



What Advisers Need to Know About Giving Rollover Advice After September 23, 2024

THE RETIREMENT SECURITY RULE AND PTE 2020-02

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Agenda

- Historical Perspective
- Scope of the Final Rule
- Changes to PTE 2020-02
- Comparison of PTE 2020-02, Reg BI and Advisers' Fiduciary Duty
- Tips on Compliance with the Retirement Security Rule
- Enforcement

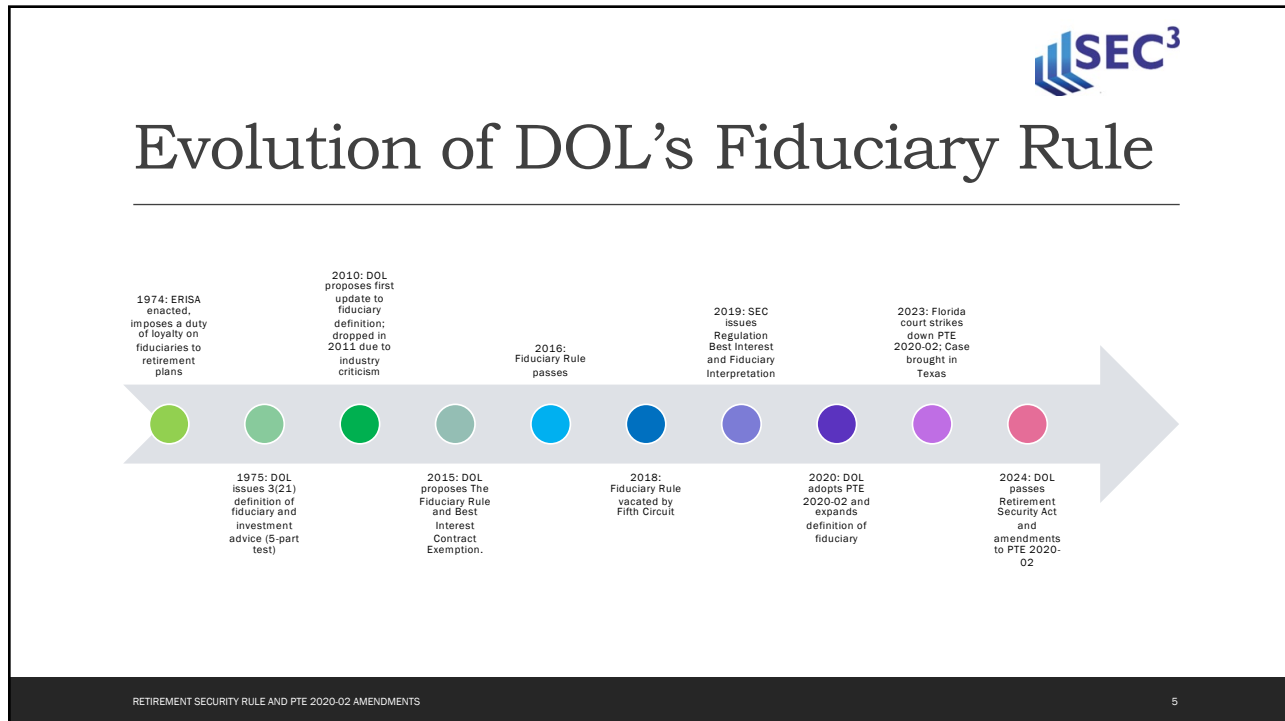
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Historical Perspective

THE DOL'S MANY ATTEMPTS TO IMPOSE FIDUCIARY DUTIES ON
ADVISERS SERVING RETIREMENT INVESTORS

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SEC³

The five-part test: a person is an "investment advice" fiduciary with respect to a plan (including an IRA) under ERISA and the prohibited transaction rules of the Internal Revenue Code when: 1) providing advice or recommendations regarding purchasing or selling, or the value of, securities or other property for a fee 2) on a regular basis 3) pursuant to a mutual understanding that 4) the investment advice will serve as a primary basis for an investment decision, and 5) the advice is individualized.

