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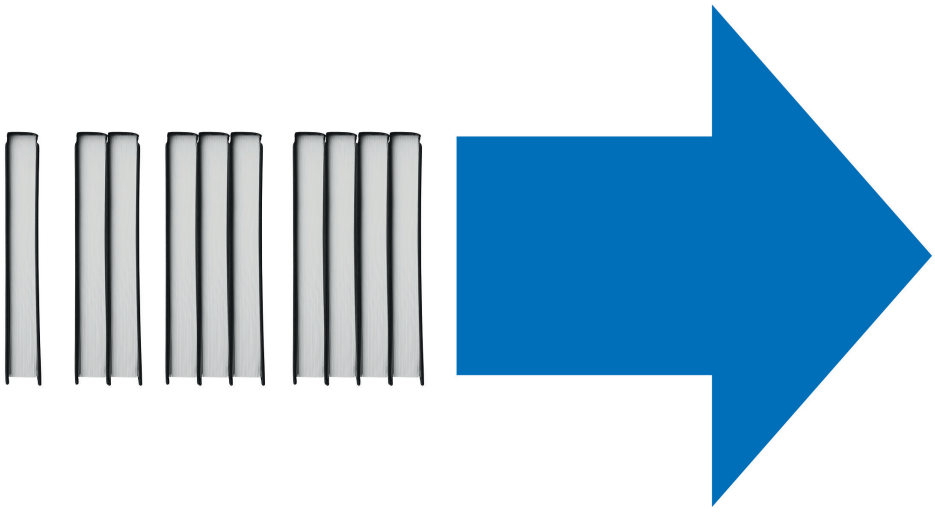

Closing the book

On continuing the ERISA "best interest" debate – is there anything left to argue about?

As announced in a press release and contrary to expectations created prior to the election, the US Department of Labor (DOL) has allowed its Fiduciary Rule 3.0 to take effect February 16, 2021, notwithstanding the change of Administrations and without further "midnight regulation" review. Absent legislative action under the Congressional Review Act, which as always is improbable, Rule 3.0 will stand, at least for the moment.

- In Rule 3.0, DOL refined its interpretive position on when rollover advice is fiduciary investment advice for purposes of the Employee Retirement Income Security Act of 1974, as amended (ERISA).
- It also adopted Prohibited Transaction Exemption (PTE) 2020-02, providing "best interest" terms on which fiduciary investment advisers may serve ERISA plans and individual retirement accounts (IRA) notwithstanding conflicts of interest.
- Finally, it announced that the temporary enforcement policy that has been in effect since Rule 2.0 was vacated in 2018 by the Fifth Circuit Court of Appeals would sunset on December 20, 2021.

At this writing, the reaction to Rule 3.0 from consumer advocates and from financial services providers has largely been comparable – that the Rule reflects an imperfect but responsible regulatory approach that they would prefer be improved in particular, albeit different ways. This, one might think, is precisely the sort of outcome that an Administration committed to finding common ground and calming political divisiveness would embrace.

The press release, however, indicates that DOL "will continue our stakeholder outreach to determine how we might improve this exemption, the rule defining who is an investment advice fiduciary, and related exemptions to build on this approach." Secretary of Labor nominee Marty Walsh has also indicated his support of reexamining the exemption "consistent with regulatory procedures and the Administrative Procedure Act." Accordingly, the finality provided by the news release may be temporary; while it would require yet another rulemaking, DOL is suggesting that further changes, not only to the "best interest" exemption but to the fiduciary investment advice definition itself, may be forthcoming.

Inasmuch as DOL first launched this undertaking in 2010, we've now entered the second decade of the debate over this issue, with its accompanying disruption of the private retirement system. (Uncertainty is always disruptive, and the debate diverts resources that might otherwise be spent by the private sector on improvements to the retirement system and by DOL on other priorities.) Accordingly, it seems worthwhile to reset the stakes in continuing to have this debate.

