The Department of Labor's Investment Advice Fiduciary Rule Broadens Who Is a Fiduciary

May 15, 2024

On April 23, 2024, the Department of Labor ("DOL") released its final investment advice fiduciary rule, titled the Retirement Security Rule (the "Final Rule"), which re-defines who is a fiduciary on account of providing investment advice to workplace retirement plans and individual retirement accounts ("IRAs"). In addition, the DOL released several amended DOL prohibited transaction exemptions that, together with the Final Rule, are "intended to protect the interests of retirement investors by requiring persons who are defined in the Final Rule as investment advice fiduciaries to adhere to stringent conduct standards and mitigate their conflicts of interest." The Final Rule and the amended exemptions finalize the proposed investment advice fiduciary rule and proposed amendments to the prohibited transaction exemptions, which the DOL issued on October 31, 2023. The Final Rule narrows certain provisions in the proposed rule that some commentators and industry groups argued were overly broad. The Final Rule and the amended prohibited transaction exemptions will become effective on September 23, 2024, except that certain provisions in the amended exemptions will not be phased in until one year after such effective date.

The Final Rule will cause certain persons, including many broker-dealers, investment managers, investment advisers, banks, insurance companies, and other financial institutions and investment professionals, who were not previously deemed to be a fiduciary, to be a fiduciary under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Internal Revenue Code of 1986, as amended (the "Code"), on account of providing "investment advice" to "Retirement Investors." Under the Final Rule, "Retirement Investors" include workplace retirement plans, plan participants or beneficiaries, individual retirement accounts, IRA owners or beneficiaries and plan fiduciaries and IRA fiduciaries who have discretionary authority with respect to the investment or management of a plan's or IRA's assets. Thus, the provision of "investment advice" for a fee or other compensation to any of these parties could cause the person that provides such advice to be a fiduciary, which could subject the person to certain fiduciary requirements and ERISA's and the Code's prohibited transaction rules (*i.e.,* the receipt of compensation by a fiduciary from the Retirement Investor may be prohibited). Accordingly, unless the conditions of a prohibited transaction exemption ("PTE") are satisfied, a provider of investment advice to a Retirement Investor is prohibited from receiving certain fees and compensation when it, for example, recommends to the Retirement Investor to purchase, sell, or hold certain stocks, bonds, mutual funds, unit investment trusts, ETFs or other investment property.

The DOL, simultaneously with the Final Rule, issued final amendments to several of the DOL's existing prohibited transaction exemptions, including the exemptions covering sales of various investment products to Retirement Investors. While the Final Rule will expand ERISA's and the Code's current definition of fiduciary and, therefore, is expected to bring many investment professionals within the coverage of ERISA for the first time, compliance with the prohibited transaction exemptions, and in particular PTE 2020-02,[1] should resemble in many respects (but not all) compliance with the Securities and Exchange Commission's (the "SEC's") Regulation Best Interest, which has already been applicable to broker-dealers since mid-2020 and applies to investment recommendations provided by broker-dealers to retail customers.

Final Rule Redefines the DOL's Definition of Investment Advice Fiduciary

In 2018, after the U.S Court of Appeals for the Fifth Circuit in *Chamber of Commerce v. United States Department of Labor* [2] vacated the DOL's prior attempt to expand the scope of the definition of fiduciary, the DOL's 1975 regulations that defined an investment advice "fiduciary" by using a five-part test to determine whether a person is providing "investment advice" was reinstated (the "1975 Test"). Under the 1975 Test, because the provision of advice by many investment professionals often failed to satisfy certain parts of the 1975 Test (including the "regular basis" part of the 1975 Test), many investment professionals were not treated as investment advice fiduciaries for ERISA purposes. For example, under the 1975 Test, persons who provided one-time advice with respect to retirement plan rollovers or a particular investment would not have been investment advice fiduciaries. In its preamble to the Final Rule (the "Preamble"), the DOL provided that the retirement plan landscape has changed significantly, with a shift from defined

benefit plans (in which decisions regarding investment of plan assets are primarily made by professional asset managers) to defined contribution plans/individual account plans, such as 401(k) plans (in which decisions regarding investment of plan assets are often made by plan participants who lack professional investment expertise). The DOL said that in 1975, IRAs had only recently been created and 401(k) plans did not exist. Now, with IRAs and plans providing for participant-directed investments and rollovers from workplace plans to IRAs being commonplace, individuals have increasingly become direct recipients of investment advice often involving complex financial products.