- ERISA SECTION 3(21)(A)(II)

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Why the DOL is Concerned

Changes in how investors prepare for retirement

- ✓ Drop in employer-sponsored pensions and defined benefit plans since 1975
- ✓ Increase in defined contribution plans and IRAs (created in 1974)
- ✓ Decrease in social security benefits means increased reliance on individual retirement savings
- ✓ Investors lack investment expertise and rely on experts
- ✓ Investors may not understand how investment professionals are compensated, or that advice provided may not be in their best interest

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SEC Imposes Fiduciary Duties

June 2019

- [Regulation Best Interest](#)
- [Form CRS](#) and
- [Commission Interpretation Regarding Standard of Conduct for Investment Advisers](#)



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DOL Tries Again with PTE 2020-02

DOL response to Fifth Circuit vacating the 2016 Fiduciary Rule:

- Reinstated 1975 version of ERISA Section 3(21)'s five-part test
- Proposed PTE 2020-02
- Updated website to remove BICE (best interest contract exemption) and reinstate prior PTEs
- Revoked [Deseret Letter](#) that held one-time rollover advice as not fiduciary investment advice under ERISA, redefines "regular basis" to include relationships that are recurring and expected to continue

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Complying with PTE 2020-02

PTE 2020-02 Requirements (see [Complying With PTE 2020-02 Under DoL's New IRA Rollover Requirements](#)):

1. *Acknowledge fiduciary status under ERISA*
2. *Disclose to the client the scope of the relationship and any material conflicts of interest*
3. *Comply with DOL's Impartial Conduct Standards requiring advisors to provide prudent investment advice, charge only reasonable compensation, and avoid misleading statements*
4. *Provide written disclosures about why the recommendation to roll over assets is in the client's best interest*
5. *Conduct an annual review of the firm's compliance with PTE 2020-02 and document the results in a written report to a "Senior Executive Officer" of the financial institution*
6. *Adopt and implement policies and procedures to comply with the DOL's Impartial Conduct Standards, mitigate conflicts of interest, and document the reasons for recommending rollovers of retirement assets*

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DOL Loses in Florida; Issues New Fiduciary Rule

In March 2023, a Florida Federal District Court vacated the DOL's interpretation of "regular basis" in the preamble to PTE 2020-02 as "arbitrary and capricious."

DOL does not appeal; instead issues its new fiduciary rule to address comments from the Fifth Circuit when it vacated the 2016 version of the fiduciary rule:

- Narrower than the 2016 version, applies to relationships of "trust and confidence" (aka fiduciary relationships)
- Imposes no contractual requirements or private rights of action

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Scope of the Final Rule

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Retirement Security Rule

Expanded Definition of Fiduciary in ERISA Section 3(21)

- The *service provider makes an investment recommendation to a retirement investor*;
- *The recommendation is provided for a fee or other compensation, such as commissions*; and
- The financial services provider holds itself out as a trusted adviser by
 - Specifically stating that it is acting as a fiduciary under Title I or Title II of ERISA; or
 - Making the recommendation in a way that would indicate to a reasonable investor that it is acting as a trusted adviser making *individualized recommendations based on the investor's best interest*.
- Applies to *non-discretionary fiduciary advice*

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Scope of New Rule

What is covered:

- ✓ Recommendations to acquire, hold, dispose of, or exchange securities or *other investment property or strategy*
- ✓ Recommendations on investment policies or strategies, portfolio composition, selection of other advisers, selection of account type and voting proxies
- ✓ Recommendations regarding whether to rollover, transfer or distribute assets from an ERISA plan or IRA, including whether to engage in the transaction and the destination of the assets

What is not covered:

- ✓ “Hire me” exception: A sales pitch for a product or investment strategy made without using expertise or considering the specific needs of the investors.
- ✓ “Education Exception”: Educational information about retirement planning, general investment advice and asset allocation models. ([See Interpretive Bulletin 96-1](#))
- ✓ Unsolicited requests: rollover requested by client.

Note: Disclaimers will not control if they are inconsistent with a firm’s communications or marketing materials.

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Scope of the New Rule (cont.)

Retirement Investor is a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, and employers who select investments for their 401(k) plan.

IRA includes individual retirement annuities, health savings accounts, Archer medical savings accounts and Coverdell education savings accounts.

Other investment property includes annuities, fixed indexed annuities, CDs and other banking products, digital assets, commodities and real estate.