- As has now been widely acknowledged, conflicts inevitably exist in every possible financial services business model. If the financial professional is being paid, there is likely some sort of conflict embedded in the circumstances and method of payment.
- DOL's primary concern from the outset functionally has been on compensation that is transactional in nature, such as brokerage commissions or payments from product manufacturers like insurance commissions or 12b-1 fees. Firms utilizing this business model have often been designated and regulated as selling firms, and their interactions with retirement investors have traditionally been policed by their primary regulators through suitability standards.
- The fee-based business models typical of registered investment advisers and bank trust departments have also been within scope but have received less attention from DOL. Traditionally, these firms have been treated by their primary regulators as fiduciaries to retirement investors.
- Neither of these compensation models is a universal solution. There are circumstances where each model better serves the interests of retirement investors, and it is essential that retirement investors be able to choose the model that best meets their needs.
- Financial services regulation of the conflicts presented by these models looks very different in 2021 than the prevailing traditional regulation when DOL initiated its regulatory initiative in 2010. For example:
  - The SEC has enhanced its conflict regulation of broker-dealers in its Regulation Best Interest (BI) and consolidated its fiduciary guidance for registered investment advisers.
  - FINRA has published member guidelines specifically for rollover recommendations.
  - Legislatures and regulators in some states have established "best interest" standards for broker-dealers and insurance salespeople.
  - The OCC has recently updated its fiduciary guidance for the banks it regulates, including in the retirement setting.
- Between the market, legislation, regulation and litigation, financial services providers generally have become more transparent and more accountable to retirement investors than they were in 2010. DOL's fiduciary project did not start this trend, but it certainly accelerated it.
- In Rule 3.0, DOL undertook to craft an ERISA exemption for conflicted advice that leveraged and fit into this changing financial services regulatory landscape.

It is against this background, that the considerations for "improvements" to the fiduciary investment advice definition and the "best interest" exemption as they currently stand would be measured.

Fiduciary Investment Advice Definition

The possibility of "improving" by regulation the ERISA definition of "providing investment advice for a fee" can be addressed succinctly.

- The Fifth Circuit opinion vacating Rule 2.0 leaves no room for DOL to discover, nearly fifty years after enactment of the statute, that the definition reaches farther than the 5-part test adopted by DOL in 1975.
- Had DOL the authority to expand the regulatory definition, its new rollover position would surely have taken the form of an amendment to the regulation stating the 5-part test, rather than a sub-regulatory interpretation.
- As it stands, the rollover interpretation may already exceed DOL's regulatory authority and may not be upheld by the courts.

Bottom line: If DOL has concerns about the scope of ERISA fiduciary status, the Fifth Circuit opinion indicates it must take those concerns to Congress.

For More Information

For resources and commentary regarding this DOL initiative, visit Eversheds Sutherland's dolfiduciaryrule.com.

- Text of and supporting materials for Rules 1.0, 2.0 and 3.0
- Pleadings and decisions in the litigations that challenged Rule 2.0
- Articles, presentations and client alerts
- Videocasts about Rule 2.0

Best Interest Exemption

Before launching a Rule 4.0 rulemaking, it seems instructive to compare PTE 2020-02 with the approach held out by proponents for more regulation as the ERISA gold standard: the Best Interest Contract Exemption (BICE, or BIC Exemption) adopted by DOL in 2016 and vacated as regulatory overreach by the Fifth Circuit in 2018. And because transaction-based compensation has been the more significant pressure point in this debate, the comparison should be to the most rigorous version of the BICE: the "full" BICE applicable to proprietary products and third-party payments, without the benefit of the special level-fee fiduciary, transition or other rules. We set forth below a side-by-side comparison of the key provisions of the full BICE and PTE 2020-02:

- the scope of relief provided,
- the "Impartial Conduct Standards" that conflicted fiduciary advisers are required to meet,
- other conditions of the exemption in support of the Impartial Conduct Standards,
- disclosure requirements (clearly more voluminous in BICE), and
- other provisions of the exemptions.

For purposes of this comparison, we set aside the private right of action for IRA owners created by BICE but now disallowed by the Fifth Circuit decision.

To summarize the side-by-side comparison, the commonalities between PTE 2020-02 and BICE are far more extensive and significant than the differences. Where there are differences, PTE 2020-02 often is more protective of retirement investors.

