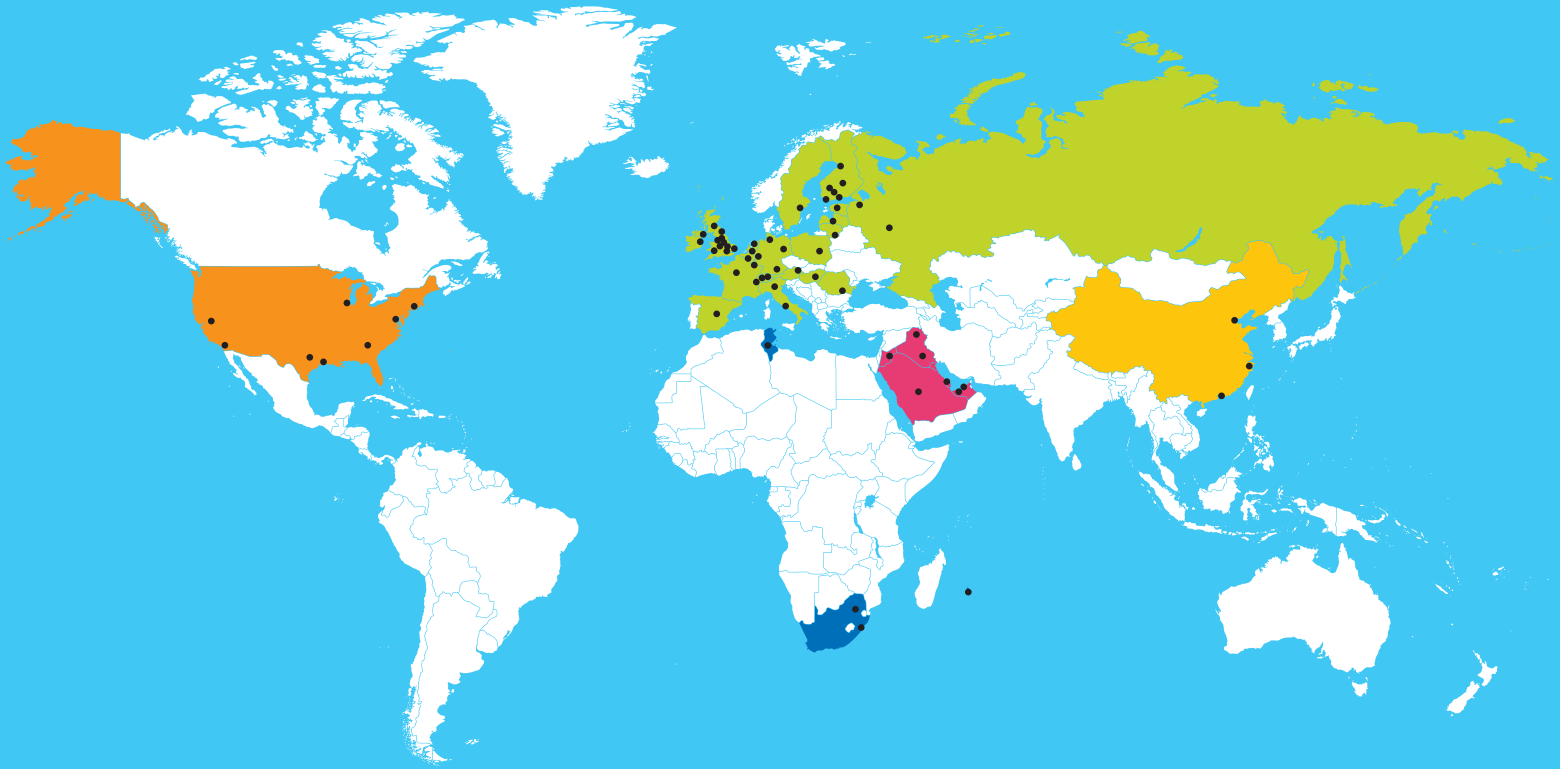
– *Chambers USA 2020*

"Eversheds Sutherland has demonstrated an ability to understand and successfully navigate through areas where multiple types of subject matter intersect; this is an unusual and valuable element."

– *Chambers USA 2020*

Global reach

We have **68 offices** across **32 countries** worldwide



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Tunis

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Erbil

Jordan
Amman

Qatar
Doha

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