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Changes to PTE 2020-02

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Amendments to PTE 2020-02

Changes from current PTE 2020-02: Effective September 23, 2024

1. Expands scope to include "recommendations of any investment product, regardless of whether the product is sold on a principal or agency basis"
2. Non-bank Health Savings Account (HSA) trustees and custodians are "Financial Institutions"
3. Revises the disclosure requirements to conform to Reg BI and SEC's Fiduciary Interpretation for RIAs
4. Allows robo-advisers to use the exemption
5. Allows Pooled Plan Providers (PPPs) providing investment advice to Pooled Employer Plans (PEPs) to use the exemption (however, a PPP's decision to hire an affiliated or related party as an advice provider is excluded)

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Amendments to PTE 2020-02

Changes from current PTE 2020-02: Effective September 23, 2024

6. More "bad actions" can result in disqualification from using the exemption (including greater list of criminal convictions, convictions in foreign courts, and other misconduct subject to a final judgement or court-approved settlement)
7. Requires firms to correct, report and pay excise taxes to IRS for prohibited transactions that happen as a result of providing fiduciary investment advice
8. Allows firms to self-correct violations without reporting to DOL

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Conditions of PTE 2020-02

1. Comply with the Impartial Conduct Standards – meet duties of care and loyalty, charge only reasonable compensation, meet best execution standards and provide no materially misleading statements.
2. Pre-transaction Disclosure – disclose to retirement investors:
 - a) Acknowledgment of fiduciary status under ERISA and Internal Revenue Code
 - b) Description of care and loyalty obligations
 - c) All material facts concerning fees and costs, type and scope of services, including any material limitations
 - d) Material facts regarding conflicts of interests
 - e) Rollover recommendations must include the bases for the recommendation
3. Adopt policies and procedures – to ensure compliance with Impartial Conduct Standards and other conditions of PTE 2020-02.
4. Annual Retrospective Review addresses whether PTE conditions are being satisfied

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Effective Dates and Phase-In Period

September 23, 2024:

1. Impartial Conduct Standards
2. Pre-transaction disclosure acknowledging fiduciary status

September 23, 2025:

1. All pre-transaction disclosures
2. Written and enforced PTE 2020-02 policies and procedures
3. Annual Retrospective Review



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Comparison of PTE 2020-02, Reg BI and Advisers' Fiduciary Duty

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Comparison of PTE 2020-02, Reg BI and Advisers' Fiduciary Duty


	PTE 2020-02	Regulation BI	Advisers' Fiduciary Duty
Coverage	Applies to Retirement Investors, 401(k) plans, participants and beneficiaries, Plan fiduciaries under ERISA or IRC, and IRA fiduciaries under IRC	Applies to retail customers (natural persons or their legal representatives) who receive a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer for personal, family, or household purposes.	Applies to all clients of an investment adviser
Standard of Care	"Prudent man" standard of Care and Loyalty.	(1) Duty of Care: Give "best interest" advice. (2) Disclosure of capacity, fees and expenses, scope and type of services provided, risks involved, and reasonable alternatives. (3) Identify and mitigate conflicts of interest. (4) Compliance – have P/Ps to address conflicts and compliance with Reg BI.	Duty of Care (1) Give Best Interest Advice: (2) Seek Best Execution (3) Provide Advice & Monitoring: To provide advice and monitoring over the course of the relationship based on the scope of the agreed-upon relationship. Duty of Loyalty Make full and fair disclosure of conflicts.
Required Disclosures	(1) Acknowledgment of fiduciary status, Care and Loyalty obligations, (2) Specific rollover disclosure (see next page) (3) 408(b)-2 Disclosure	Reg BI disclosures (see above), Form CRS. Note: SEC Staff Bulletin says B-D and reps must have "specific reasons" for the rollover recommendation, but no requirement that these be provided to the client.	Form ADV Part 2A, Form ADV Part 2B (if applicable), Form CRS (if applicable)

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Comparison of PTE 2020-02, Reg BI and Advisers' Fiduciary Duty



	PTE 2020-02	Regulation BI	Advisers' Fiduciary Duty
Conflicts of Interest	Principles-based approach, using "reasonable person" standard. Does not specifically prohibit sales contests or incentive programs but cannot be used if such practices are likely to result in an incentive to NOT act in client's best interest.	Disclosure or elimination approach. Requires elimination of sales contests, sales quotas, bonuses and non-cash compensation based on the sale of specific securities or types of securities in a limited time.	Principles-based approach.
Record-keeping	Maintain record to demonstrate compliance for covered transactions for six years.	Maintain records of information collected from and provided to each retail customer for at least six years after the earlier of the date the account was closed or when the information was replaced or updated.	Maintain records of Form ADV Part 2A, Form ADV Part 2B, Form CRS and any revisions, for a period of five years. Maintain written communications received and sent by the adviser relating to or any recommendation made or proposed to be made and any advice given or proposed to be given, for five years.
Rollover Disclosure	Disclose to Retirement : <ul style="list-style-type: none"> the alternatives to a rollover; 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. 		