Final Rule

Investment Advice. Under the Final Rule, a person will provide investment advice if they make a “recommendation” of any investment transaction or investment strategy to a Retirement Investor and either of the following is satisfied:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes a professional investment recommendation to Retirement Investors on a regular basis as part of their business and the recommendation (1) is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the Retirement Investor’s particular needs or individual circumstances, (2) reflects the application of professional or expert judgment to the Retirement Investor’s particular needs or individual circumstances, and (3) may be relied upon by the Retirement Investor as intended to advance the Retirement Investor’s best interest; or

- The person represents or acknowledges that they are acting as a fiduciary under ERISA.

The Final Rule’s changes to the 1975 Test have the effect of significantly expanding the persons who will be a fiduciary on account of providing investment advice. The Final Rule no longer requires the person to provide advice on a “regular basis” to the Retirement Investor. Instead, under the Final Rule, the person only has to make investment recommendations “on a regular basis as part of their business.” This means that there no longer needs to be a continuing relationship between the person and the Retirement Investor. In fact, the test under the Final Rule essentially would look to the person’s or their firm’s business and cause any person who is employed by, or otherwise represents, a firm that provides investment advice to be a fiduciary, regardless of the person’s continued or past relationship with the Retirement Investor. In addition, the Final Rule no longer requires the advice to be provided pursuant to a mutual agreement, arrangement, or understanding between the person and the Retirement Investor. Also, the advice need not serve as a *primary* basis for the investment decision, but simply must be understood by the Retirement Investor as intended to advance its best interest.

Importantly, the Final Rule requires that a recommendation must be made under circumstances would indicate to a reasonable investor in like circumstances that the recommendation is based on a review of the Retirement Investor’s particular needs or individual circumstances and the recommendation reflects the application of professional or expert judgment to the Retirement Investor’s particular needs or individual circumstances.

Recommendation. The Final Rule defines a recommendation as the recommendation of any securities transaction or investment strategy as to:

- The advisability of acquiring, holding, disposing of, or exchanging, securities or investment property or how securities or investment property should be invested after they are rolled over, transferred, or distributed from a plan or IRA;

- The management of securities or other investment property, including recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage vs. advisory), or voting of proxies; and

- Rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such rollover, transfer, or distribution.

In its preamble to the Final Rule (the "Preamble"), the DOL indicated that whether a person has made a recommendation will turn on the facts and circumstances of the particular circumstances, including whether the communication reasonably could be viewed as a "call to action." The more individually tailored the communication to a specific customer, the greater the likelihood that the communication may be viewed as a recommendation. This approach was adopted by the SEC in Regulation Best Interest. The DOL indicated that it intended that the determination of whether a "recommendation" occurred will be interpreted consistent with the SEC's framework.

Fee or Other Compensation. In addition, to be an investment advice fiduciary, the Final Rule requires that the person (or an affiliate) receives a fee or other compensation, direct or indirect, for providing investment advice to the Retirement Investor. Such fee or other compensation is very broadly defined to include, but not be limited to, any explicit fee or compensation, from any source, in connection with or as a result of the recommended purchase, sale or holding of an investment product, including commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer, expense reimbursements, gifts and gratuities, or other non-cash compensation.

Includes One-Time Recommendations. As provided above, the Final Rule will result in many investment professionals being deemed investment advice fiduciaries who may not have been a fiduciary under the 1975 Rule. For example, broker-dealers, insurance agents and investment advisers may now be considered investment advice fiduciaries even if their recommendation is provided on a one-time basis, such as, for example, whether or where to roll over assets from a workplace retirement plan to an IRA or whether to invest in a particular investment product or strategy.