- While both exemptions generally permit the receipt of any form of compensation by regulated financial services companies and their representatives, the scope of relief provided by PTE 2020-02 is actually more restrictive. PTE 2020-02 adds new exclusions for financial institutions and advisers that have been disqualified by another regulator or convicted of certain financial crimes, or have abused the exemption.
- The Impartial Conduct Standards of PTE 2020-02 are, contrary to some assertions, fiduciary standards; they purposefully adopt the ERISA section 404 care and loyalty standards to which ERISA fiduciaries are generally subject. Courts have regularly characterized these statutory standards as the "highest known to the law." While it uses a different form of words, BICE incorporates precisely the same standards.
- The policies and procedures, documentation, and compliance review provisions are largely a wash; each exemption is more prescriptive in some respects and more principles-based in others, but they essentially cover the same ground.
- The two exemptions plainly reflect different judgments about the value and utility of disclosure. To bluntly make our own perspective clear, the content and repetition of the disclosures required by BICE are the type of disclosure that consumer advocates, regulators and attorneys find comforting; that typical recipients of the disclosure find useless; and that increase, to no good purpose, the incremental costs of the retirement system which, as always, are directly or indirectly borne by retirement investors. In any event, this difference cannot be sufficiently impactful to justify restarting the regulatory process yet again.
- As to the other provisions of the exemptions, the self-correction procedure added in PTE 2020-02 incents energetic compliance monitoring and amplifies the effect of DOL's limited resources.

The crux of this comparison comes down to any perceived difference in loyalty standards.

- The BICE loyalty standard requires investment advice to be provided "without regard to" the fiduciary adviser's interest.
- PTE 2020-02 requires that the advice not put the adviser's interest "ahead of" or "subordinate" the retirement investor's interest.

- The PTE 2020-02 formulation is an ERISA fiduciary standard just as rigorous as the BICE formulation.
  - » Proponents of more regulation tend to prefer the BICE "without regard to" loyalty standard (borrowed from the Dodd-Frank Act), which per the BICE preamble incorporates the ERISA section 404 loyalty standard.
  - » The PTE 2020-02 loyalty standard produces the same result more directly by adopting the language of DOL's long-standing interpretation of the section 404 loyalty standard. It is exactly the same statutory fiduciary standard incorporated in BICE.
  - » The alignment of PTE 2020-02 and Regulation BI does not undermine that standard. Under the final preamble, the PTE 2020-02 standard is generally to be interpreted and applied "consistently" with SEC standards. DOL specifically declined to make SEC compliance a safe harbor, however, and will make its own judgments, on the facts and circumstances, whether or not SEC compliance is sufficient under the ERISA statutory loyalty standard embedded in PTE 2020-02.

Conclusion

While the best interest issue is an important one as a matter of perceived integrity, it at worst costs the private retirement system (by DOL's 2016 estimate) no more than 0.0025% of its assets annually and is far less material to the success of the retirement system than other regulatory priorities.

Nonetheless, in the service of getting the best interest issue right, DOL has already undertaken three separate rulemakings across two Administrations. This process has created uncertainty in the regulated community for more than a decade. DOL is currently asking that community again to expend resources – on top of (i) the costs of a regulatory process that has already included three hearings and eleven rounds of comment letters, and (ii) the estimated $5 billion expended on Rule 2.0 compliance before it was vacated – to operationalize compliance with Rule 3.0 on a tight schedule, with no assurance that DOL will hold to the conditions of that exemption as adopted. Indeed, DOL is affirmatively promising a continuing reexamination of its approach.

Consider what DOL has already accomplished in Rule 3.0. It has:

- Imposed fiduciary status on financial service providers in circumstances that inherently give rise to prohibited conflicts the providers are obliged to address; and
- Adopted a robust PTE on terms equivalent to the BICE, to govern the conduct of providers in addressing that newly prohibited conflict.

On reflection, DOL surely will appreciate there is no good purpose to be served in modifying the conditions of PTE 2020-02 shortly after requiring financial services providers to go to the time and expense of implementing them, particularly if there is no empirical record over a meaningful time period demonstrating that retirement investors are being significantly disserved notwithstanding the range of more rigorous standards of care and loyalty to which providers are now subject. And surely it is not constructive to again go through the process of adding impartial conduct standards to class PTE's other than PTE 2020-02, as vacated Rule 2.0 did; the only consequence of such an amendment is to make ERISA section 404(a) standards applicable in the IRA setting contrary to the legislative scheme, and the Fifth Circuit has already addressed and rejected that gambit.

Rule 3.0 provides a regulatory approach that can responsibly bring finality to this process. There is nothing to be gained in continuing to churn this debate.