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Tips on Compliance with the Retirement Security Rule

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Tip #1: Acknowledge Fiduciary Status

Get rid of qualifiers like “may be acting as a fiduciary” or “to the extent we meet the definition of fiduciary.”



DOL's Model Language:

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.*

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Tip #2: Revise Disclosure Requirements

Disclosures and documentation supporting rollover recommendations are required in most cases.



Required disclosures under PTE 2020-02 for rollover recommendations from 401(k) to IRA:

- ✓ Why rollover is in the retirement investor's best interest
- ✓ Alternatives to a rollover, including leaving the money in the current 401(k) plan.
- ✓ Fees and expenses of current plan and recommended IRA
- ✓ Whether administrative expenses of current 401(k) are being paid by employer
- ✓ Different levels of services and investments for the current plan and recommended IRA.

Disclosures NOT required for switches from one IRA to another, or from one account type to another.

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Practice Tips on Disclosure

Consider including language in Form ADV Part 2A (or a separate disclosure document) for required disclosures. Address these topics (as applicable):

- Limitations on advice and products being offered. If firms use proprietary products, then disclose how conflicts are mitigated and why the recommendation is in the client's best interest.
- Firms should address compensation policies, such as prohibiting incentives to recommend certain products or investments. Consider discussing firm processes to ensure investments are selected based on client needs and objectives.
- Discuss the use of affiliated service providers, such as broker-dealers, custodians, consultants, or administrators, the extent to which the adviser uses these service providers, and how the firm mitigates conflicts of interest.
- Disclose benefits the firm receives from service providers, such as providing access to educational seminars related to current products and industry issues. This disclosure should also include the firm's participation in sales events, conferences, and programs held by mutual fund distributors.
- Discuss outside business activities of executives and investment adviser representatives.

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Tip #3: Update Disclosures to Include Care and Loyalty Duties

Disclosures should mirror Reg. BI and SEC's Fiduciary Interpretation for RIAs

PTE 2020-02 replaces "Best Interest" with "Care Obligation" and "Loyalty Obligation."

Care Obligation means that *the 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 with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investors.*

Loyalty Obligation means that *the advice does not place the financial or other interests 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 those of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party.*


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Tip #4: Amend Policies and Procedures to cover PTE 2020-02's Conditions

Expands beyond impartial conduct standards to all conditions of PTE 2020-02.



New Requirements:

- Original PTE 2020-02 required firms to “establish, maintain and enforce” written policies and procedures to comply with the Impartial Conduct Standards.
- Amended PTE 2020-02 requires policies and procedures to comply with **all of PTE 2020-02's exemption conditions.**
- Policies must prohibit incentives, such as bonuses and contests, that are “likely to result in recommendations that are not in Retirement Investors' Best Interest”


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Tip #5: Update the Process for Annual Retrospective Review

Test compliance with all the conditions of PTE 2020-02, not just the impartial conduct standards



New requirements:

1. Financial institutions must test compliance with all of PTE 2020-02's conditions, not just impartial conduct standards.
2. Senior Executive Officer must certify that the firm has corrected, filed [Form 5330](#) with the IRS, and paid excise taxes for any non-exempt prohibited transactions discovered by the firm in connection with investment advice covered under the Internal Revenue Code.

Due dates: First annual retrospective review under the amended PTE is for the period beginning on September 3, 2025. (See Fred Reish.com, [The New Fiduciary Rule \(36\): Confusion about Annual Retrospective Reviews](#))


First review period starts September 23, 2025, and goes to December 31, 2025 (because of phase-in period).

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Tip #6: Review the New List of Disqualifying Crimes



Domestic Crimes

- any felony involving abuse or misuse of such person’s employee benefit plan position or employment, or position or employment with a labor organization
- any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary
- income tax evasion
- any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities
- conspiracy or attempt to commit any such crimes
- any crime that is identified or described in ERISA Section 411

Foreign Crimes


- any conviction by a foreign court of competent jurisdiction as a result of a substantially equivalent offense to the offenses listed above under “Domestic Crimes” (excluding convictions or imprisonments in countries that are listed on the foreign adversary list maintained by the Department of Commerce)

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Tip #7: Update Self-Correction Procedures

Dropped requirement to report self-corrections to DOL



Self-correction process under amended PTE 2020-02

- Correct the violation within 90 days of the date the firm learns (or should have learned) of the violation
- Make the retirement investors whole for any investment losses
- Report the correction in the firm’s annual retrospective compliance review.