Wholesalers and Salespersons. Although the Final Rule does not include a specific exception for wholesalers or salespersons, it includes a paragraph providing that a salesperson's recommendation to purchase a particular investment or pursue a particular investment strategy is not investment advice if the recommendation does not otherwise satisfy the investment advice requirements, including the requirement that a reasonable investor would perceive that the recommendation was individualized to a Retirement Investor's individual needs or particular circumstances and may be relied on by the Retirement Investor to advance its best interest. In the Preamble, the DOL specifically rejected including a carve-out from providing investment advice for interactions between wholesalers or salespersons and sophisticated parties, such as broker-dealers. Instead, the DOL indicated that a facts and circumstances test should apply and it is appropriate to consider whether a reasonable investor in like circumstances would perceive that the recommendation was individualized to a Retirement Investor's individual needs or particular circumstances and would rely on the recommendation as intended to advance the investor's best interest. Also, helpful to wholesalers and salespersons is that the Final Rule defines "Retirement Investor" to only include plan and IRA fiduciaries who have discretionary authority and control to invest the plan's or IRA's assets (i.e., as defined in the Final Rule, "Retirement Investor" does not include investment advice fiduciaries). The DOL's rationale is that investment advice fiduciaries (*i.e.,* fiduciaries who do not have investment or management discretion) do not have the authority or control to implement a recommendation. The DOL further provided that information or education, without a recommendation, would not result in a wholesaler or salesperson providing investment advice. Accordingly, wholesalers and salespersons must be careful when they are distributing or discussing investment products to a person with discretionary investment authority, such as an investment adviser representative, to not make recommendations that a reasonable investor would believe are based on the individual needs and circumstances of a plan or IRA. On the other hand, if the person to whom they are discussing their products is an investment advice fiduciary, who does not have discretionary investment or management authority over a plan or IRA, even if the recommendations from the wholesaler or salesperson is individualized, such recommendations should not cause the wholesaler or salesperson to be an investment advice fiduciary under the Final Rule.

Disclaimers. The Final Rule along with the Preamble make clear that disclaimers may be used to define the parties' relationships so long as written statements disclaiming fiduciary status are consistent with the person's oral or other written communications, marketing materials, applicable law, or other interactions. Thus, investment professionals may rely on disclaimers, but must exercise care to ensure that their actions and communications are consistent with their disclaimer of fiduciary responsibility and do not rise to a recommendation that a reasonable investor would, based on the circumstances, believe that the recommendation is based on an investor's individual needs. A

wholesaler or a salesperson (or any investment professional, for that matter) cannot receive significant information about an individual Retirement Investor and simply disclaim that they are making a recommendation based on an investor's individual circumstances. Nevertheless, it may be helpful for wholesalers and salespersons to include certain disclaimers in their written materials, limit the materials to financial adviser use only, and to have a conversation with the person with whom they are speaking that their conversation is intended only as a sales or wholesaling conversation and not a recommendation to invest in a specific product. Together, this approach arguably would increase the likelihood that a reasonable investor would look at the circumstances and not consider a sales presentation to be a recommendation.

"Hire Me". Noting that recommendations of other investment advisers or managers are no different than recommending a particular investment that the plan should acquire, the DOL provided that it is not suggesting in the Final Rule that a person could become a fiduciary merely by engaging in the normal activity of marketing its own services as an investment adviser or manager or touting the quality of its own advisory or investment management services (*i.e.,* "hire me"). However, the DOL went on to provide that while he or she does not become an investment advice fiduciary by touting their own services or providing other information, to the extent that "hire me" communications include covered investment recommendations (such as particular investment strategies or an investment fund that the investment professional would use or favors), the investment professional could become an investment advice fiduciary. For example, if an investment professional's sales pitch includes individualized recommendations on how to design an entire portfolio or whether to roll over assets into an IRA or how to invest such assets, such recommendations could cross the line and cause the investment professional to be an investment advice fiduciary under the Final Rule. Accordingly, in the course of its sales pitch, the investment professional should be careful not to, for example, recommend that the Retirement Investor enter into an advisory relationship, withdraw funds out of a retirement plan or invest in a particular type of investment.