Side-by-Side Comparison

	Full BIC Exemption	PTE 2020-02	Observations
Scope of Relief			
Receipt of compensation	Permitted compensation includes "many forms of compensation that would otherwise be prohibited, including, inter alia, commissions, trailing commissions, sales loads, 12b-1 fees, and revenue-sharing payments from investment providers or other third parties," and also including differential compensation.	This exemption also is not prescriptive as to the form of compensation.	Through their conditions and preambles, both exemptions disallow time-limited sales contests linked to specific investments or products.
By a			
– **Financial Institution**	An entity that is: – a registered investment adviser, – a bank or similar institution, – an insurance company, or – a broker or dealer, Each meeting certain requirements, or – an entity that is described in the definition of Financial Institution in an individual PTE; And that "employs or otherwise retains" an Adviser.	An entity that is: – a registered investment adviser, – a bank or similar institution, – an insurance company, or – a broker or dealer, Each meeting certain requirements, And that: (i) Employs or retains the Investment Professional; and (ii) Is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority or self-regulatory organization (SRO).	Between the disqualification language in this definition and the ineligibility provision described below, PTE 2020-02 tightens the qualifications for Financial Institutions to make use of the exemption.
– **Its investment/ insurance professionals**	An "Adviser" is an individual who is: – a fiduciary solely by reason of providing investment advice; – an employee, independent contractor, agent or registered representative of a "Financial Institution"; and – appropriately licensed under applicable law for the advice to be given.	An "Investment Professional" is a fiduciary of a Plan or IRA by reason of providing investment advice with respect to the assets of the Plan or IRA involved in the recommended transaction, who: – is an employee, independent contractor, agent or representative of a Financial Institution, – satisfies applicable regulatory and licensing requirements with respect to the covered transaction, and – is not disqualified or barred from making investment recommendations by any financial services authority or SRO.	This definition is similarly tightened in PTE 2020-02.

– **Or its affiliates or related parties**	"Affiliate" includes certain persons that meet a control definition; officers, directors, employees and certain other persons associated with the Adviser or Financial Institution; and corporations or partnerships of which the Adviser or Financial Institution is an officer, director or partner. A "Related Entity" is any entity other than an Affiliate in which the Adviser or Financial Institution has an interest that may affect the exercise of its best judgment as a fiduciary.	"Affiliate" includes certain persons that meet a control definition; officers, directors, employees and certain other persons associated with the Investment Professional or Financial Institution; and corporations or partnerships of which the Investment Professional or Financial Institution is an officer, director or partner. A "Related Entity" is any entity other than an Affiliate in which the Adviser or Financial Institution has an interest that may affect the exercise of its best judgment as a fiduciary.	These definitions are identical.
In respect of investment advice provided to a Retirement Investor	A "Retirement Investor" is: – an ERISA plan participant or beneficiary in a participant-directed plan; – the beneficial owner of an IRA; and – a "Retail Fiduciary" of an ERISA plan or IRA (an independent fiduciary with specified financial expertise).	A "Retirement Investor" is: – 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.	The PTE 2020-02 Plan and IRA definitions are broader than in BICE and encompass certain arrangements other than retirement income programs.
Unless specifically excluded	The exemption does not apply with regard to: – plans sponsored by the Adviser, Financial Institution or an Affiliate, or for which it is a named fiduciary or plan administrator, – most "robo-advice," and – situations where the Adviser has discretionary authority or control with regard to the recommended transaction.	The exemption does not apply with regard to: – ERISA plans sponsored by the Adviser, Financial Institution or an Affiliate, or for which it is a named fiduciary or plan administrator, – "robo-advice" provided without the personal interaction or advice of an Investment Professional, and – transactions where the Investment Professional is acting in a fiduciary capacity other than as an investment advice fiduciary.	The exclusions in the two exemptions are substantially similar, with some refinement in PTE 2020-02.

Ineligibility	No comparable provision.	Financial Institutions and Investment Professionals could lose eligibility to rely on the 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 exemption, including: – systematically or intentionally violating its conditions; or – providing materially misleading information to DOL with respect to compliance with the exemption.	This provision in PTE 2020-02 is a new and important restriction on the availability of the exemption.