DOL suggests that if the violation cannot be corrected, such as a completed rollover, the correction should restore the investor’s losses, including investment and tax losses.

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Enforcement

[DOL FAQ 21](#): How will the Department enforce compliance with the exemption? (see [Fred Reish's blog](#) here)

For plans covered by ERISA Title 1, DOL will investigate and enforce. Employee benefit plans, such as defined benefit plans, defined contributions plans (401(k) plans), and welfare plans (medical, disability, death benefit plans).

For IRAs and other non-Title 1 plans, "the Department has interpretive authority to determine whether the exemption conditions have been satisfied and transmits information to the IRS for enforcement of the excise tax."

Where will DOL or IRS get info about potential compliance failures?

- DOL reviews Form 5500 (filed by the employers or plan administrators)
- Participants or fiduciaries file complaints with DOL
- DOL can request retrospective annual reviews
- Referrals from SEC and FINRA

The DOL can refer cases to the IRS or use the "nuclear option" – revoking access to the PTE if it finds egregious violations, so a firm would not be able to rely on exemption for 10 years.

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Retirement Security Rule and PTE 2020-02 Put on Pause

[Federation of Americans for Consumer Choice Inc. v. DOL](#), E.D. Tex., No. 6:24-cv-00163, complaint filed on 5/2/24, seeks to vacate the rule, PTE 2020-02 and PTE 84-24, also seeks a preliminary injunction.

DOL [filed an answer](#) on June 14. CFP filed [an amicus curiae brief](#) in support of the DOL's new rules and amendments.

[American Council of Life Insurers, et al v. DOL](#), N.D. Tex. No. 4:24-cv-00482, filed on 5/24/24 to vacate the rule, PTE 2020-02 and PTE 84-24, and seeks a preliminary injunction.

[The Financial Services Institute \(FSI\) and Securities Industry and Financial Markets Association](#) ("SIFMA) moved to intervene in the ACLI suit, to better represent broker-dealers.

Courts ruled in both cases to issue preliminary injunctions to stop the Retirement Security Rule and both exemptions, including PTE 2020-02,

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Annual Retrospective Review

- PTE 2020-02 requires testing “the effectiveness” of the firm’s policies and procedures.”
- Define population: all retirement accounts opened during period.
- Decide on sampling methodology – random, periodic, transactional (all 401(k) to IRA rollovers), judgmental (e.g., transactions from each IAR)
- Review accounts in sample to determine whether PTE 2020-02 requirements have been met
- Fiduciary Acknowledgment, Care and Loyalty Obligation Disclosures
- Scope of relationship, fees and costs
- Conflicts of Interest
- Rollover Disclosure
 - Consideration of Alternatives
 - Fee Analysis
 - Whether the employer pays plan expenses
 - Comparison of services and investments in Plan vs. IRA
- Form CRS/Form ADV Disclosures
- Findings and comments

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Annual Retrospective Review

- Review testing results and determine next steps:
1. Follow up on issues
 2. Update policies and procedures
 3. Update workflows or forms
 4. Additional training
 5. Escalation of issues, including correction of errors
- Draft report discussing methodology and results.
- Senior Executive Officer must certify:
- He/she has read the report
 - The Firm has filed (or will file) IRS Form 5330 reporting any non-exempt prohibited transactions and paid excise taxes (if required)
 - Firm has written policies and procedures to comply with ICS and PTE 2020-02
 - The firm has a process to modify P/Ps as required by business needs or regulatory changes

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Case Study on PTE 2020-02 Compliance



Hometown Wealth Management is a new investment adviser firm started by Hal Higgins, Chief Investment Officer; Tom Flatley, Chief Operating Officer; Pam Butler, Chief Compliance Officer; and Bud Smith, Head of Client Relations.

The four previously worked for Big Box Management Company and decided to start their own firm, targeting high-net worth individuals preparing for retirement.



Image by [Mohamed Hassan](#) from [Pixabay](#)

Case Study on PTE 2020-02 Compliance



Impartial Conduct Standards

- Provide prudent investment advice
 - CIO Hal Higgins sets up an investment committee to select investments and create and maintain investment models to be used by clients.
- Charge only reasonable compensation
 - COO Thomas Flatley conducts a survey of local advisory firms to see what services they are providing and what they charge
- Avoid misleading statements
 - CCO Pam Butler works with Bud Smith to develop standardized presentations to use with potential clients describing the firm's services.