Platform Providers. Platform providers, who provide a selection of investment alternatives which are made available to Retirement Investors, and who merely identify investment alternatives using objective third-party financial or other criteria, without additional screening or recommendations based on the interests of the particular plan or IRA investors, will not be deemed to be investment advice fiduciaries. In determining whether a platform provider is an investment advice fiduciary because it is deemed to make a recommendation will turn on certain facts, including whether and to what degree the recommendation is individually tailored to the Retirement Investor or how selective the list of investment alternatives is even if no recommendation is made with respect to any one alternative. The analysis of whether the provider provided a recommendation may turn on whether the platform provider presents the investment alternatives as having been selected specifically for the Retirement Investor.

Conflicts of Interest Prohibited Transactions and DOL Exemption

Conflict of Interest Prohibited Transactions. ERISA and the Code generally prohibit fiduciaries from engaging in "prohibited transactions" in which they have a conflict of interest. Such prohibited transactions include the following:

- A fiduciary dealing with a plan's or IRA's assets in the fiduciary's own interest;
- A fiduciary receiving consideration from a third-party dealing with the retirement plan or IRA; or
- A fiduciary causing the retirement plan or IRA to engage in a transaction involving a "party-in-interest" under ERISA or, in the case of an IRA, a "disqualified person" under the Code (i.e., certain parties related to the retirement plan or IRA).

Accordingly, under the prohibited transaction rules, if a person is an investment advice fiduciary under the Final Rule, such person will not be able to receive certain compensation that varies based on the fiduciary's investment advice or compensation paid from third parties.

Exemptions. The DOL has issued certain PTEs to prevent a fiduciary's receipt of compensation from being prohibited under ERISA or the Code. Such exemptions provide protections for the Retirement Investor. Under the exemptions, a fiduciary may receive certain compensation (directly from the Retirement Investor or indirectly from a

third-party) provided that the protective conditions in the prohibited transaction exemption are satisfied. As provided above, along with the Final Rule, the DOL released amendments to several of its existing PTEs.[3]

PTE 2020-02 Generally. The most likely prohibited transaction exemption on which an investment advice fiduciary will rely to exempt the receipt of certain compensation from being prohibited is PTE 2020-02, which was originally issued on December 18, 2020. The DOL issued an amendment to PTE 2020-02 along with the Final Rule. In general, investment advice fiduciaries who rely on PTE 2020-02 must render advice that satisfies certain “impartial conduct standards” and meets certain other requirements in order to receive compensation that would otherwise be prohibited in the absence of an exemption. PTE 2020-02 expressly exempts prohibited transactions resulting from both advice on how to invest assets and rollover advice. It allows investment advice fiduciaries to receive reasonable compensation that would include, but is not limited to, fees and compensation from any source, in connection with or as a result of the recommended purchase, sale or holding of an investment product, including commissions, loads, finder’s fees, revenue sharing payments, shareholder servicing fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative’s new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation.

PTE 2020-02 requires that fiduciary advice providers adhere to stringent standards designed to ensure that their investment recommendations reflect the best interest of Retirement Investors. Many of the conditions in PTE 2020-02 are similar to the SEC’s Regulation Best Interest applicable to investment advice provided by broker-dealers to retail customers.[4] In fact, in its preamble to PTE 2020-02 (the “PTE Preamble”), the DOL indicated that it has designed PTE 2020-02 in a manner that should place financial institutions that have already built robust compliance structures in compliance with Regulation Best Interest in a strong position to comply with the closely aligned conditions of PTE 2020-02. PTE 2020-02’s conditions are described below.

Impartial Conduct Standards. “Investment professionals” and “financial institutions” must comply with Impartial Conduct Standards, which requires them to:

- Investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor (the “Care Obligation”);
- Never place their own interests ahead of the Retirement Investor’s interest, or subordinate the Retirement Investor’s interests to their own (the “Loyalty Obligation”);
- Charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding “best execution;” and
- Avoid making misleading statements or omissions about investment transactions and other relevant matters.

With respect to the Loyalty Obligation, in the PTE Preamble, the DOL emphasized that the Loyalty Obligation does not foreclose investment professionals and financial institutions from being paid on a transactional basis or from recommending proprietary products or products that generate third-party payments. Investment professionals and financial institutions are entitled to receive reasonable compensation that is fairly disclosed for their services.