That is, the scope of relief and forms of compensation conditionally permitted under both exemptions are materially identical, except that PTE 2020-02 adds new exclusions for financial institutions and advisers that have been disqualified by another regulator or convicted of certain financial crimes, or have abused the exemption. On this point, PTE 2020-02 is more protective of retirement investors than BICE.

	Full BIC Exemption	PTE 2020-02	Observations
Impartial Conduct Standards			
"Best interest" standard of care	The Adviser's recommendation 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.	The investment advice 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.	The standards of care are based on the ERISA statutory prudence standard and are substantively identical. Under both exemptions, the ERISA prudence standard is extended to advisers providing advice with respect to IRAs – a standard which would otherwise be inapplicable but for being a condition of the exemption.
"Best interest" standard of loyalty	The Adviser's recommendation is based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution, Affiliate, Related Entity or any other person.	The investment advice 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.	As stated in its preamble, PTE 2020-02 adopts the formulation DOL has historically used to describe the ERISA section 404 loyalty standard, which also is inapplicable to IRAs absent the exemption.
Reasonable compensation standard	At the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Adviser, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation.	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).	The reasonable compensation standard is substantively identical, except that best execution is explicitly incorporated in PTE 2020-02.
Anti-fraud standard	Statements by the Financial Institution and Adviser to the Retirement Investor about the recommended transaction, fees and compensation; material conflicts of interest; and any other matters relevant to a Retirement Investor's investment decisions, are not materially misleading when made.	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 the statements are made, materially misleading.	This condition in PTE 2020-02 is expressed in less granular terms, but the preamble explains that "other matters" include each of the items specified in BICE.

There is no material difference between the exemptions in their care, reasonable compensation and anti-fraud standards. Only the formulation of the loyalty standard – the "without regard to" standard of BICE and the traditional ERISA standard in PTE 2020-02 – requires further consideration.

BICE borrowed the "without regard to" formulation from the Dodd-Frank Act (which by its terms does not affect ERISA) prior to the adoption of Regulation BI. As explained in the BICE preamble, DOL intended this formulation to incorporate the section 404 loyalty standard generally applicable to ERISA fiduciaries.

> The Best Interest Standard, as set forth in the exemption, is intended effectively to incorporate the objective standards of care and undivided loyalty that have been applied under ERISA for more than forty years.... The Department additionally confirms its intent that the phrase "without regard to" be given the same meaning as the language in ERISA section 404 that requires a fiduciary to act "solely in the interest" of participants and beneficiaries, as such standard has been interpreted by the Department and the courts.

Alternatively, the PTE 2020-02 loyalty standard directly adopts the language long used by DOL to explicate the section 404 standard. As that preamble states:

> The Department also disagrees with the suggestion that the [PTE 2020-02] best interest standard is not a "true" fiduciary standard. The Department acknowledges that the Best Interest Contract Exemption and other exemptions granted in association with the 2016 fiduciary rule used a loyalty formulation of "without regard to," which was described as "a concise expression of Title I's duty of loyalty, as expressed in section 404(a)(1)(A) of ERISA and applied in the context of advice." In connection with concerns expressed by commenters on those exemptions, however, the Department had to provide specific confirmation that the standard was not so exacting as to prevent a fiduciary from being paid.... It is important to note that for decades the Department has also articulated the duty of loyalty in ERISA section 404 as prohibiting a fiduciary from "subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives."...
>
> As set forth above, the Department does not believe there is a distinction between ERISA's section 404 standards of prudence and loyalty and the Impartial Conduct Standards, given that the best interest standard includes a prudence obligation and the Department has in the past described the duty of loyalty as prohibiting fiduciaries from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives.

DOL actually made use of the non-subordination language in BICE in its policies and procedures condition, as a proxy for the loyalty standard. On this basis, the distinction in form between the two exemptions is without a difference in substance.

- There has been a recurring concern that the BICE formulation might be read to have additional "hidden" import beyond the section 404 statutory standard, e.g., a subjective element, which it might be argued disallows some or even all forms of compensation notwithstanding the balance of the exemption. While this outcome was not intended by DOL, the PTE 2020-02 formulation directly allays this concern.
- For the commentators concerned that the alignment of PTE 2020-02 with Regulation BI diluted the ERISA fiduciary standard, DOL similarly allayed that concern in the preamble to the final exemption. The PTE 2020-02 loyalty standard is to be interpreted "consistently" with Regulation BI, but SEC compliance is not a safe harbor, and DOL will make a facts and circumstances determination on whether any course of conduct reaches the statutory loyalty standard required by ERISA and PTE 2020-02.

