

April 21, 2021

DOL Issues Interpretative Guidance on Investment Advice Prohibited Transaction Exemption (PTE 2020-02)

On April 13, 2021, the U.S. Department of Labor issued a set of previously promised [FAQs](#) addressing its new prohibited transaction exemption (PTE 2020-02). PTE 2020-02 allows “investment advice fiduciaries” to employee benefit plans and individual retirement accounts (IRAs) to receive certain otherwise prohibited compensation, including commissions, 12b-1 fees, revenue sharing, and mark-ups and mark-downs in certain principal transactions. The exemption expressly covers prohibited transactions resulting from rollover advice, advice on how to invest assets within a plan or IRA, and advice on whether to engage in certain principal transactions. For further details on PTE 2020-02, see our prior [Alert](#).

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The FAQs provide clarifications of PTE 2020-02, as well as information about effective dates and a discussion of how the DOL plans to enforce compliance with the exemption. Key takeaways of the FAQs for financial institutions, advisors, and asset managers are described below.

- **PTE 2020-02 Took Effect on February 16, 2021, and the DOL Believes the Core Components of the Exemption Should Not Be Delayed**
 - The FAQs confirm that although the exemption is subject to change (as discussed below), it became effective on its originally scheduled date of February 16, 2021. The DOL also made it clear in the FAQs that the protections outlined in the exemption should not be delayed while the exemption is subject to ongoing review.
- **Field Assistance Bulletin (FAB) 2018-02 Remains in Place until December 20, 2021**
 - Following the U.S. Court of Appeals for the Fifth Circuit’s decision to vacate the 2016 fiduciary rule including the Best Interest Contract Exemption, the DOL issued FAB 2018-02, a temporary enforcement policy providing relief to investment advice fiduciaries who worked diligently and in good faith to comply with the Best Interest Contract Exemption’s Impartial Conduct Standards. PTE 2020-02 provided that this temporary enforcement policy would remain in effect for one year after publication of PTE 2020-02 in the Federal Register. This deadline was left unchanged in the FAQs.
- **This Is Not the DOL’s Final Word on PTE 2020-02 or the Investment Advice Fiduciary Rule**
 - The FAQs state that the DOL is reviewing issues of fact, law, and policy related to PTE 2020-02 as well as its regulation of fiduciary investment advice. Furthermore, the agency anticipates taking further regulatory and sub-regulatory actions, as appropriate, including amending the investment advice fiduciary regulation to broaden the range of people who are fiduciaries under ERISA, amending PTE 2020-02, and amending or revoking some of the other existing class exemptions available to investment advice fiduciaries.
 - Financial institutions that are currently or were anticipating relying on PTE 2020-02 should proceed cautiously as the DOL considers incorporating additional protections into the exemption. That said, the DOL has described the Impartial Conduct Standards and the requirement for strong policies and procedures as core components of the exemption and fundamental investor protections, so robust compliance with those elements of PTE 2020-02 will likely remain required, even if the specifics of those elements may change.

- The DOL’s statement that it may revoke some of the other existing class exemptions available to investment advice fiduciaries can be read to suggest that PTE 2020-02 may no longer be just an option, but instead, may become mandatory for certain transactions that would trigger the receipt of otherwise prohibited compensation.
- **Principal Transactions Not Specifically Addressed**
 - The FAQs are generally silent on the broad relief PTE 2020-02 provides for certain principal transactions where the financial institution giving investment advice sells securities or investments from its own inventory to the advice recipient or purchases securities or investments for its own account from the advice recipient. For example, the FAQs do not shed any further light on what other types of securities may be considered for Covered Principal Transactions in the context of sales from the financial institution to a retirement plan or IRA. It is not clear if the DOL will provide further guidance on principal transactions.
- **Mitigating Conflicts of Interest Via Compensation Structures**
 - PTE 2020-02 requires financial institutions’ policies and procedures to 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. According to the FAQs, financial institutions intending to rely on PTE 2020-02 must identify and carefully focus on the conflicts of interest associated with the business models and practices that create incentives for the financial institution or investment professional to place their interests ahead of the retirement investor’s interest.
 - In particular, the FAQs caution financial institutions not to use quotas, bonuses, prizes, or performance standards as incentives that a reasonable person would conclude are likely to encourage investment professionals to make recommendations that are not in retirement investors’ best interest. The FAQs also note that, although firms cannot eliminate all conflicts of interest, steps can be taken to mitigate such conflicts. For instance, a firm could implement level compensation for recommendations to invest in assets that fall within reasonably defined investment categories (e.g., mutual funds), and exercise heightened supervision as between investment categories (e.g., between mutual funds and fixed annuities) to the extent that it is not possible for the institution to eliminate conflicts of interest between these categories. This guidance seems to echo the “neutral factors” interpretive approach the DOL offered for the Best Interest Contract Exemption back in 2016.
- **Enforcement of PTE 2020-02 Compliance**
 - The FAQs state that for plans covered by ERISA, the DOL will investigate for compliance with the exemption and enforce ERISA’s Title I protections. For IRAs and other non-Title I plans, the FAQs note that the DOL has interpretive authority to determine whether the exemption conditions have been satisfied and will transmit information to the IRS for enforcement of the excise tax. In contrast to the 2016 fiduciary rulemaking, the new exemption does not impose contract or warranty requirements on the financial institutions or investment professionals responsible for compliance. In addition, the FAQs state how PTE 2020-02 does not expand retirement investors’ ability to enforce their rights in court or create any new legal claims beyond those in Title I of ERISA and the Internal Revenue Code.

For more information about these FAQs, PTE 2020-02, or the DOL’s investment advice fiduciary rulemaking efforts, please feel free to reach out to any of the attorneys listed above.