With respect to the “reasonable compensation” standard, the DOL requires that the compensation received by investment professionals and financial institutions not be excessive, as measured by the market value of the particular services, rights, and benefits the investment professional and financial institution are delivering to the Retirement Investor.

Other Conditions Required in PTE 2020-02. In addition to the Impartial Conduct Standards and certain other requirements, PTE 2020-02 requires financial institutions and investment professionals to:

- Provide a written acknowledgement of their fiduciary status at or prior to the time the transaction occurs;

- Provide a written statement of the Care Obligation and Loyalty Obligation owed by the investment professional and financial institution to the Retirement Investor;
- Provide a written description of all of the material facts relating to the scope and terms of the relationship, including (1) the material fees and costs that apply to the Retirement Investor's transactions, holdings and accounts and (2) the type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor;
- Provide a written disclosure of all material facts relating to any conflicts of interest that are associated with the recommendation;
- Document and disclose the specific reasons that any rollover recommendations are in the Retirement Investor's best interest. Relevant factors to consider must include but are not limited to:
  - The alternatives to a rollover, including leaving the money in the retirement plan or account type, as applicable;
  - The fees and expenses associated with the retirement plan and the recommended investment or account;
  - Whether an employer or other party pays for some or all of the retirement plan's administrative expenses; and
  - The different levels of services and investments available under the retirement plan and the recommended investment or account.
- Establish, maintain, and enforce written policies and procedures prudently designed to ensure compliance with the impartial Conduct Standards and other conditions of PTE 2020-02 and to mitigate conflicts of interest that could otherwise cause violations of those standards; and
- Conduct an annual retrospective compliance review that is reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of PTE 2020-02. As part of its review, the fiduciary must consider whether it has filed (or will file timely, including extensions) Internal Revenue Service Form 5330 to report any non-exempt prohibited transactions discovered by the financial institution in connection with investment advice, correct those transactions, and pay any resulting excise taxes owed under the Code. Such retrospective review must be certified annually by a "senior executive officer."

The DOL has provided model language that a financial institution may use to satisfy the fiduciary disclosure requirement and the disclosure requirement related to the Care Obligation and the Loyalty Obligation. The DOL did not provided model language regarding the other disclosure requirements because the information that is required to be disclosed for those requirements is unique to each financial institution.[5]

Timing and Our Early Thoughts

The Final Rule is applicable to investment advice provided on or after September 23, 2024. Similarly, PTE 2020-02 is also effective on September 23, 2024. However, PTE 2020-02 provides a one-year phase-in period. During such phase-in period, exemptive relief for the receipt of compensation in connection with the provision of investment advice is available so long as the Impartial Conduct Standards and fiduciary acknowledgement conditions of PTE 2020-02 are satisfied.

Even though the DOL has tried to tailor its changes in a way that considers and alleviates the concerns raised by the Fifth Circuit when it vacated the DOL's prior rule in 2018 and has attempted to narrow the proposed rule, certain industry groups, some commentators and legislators have criticized the substance of the Final Rule, questioning among other things, whether there is a real need for the changes and whether the Final Rule ultimately rehashes the prior rule that was vacated by the Fifth Circuit. Concerns have also been raised regarding the DOL's exceptionally abbreviated comment periods and regulatory process. Although these concerns may provoke future court challenges

of the Final Rule and exemption amendments,[6] given the relatively quick effective date, it would be prudent for financial institutions to start structuring their operations to either prevent them from being an investment advice fiduciary or, in the alternative, satisfying the conditions contained in PTE 2020-02.

We will continue to review the Final Rule and exemptions and follow any further guidance and comments from the DOL as well as other developments. As further issues arise or become clear and as currently unforeseen issues arise, we will keep clients informed so that you can make informed decisions as you structure your relationships with Retirement Investors.

For More Information

If you would like further information concerning the matters discussed in this article, please contact the attorney with whom you regularly work or visit us online at chapman.com.