In sum, there is no meaningful substantive difference in any of the impartial conduct standards of the BICE and PTE 2020-02.

	Full BIC Exemption	PTE 2020-02	Observations
Conditions in Support of the Impartial Conduct Standards			
BIC contract	Required in the case of IRAs, to create private rights of action to enforce these conditions.	No comparable provision.	The Fifth Circuit decision specifically disallowed such a condition.
Policies and procedures	The Financial Institution adopts, monitors, implements, warrants and adheres to policies and procedures and incentive practices reasonably and prudently designed to adhere to the foregoing standards. In formulating its policies and procedures, the Financial Institution identifies and documents its material conflicts of interest and adopts measures reasonably and prudently designed to prevent material conflicts of interest from causing violation of these standards. Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity uses or relies on compensation or performance actions or incentives that would cause an Adviser to violate the Impartial Conduct Standards, provided that differential compensation that does not misalign the interests of the Adviser and the Retirement Investor (e.g., because it is based on neutral factors) is permissible.	The Financial Institution establishes, maintains and enforces written policies and procedures: – prudently designed to ensure the Financial Institution and its Investment Professionals comply with the foregoing standards, and – that mitigate conflicts of interest to the 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.	The formulation of the policies and procedures condition in PTE 2020-02 is largely a condensed version of the corresponding provision in BICE.
Documentation generally	The Financial Institution documents in writing: – its limitations on the universe of recommended investments; – its material conflicts of interest; – its reasonable conclusion that the foregoing will not cause violations of the care or reasonable compensation standards; – any services it will provide to Retirement Investors or any other party in exchange for third-party payments; and – the basis for its conclusions.	No comparable provision.	BICE requires this specific documentation, while PTE 2020-02 leaves it to the determination of the Financial Institution.

Documentation of rollover advice	No comparable provision, other than in the specific exemption for level-fee fiduciaries.	Policies and procedures must require documentation of the specific reasons why a rollover is in the best interests of the Retirement Investor and must reflect: – consideration of alternatives to the rollover; – 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 – differences in services and investments available under the plan and the IRA.	PTE 2020-02 requires this specific documentation, while BICE leaves it to the determination of the Financial Institution.
Annual compliance review	No comparable provision.	The Financial Institution must 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. The officer is required to certify that the Financial Institution has in place policies and procedures prudently designed to achieve compliance with the exemption and to update and test these policies and procedures.	PTE 2020-02 requires this specific review, while BICE includes a less granular monitoring requirement as part of its policies and procedures condition.

The policies and procedures, documentation, and compliance review conditions of the exemptions are the means by which the Impartial Conduct Standards are effectuated. Both exemptions generally take a principles-based approach to these conditions, but then add granular detail on specific points.

- The overarching policies and procedures condition in both exemptions requires policies and practices that are prudently designed to produce compliance with the Impartial Conduct Standards and to mitigate conflicts of interest. In form, the BICE states this condition in more fulsome terms than PTE 2020-02, and then reiterates specifically that the Financial Institution may not use compensation or performance practices to misalign the interests of advisers and retirement investors.
- BICE is more prescriptive in how Financial Institutions document prospective compliance with the policies and procedures condition, while PTE 2020-02 is more prescriptive with respect to retrospective documentation of compliance.
  - » BICE requires Financial Institutions to "show their homework" and document in specific ways the backup for their policies and procedures as constructed. PTE 2020-02 leaves it to each Financial Institution to determine how best to document the prudent construction of its policies and procedures.
  - » Conversely, PTE 2020-02 requires Financial Institutions to conduct a specific annual compliance review, which BICE covers only with a general monitoring requirement.
- PTE 2020-02 requires specific documentation of rollover advice. BICE requires such documentation only under its special rule for level-fee fiduciaries, although of course well-advised Financial Institutions regularly included such documentation as part of their full BICE compliance programs.

While the two exemptions reflect different choices on the points for which principles-based regulation is appropriate and for which the exemption should be more prescriptive, these conditions cover the same ground, and the compliance programs and practices Financial Institutions would adopt under either exemption would be comparable in scope and effect.