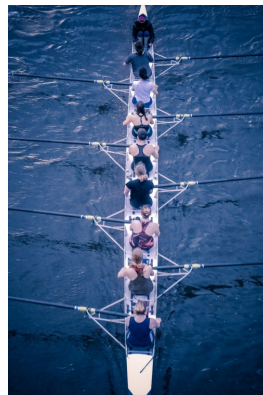


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Case Study on PTE 2020-02 Compliance



Getting ready for the first client...

1. Adopt technology to help with the process, including 401(k) plan data, access to benchmarks, automated scorecards and documentation of analysis results.
2. Train IARs on the onboarding process and guidelines for making recommendations to clients.
3. Complete client questionnaire to develop investor profile, investment goals and timeline, and risk appetite.
4. Use investor profile to recommend investment strategies and account type (using firm guidelines).
5. For clients with 401(k) assets, discuss four options.
6. Compare current 401(k) plan to services and investment products offered by Hometown using scorecard and discuss with client.



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Case Study on PTE 2020-02 Compliance



First client: Jane O'Hearn

- 56-year-old woman with two grown children.
- Retired from a job with a large consulting firm to start her own business.
- Has 401(k) assets with her former employer but would like to explore other investment opportunities.
- Wants to retire by age 63.



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Case Study on PTE 2020-02 Compliance



Best Interest Discussion between Bud and Jane

1. Bud updates Jane's investor profile, noting her desire to retire by age 63 and her decreased appetite for risk.
2. Bud discusses Jane's options for her 401(k):
 - a. Keep money in the current plan, which offers low-cost mutual fund share classes, professional asset management. And employer-paid administrative expenses. Jane has not taken out any loans from her 401(k) plan and does not own any company stock in that plan. Bud points out that the 401(k) assets are protected from creditors in bankruptcy proceedings and plaintiffs in lawsuits.
 - b. Take a lump sum payment. Bud and Jane quickly decide against taking a lump sum payment from the 401(k) plan since she does not need the cash and does not want to pay the penalties for early withdrawal.
 - c. Rollover assets into a new employer's 401(k) plan. Since Jane is now self-employed, this is not an option.
 - d. Rollover the assets to an IRA managed by Bud and his firm.
3. Bud and Jane then discuss the IRA offered by Hometown Wealth Management, which offers a mix of ETFs and mutual funds that have been vetted by the firm and periodically monitored to ensure that the investment options meet client investment goals, perform well (as compared to peers) and are cost-effective when compared to similar investment products.



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Case Study on PTE 2020-02 Compliance



Disclosures


Based on this discussion, Jane tells Bud that she would like to rollover her 401(k) assets into an IRA managed by Hometown Wealth Management.

Rollover Recommendation Disclosure: The disclosure includes a comparison of services offered, how those services meet the needs of the investor, and costs.

Investment Management Agreement:

- Acknowledgment of Fiduciary Status using DOL-recommended language
- Scope of relationship: discuss how often the account will be monitored and rebalanced, the investment products to be used and any limitations (such as only using proprietary funds)
- Includes disclosure on Care and Loyalty Obligations

Case Study on PTE 2020-02 Compliance




Form ADV Part 2A Disclosures:

- Limitations on the advice and products being offered.* If the advisor only offers proprietary products or products offered by its affiliates, clients should understand why.
- Special incentives.* Firms should either (a) specifically prohibit any incentives or rewards that might encourage employees to *not* act in the client's best interest, or (b) have processes to mitigate the incentive by ensuring that investments are selected based on the client's needs and objectives.
- Payments made and received by the firm and its affiliates, including referral fees, revenue sharing, 12b-1 payments, shareholder servicing fees, and recordkeeping fees.
- Clients who may also have vendor or business relationships with the firm and whether they receive favorable treatment because of those relationships.
- Affiliated service providers, such as broker-dealers, custodians, consultants, or administrators, the extent to which the advisor uses these service providers, and how the firm mitigates conflicts of interest.
- Benefits the firm receives from service providers, such as providing access to educational seminars related to current products and industry issues. This disclosure should also include the firm's participation in sales events, conferences, and programs held by mutual fund distributors.
- Outside business activities of executives and investment adviser representatives.

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Thanks for your participation!

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