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1 Although this alert focuses on PTE 2020-02, the DOL also amended and simultaneously with the Final Rule issued PTEs 75-1 (relating to Underwritings, Market Making, and Extension of Credit in Connection with Securities Transactions), 77-4 (relating to Transactions Involving Registered Investment Companies), 80-23 (relating to Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness), 83-1 (relating to Certain Transactions Involving Mortgage Pool Investment Trusts), 84-24 (relating to Transactions Involving Insurance Products and Investment Company Securities), and 86-128 (relating to Securities Transactions Involving Broker-Dealers).

2 885 F.3d 360 (5th Cir. 2018).

3 See footnote 1 above.

4 See attached *Exhibit A* comparing PTE 2020-02 with Regulation Best Interest.

5 The model disclosure language follows:

We are making investment recommendations to you regarding your retirement plan account or individual retirement account as 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 or otherwise are compensated creates some conflicts with your financial 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.

Under this special rule's provisions, we must:

- *Meet a professional standard of care when making investment recommendations (give prudent advice) to you;*
- *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 what is reasonable for our services; and*
- *Give you basic information about our conflicts of interest.*

6 As of the date of this Client Alert, one lawsuit has already been filed. On May 2, 2024, plaintiffs, including an advocacy group for independent insurance agents, the Federation of American for Consumer Choice, filed a lawsuit in the U.S. District for the Eastern District of Texas, which asks the court to strike down the Final Rule, arguing, among other things, that the DOL is reprising a similar attempt to broaden the definition of investment advice fiduciary that was vacated in *Chamber of Commerce v. United States Department of Labor*.

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To the extent that any part of this summary is interpreted to provide tax advice, (i) no taxpayer may rely upon this summary for the purposes of avoiding penalties, (ii) this summary may be interpreted for tax purposes as being prepared in connection with the promotion of the transactions described, and (iii) taxpayers should consult independent tax advisors.

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Exhibit A

Comparison of DOL's Prohibited Transaction Class Exemption 2020-02 to SEC's Regulation Best Interest

	Reliance on PTE 2020-02 (the "Exemption")	Compliance with Regulation Best Interest	Notable Harmonization and Differences
Covered Customers	Retirement Investors—a Plan (*e.g.,* a workplace retirement plan, such as a 401(k) plan), Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA or the Tax Code, or an IRA fiduciary within the meaning of the Tax Code.	Retail customer—a natural person, or the legal representative of such natural person, who: (A) receives a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer; and (B) uses the recommendation primarily for personal, family, or household purposes.	Both Regulation Best Interest and the Exemption apply to recommendations to plan participants and IRA owners, but Regulation Best Interest does not apply to recommendations to workplace retirement plan sponsors or plan fiduciaries.
Disclosure Obligations	Prior to or at the time of the later of the recommendation by the Investment Professional or Financial Institution or their receipt of compensation, the Financial Institution must provide to the Retirement Investor, in writing, the following: ▪ written acknowledgement of fiduciary status under ERISA and the Tax Code; ▪ written acknowledgement of the Care Obligation and the Loyalty Obligation (described below) that is owed to the Retirement Investor; ▪ all material facts related to the scope and terms of the relationship, including material fees and costs, type and scope of services and material conflicts of interest; and ▪ If applicable, a rollover disclosure (see below).	Prior to or at the time of the recommendation, a broker-dealer must provide to the retail customer, in writing, full and fair disclosure of all material facts related to the scope and terms of the relationship with the retail customer and all material facts relating to conflicts of interest that are associated with the recommendation. This includes a disclosure that the firm or representative is acting in a broker-dealer capacity, the material fees and costs the customer will incur, and the type and scope of the services to be provided, including any material limitations on the recommendations that could be made to the retail customer. Moreover, the broker-dealer must disclose all material facts relating to conflicts of interest associated with the recommendation that might incline a broker-dealer to make a recommendation that is not disinterested.	The DOL has indicated that it attempted to align the disclosure obligations in the Exemption with the disclosure obligations in Regulation Best Interest. Accordingly, but for the fiduciary acknowledgement (which does not apply under Regulation Best Interest), the disclosure requirements are similar. The DOL has provided model language that a Financial Institution may use to satisfy the first two bullet points (no model language was provided for the third and fourth bullet points because disclosure of such information will be different for each Financial Institution).