	Full BIC Exemption	PTE 2020-02	Observations
Disclosures			
Fiduciary acknowledgment	The Financial Institution affirmatively states in writing that it and its Advisers are fiduciaries with respect to investment advice they provide.	The Financial Institution provides a written acknowledgment that it and its Investment Professionals are fiduciaries with respect to investment advice they provide.	These requirements are materially identical.
Other advance written disclosure	Before or at the same time as the execution of the recommended transaction, the Retirement Investor is clearly and prominently informed in writing: – that the Financial Institution offers proprietary products or receives third-party payments; – of the limitations placed on the universe of investments that the Adviser may recommend to the Retirement Investor, including specific disclosure of the extent to which recommendations are, in fact, limited on that basis; and – of any material conflicts of interest that the Financial Institution or Adviser has with respect to the recommended transaction.	Prior to engaging in a transaction pursuant to the exemption, the Financial Institution provides to the Retirement Investor: – a written description, accurate in all respects, of the services to be provided and the Financial Institution's and Investment Professional's material conflicts of interest; and – if applicable, documentation of specific reasons for a rollover recommendation.	The advance disclosure condition of PTE 2020-02 is less granular than the comparable BICE condition, other than in its requirement of rollover documentation.
Website disclosure	The Financial Institution must maintain a webpage, open to the general public and updated at least quarterly, that contains: – a description of its business model and material conflicts of interest; – a model contract for services; – a schedule of typical account or contract fees and service charges; – a written description of the financial institution's policies and procedures described above; – if applicable, a list of all product manufacturers and other parties that provide third-party payments and related information; and – disclosure of the Financial Institution's compensation and incentive arrangements with Advisers.	No comparable condition.	This BICE condition raises a number of privacy concerns.

Transaction disclosure	Before or at the same time as execution of the recommended investment, the Financial Institution must disclose to the Retirement Investor in a single written document: – the best interest standard and any material conflicts of interest; – costs, fees and other compensation, including third-party payments regarding recommended transactions; – the Retirement Investor's right to obtain copies of the Financial Institution's written description of its policies and procedures; and – a link to the Financial Institution's public website.	No comparable condition.	The preamble to PTE 2020-02 contains model language that can be used to explain the best interest standard. Much of the additional disclosure required by BICE may be duplicative of information provided in other required disclosure documents.
Disclosure to DOL	Before receiving compensation in reliance on the BICE, the Financial Institution must provide a one-time notification to DOL of its intent to rely on the exemption.	No comparable provision.	To utilize the self-correction procedure of PTE 2020-02, described below, the Financial Institution must provide notification to DOL.

There is a substantial difference in the disclosure requirements of the two exemptions.

– Both exemptions require (i) written acknowledgment of fiduciary status and (ii) advance written disclosure to the Retirement Investor, on terms that both overlap and differ in certain respects.

– The BICE goes on to require (iii) unprecedented website disclosure available to the public at large and (iv) transaction-specific disclosures. Conflicts disclosure is repeated in each of the latter three disclosures under BICE.

	Full BIC Exemption	PTE 2020-02	Observations
Other Provisions			
Recordkeeping and access	The Financial Institution must maintain certain records for six years and, subject to certain limitations, provide reasonable access during normal business hours to designated persons, including (a) DOL or IRS; and (b) participants or IRA owners (or their representatives).	The Financial Institution must maintain certain records for six years and, subject to certain limitations, provide reasonable access during normal business hours to DOL or IRS.	The only difference in substance is access by plan fiduciaries and participants, consistent with DOL's intent not to impermissibly create private rights of action through PTE 2020-02.
Self-correction	No comparable provision.	Violation of the conditions of the exemption will not be considered to result in a non-exempt prohibited transaction if: – 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; – the correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; – the Financial Institution corrects the violation and notifies DOL within 30 days of correction; and – the Financial Institution notifies the persons responsible for conducting the annual compliance review and includes the violation and correction in the written report of the review.	This self-correction process is protective of Retirement Investors. To take advantage of it, the Retirement Investor must be made whole for any losses.

The self-correction procedure is a material improvement in PTE 2020-02 that conserves DOL enforcement resources, incents a vigorous compliance and monitoring program by Financial Institutions, and timely cures any losses to Retirement Investors.