	Reliance on PTE 2020-02 (the "Exemption")	Compliance with Regulation Best Interest	Notable Harmonization and Differences
Impartial Conduct Standards/ Care Obligation	Investment Professionals and Financial Institutions must comply with Impartial Conduct Standards as follows: (1) the Care Obligation, (2) the Loyalty Obligation, (3) the receipt of reasonable compensation, and (4) the avoidance of making misleading statements. The Care Obligation requires Investment Professionals and Financial Institutions to investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (*i.e.,* their recommendations must be "prudent"). The Loyalty Obligation requires Investment Professionals and Financial Institutions to never place their interests ahead of the Retirement Investor or subordinate the Retirement Investor's interests to their own. Investment Professionals and Financial Institutions cannot charge more than reasonable compensation within the meaning of ERISA and the Tax Code and must seek to obtain best execution of the investment transaction reasonably available under the circumstances. Investment Professionals and Financial Institutions must avoid making misleading statements or omitting necessary information about investment transactions and other relevant matters.	A broker-dealer must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer. The broker-dealer must understand potential risks, rewards, and costs associated with the recommendation. The broker-dealer must then consider those risks, rewards, and costs in light of the customer's investment profile and have a reasonable basis to believe that the recommendation is in the customer's best interest and does not place the broker-dealer's interest ahead of the retail customer's interest. A broker-dealer should consider reasonable alternatives, if any, offered by the broker-dealer in determining whether it has a reasonable basis for making the recommendation. When recommending a series of transactions, the broker-dealer must have a reasonable basis to believe that the transactions taken together are not excessive, even if each is in the customer's best interest when viewed in isolation.	Regulation Best Interest does not use "prudence" in its Care Obligation. Nevertheless, the DOL has indicated in the Exemption's preamble that the DOL intends that its standards of care are consistent with Regulation Best Interest. Regulation Best Interest has no specific requirement regarding compensation, but broker-dealers are already required to receive only reasonable compensation. Under the DOL guidance, whether compensation is reasonable is generally a facts and circumstances determination. It must not be excessive, measured by the market value of particular services, rights, and benefits that are being delivered to the Retirement Investor. Neither rule requires that the lowest cost investment option be recommended, forecloses payment on a transactional basis, or restricts the investment in proprietary products. The DOL indicated that the "best execution" requirement under the Exemption is meant to be consistent with federal securities laws.

	Reliance on PTE 2020-02 (the "Exemption")	Compliance with Regulation Best Interest	Notable Harmonization and Differences
Conflicts of Interest	Investment Professionals and Financial Institutions must adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards (see above) and other Exemption conditions and to mitigate conflicts of interest that could otherwise cause violations of those standards. Specifically, the policies and procedures must 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 interest ahead of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, contests, special awards, differential compensation or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or the Loyalty Obligation.	A broker-dealer must establish, maintain, and enforce reasonably designed written policies and procedures addressing conflicts of interest associated with its recommendations to retail customers. These policies and procedures must be reasonably designed to identify all such conflicts and at a minimum disclose or eliminate them. Importantly, the policies and procedures must be reasonably designed to mitigate conflicts of interests that create an incentive for an associated person of the broker-dealer to place its interests or the interest of the firm ahead of the retail customer's interest. Moreover, when a broker-dealer places material limitations on recommendations that may be made to a retail customer (*e.g.,* offering only proprietary or other limited range of products), the policies and procedures must be reasonably designed to disclose the limitations and associated conflicts and to prevent the limitations from causing the associated person or broker-dealer from placing the associated person's or broker-dealer's interests ahead of the customer's interest. Finally, the policies and procedures must be reasonably designed to identify and eliminate sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited period of time.	The definition of "conflicts of interest" is similar under both the Exemption and Regulation Best Interest. The Exemption uses a principles-based approach and Regulation Best Interest uses a disclosure or elimination approach. Although the Exemption requires disclosure of the conflict, the Exemption's principles-based approach requires elimination of the conflict if a "reasonable person" would consider the conflict to be sufficiently mitigated such that the conflict does not create an incentive to place the Financial Institution ahead of the Retirement Investor. On the other hand, Regulation Best Interest broker-dealers may either disclose or, for certain types of conflicts, eliminate conflicts associated with a recommendation. The Exemption does not expressly prohibit certain sales contests and incentive programs, but uses a principles-based approach to determine whether such contests and programs should be prohibited. Regulation Best Interest requires the elimination of sales contests and incentive programs that are based on the sale of specific securities or specific types of securities within a limited period of time.

	Reliance on PTE 2020-02 (the "Exemption")	Compliance with Regulation Best Interest	Notable Harmonization and Differences
Policies and Procedures	Investment Advice fiduciaries must adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other Exemption conditions and to mitigate conflicts of interest that could otherwise cause violations of those standards. See "Conflicts of Interest" above for policies and procedures relating to mitigating conflicts of interest. Financial Institutions must provide their complete policies and procedures to the DOL upon request within 30 days of the request.	A broker-dealer must establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole.	Both rules require the adoption and maintenance of certain policies and procedures to address conflicts of interest. The Exemption also specifically requires policies and procedures to ensure compliance with the Impartial Conduct Standards and other Exemption requirements; whereas, Regulation Best Interest requires policies and procedures with the Regulation as a whole.
Rollover-Related Obligations	Retirement Investor fiduciaries must document and disclose the specific reasons that any rollover recommendations are in the Retirement Investor's best interest. Relevant factors to consider must include but are not limited to: ▪ the alternatives to a rollover, including leaving the money in the retirement plan, if applicable; ▪ the fees and expenses associated with the retirement plan and the recommended investment or account; ▪ whether an employer or other party pays for some or all of the retirement plan's administrative expenses; and ▪ the different levels of services and investments available under the retirement plan and the recommended investment or account.	The Best Interest standard applies to recommendations regarding account types, rollovers or transfers of assets in a workplace retirement plan account to an IRA, and recommendations to take a plan distribution. A staff bulletin published by the Securities and Exchange Commission in March 2022 noted that advisers must consider if a client would be better off keeping their assets in a retirement plan when recommending a rollover to an IRA. The bulletin indicated that it would be difficult to form a reasonable basis to believe that a rollover recommendation is in the retail investor's best interest and does not place the broker-dealer of his or her firm interests ahead of the retail investor's interest, if the broker-dealer does not consider the alternative of leaving the retail investor's investments in their employer's plan. The broker-dealer would need to obtain information about the existing plan, including the costs associated with the options available in the investor's current plan.	The factors that should be considered under both the Exemption and Regulation Best Interest are mostly the same.

	Reliance on PTE 2020-02 (the "Exemption")	Compliance with Regulation Best Interest	Notable Harmonization and Differences
Retrospective Review	Fiduciaries must conduct an annual retrospective compliance review that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of the Exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the Exemption. The methodology and results of the review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution. The Senior Executive Officer must certify annually that (1) he or she has reviewed the retroactive review report, (2) the Financial Institution has filed (or will file timely, including extensions) IRS Form 5330 to report any non-exempt prohibited transactions discovered by the fiduciary in connection with investment advice covered under the Code, correct those transactions, and pay any resulting excise taxes owed under the Code, (3) the Financial Institution has written policies and procedures that meet the Exemption's requirements, and (4) the Financial Institution has a prudent process to modify such policies and procedures. A "Senior Executive Officer" is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.	No requirement in Regulation Best Interest.	In its preamble to the Exemption, the DOL indicated that most entities affected by the Exemption likely have already conducted a retrospective review under FINRA Rules 3110, 3120 and 3130. Additionally, SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)-7. Although the reviews may be different, the DOL indicated that it assumed that an entity would incur minimal costs to meet this requirement. The Exemption provides a process for self-correcting a violation of the Exemption's conditions under certain circumstances.

	Reliance on PTE 2020-02 (the "Exemption")	Compliance with Regulation Best Interest	Notable Harmonization and Differences
Recordkeeping	Financial institutions must maintain for a period of six years following the covered transaction records demonstrating compliance with the Exemption.	Broker-dealers must retain all records of the information collected from or provided to each retail customer for at least six years after the earlier of the date the account was closed or the date on which the information was replaced or updated.	The six-year period for each rule commences at different times.