

# DOL Investment Advice Exemption: Tips & Traps for Banking Professionals

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- Executive Summary
- Temporary Enforcement Policy (“TEP”) vs. 20-02 PTE Conditions & Compliance Policies
- New Interpretations of 5-part Test for “Investment Advice”
- April 2021 FAQs for Financial Institutions
- Next Steps & Action Items

- PTE 20-02 became effective on Feb. 16, 2021, including new interpretations relating to rollover advice;
- Compliance with TEP is available in lieu of full PTE compliance until Dec. 20, 2021;
- PTE and TEP apply to “investment advice” only (not discretion);
- Rollover recommendations are now fiduciary acts under ERISA & IRC if advice relationship existed prior to recommendation (in a tax-advantaged account) or will post (in the IRA);
- PTE and TEP allow “a wide variety of payments that would otherwise violate [PT] rules” in connection with investment advice (vs. discretion), including rollover advice and principal transactions; and
- Full PTE compliance will require adoption of policies reminiscent of 2016 Fiduciary Rule, but enforcement of PTs is limited to DOL and IRS; however, violation of firm policies can be a predicate for enforcement by other regulators (e.g., SEC, FINRA, OCC, etc.) and/or claimants/plaintiffs (i.e., breach of fiduciary duty, failure to supervise, etc.).

## A person is a fiduciary if he/she:

- Exercises discretion over the management of the plan or plan assets
- Renders investment advice to a plan or plan participant for compensation
- Has any discretionary authority in the administration of the plan.

See [ERISA Sec. 3\(21\)](#)

*A person is a NOT a fiduciary with respect to other services provided, which are authorized, even if the person is acting as an ERISA fiduciary with respect to one or more of the above functions.*

Will Remain Intact ...



... Subject to New  
“Interpretations”

# Fiduciaries are prohibited from...

- Self dealing – providing advice that will increase the compensation paid to the advisor, his/her supervising firm and/or any affiliate(s);
- Dual representation – acting on behalf of or representing a party dealing with the plan in a transaction involving the assets of the plan; or
- Third party payments – receiving any consideration for his/her own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

## Options for rollovers in the short term:

- Comply with TEP until Dec. 20, 2021, then implement full conditions of PTE 20-02 (and, if applicable, PTE 84-24);
- Adopt full conditions now (not recommended due to forthcoming clarifications and heightened risks of enforcement from other regulators and claimants/plaintiffs); or
- Adopt education-only approach (e.g., financial professionals cannot recommend rollovers)\* and/or only allow recommendations if related to “sales transactions” and no prior or subsequent advice is provided (e.g., a single premium immediate annuity)

*\* note: this approach will be difficult to supervise, and penalties are substantial if engaging in a non-exempt PT.*

The TEP provides that “the [DOL] will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.”

**Rollover advice, as newly interpreted, must fall within your “good faith” compliance efforts.**



1. Investment advice, at the time it is provided, is in Best Interest of the Retirement Investor:
  - ✓ Duty of prudence; and
  - ✓ Duty of loyalty.
2. Financial Institutions, Investment Professionals, their affiliates and related entities Receive no more than reasonable compensation, directly or indirectly.
3. Financial Institutions' and 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.

- Compliance with Impartial Conduct Standards.
- Written disclosures re:
  - ERISA and/or IRC fiduciary acknowledgment;
  - description of services to be provided and material conflicts of interest; and
  - for rollovers, documentation of specific reasons for why the recommendation is in the client's best interest.\*
- Compliance procedures and recordkeeping requirements that allow the DOL and IRS (and other regulators) to obtain access to a Financial Institution's records.
- Retrospective review "certified" by Senior Executive Officer.
- Self-correction provision was added if violations are discovered before DOL investigates.

*\* Applies to: i) rollover from plan to another plan; ii) from an IRA to a plan; iii) from an IRA to another IRA; or iv) from one type of account to another (e.g., commission to fee-based).*

**Model Language for Fiduciary Acknowledgement:**

*“When we provide investment advice to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.”*

*See Preamble at p. 129*

## **Three requirements regarding Policies & Procedures =**

1. Establish, maintain and enforce written policies & procedures prudently designed to ensure that the Financial Institution and Investment Professionals comply with the Impartial Conduct Standards;
2. Policies & procedures 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; and
3. Document the specific reasons that any recommendation to roll over assets from a Plan to another Plan or IRA, from an IRA to a Plan, from an IRA to another IRA, or from one type account to another (e.g., from a commission-based account to a fee-based account) is in the Best Interest of the Retirement Investor.

**When it comes to recommendations to roll assets out of a Plan and into an IRA ...**

*“the factors that a Financial Institution and Investment Professional should consider and document include the following:*

- 1) alternatives to a rollover, including leaving the money in his or her current employer's Plan, if permitted, and selecting different investment options;*
- 2) the fees and expenses associated with both the Plan and the IRA;*
- 3) whether the employer pays for some or all of the Plan's administrative expenses;*
- 4) and the different levels of services and investments available under the Plan and the IRA*  
*For rollovers from another IRA or changes from a commission-based account to a fee-based arrangement, a prudent recommendation would include consideration and documentation of the services that would be provided under the new arrangement.”*

*See Preamble at p. 147.*

**The Department expects that Investment Professionals and Financial Institutions ...**

“will make diligent and prudent efforts to obtain information about the existing Title I Plan and the participant’s interests in it. In general, such information should be readily available as a result of DOL regulations mandating disclosure of Plan-related information to the Plan’s participants (see 29 CFR 2550.404a-5). If the Retirement Investor is unwilling to provide the information, even after a full explanation of its significance, and the information is not otherwise readily available, the Financial Institution and Investment Professional should make a reasonable estimation of expenses, asset values, risk, and returns based on publicly available information. The Financial Institution and Investment Professional should document and explain the assumptions used and their limitations. In such cases, the Investment Professional could rely on alternative data sources, such as the most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of Plan at issue.”

## Periodic Review of Policies & Procedures

“The [DOL] notes that [Firms] complying with the [PTE] would need to review their policies and procedures periodically and reasonably revise them as necessary to ensure that the policies and procedures continue to satisfy the conditions of this [PTE]. In particular, the [PTE] requires ongoing vigilance as to the impact of conflicts of interest on the provision of fiduciary investment advice to Retirement Investors. As a matter of prudence, [Firms] should regularly review their policies and procedures to ensure that they are achieving their intended goal of ensuring compliance with the [PTE] and the provision of advice that satisfies the [ICS]. For example, to the extent new products, lines of business, or compensation structures are introduced, [Firms] should consider whether their policies and procedures continue to be appropriate and effective. To the extent that the policies are failing to achieve their goal of ensuring compliance, the deficiencies should be corrected.”

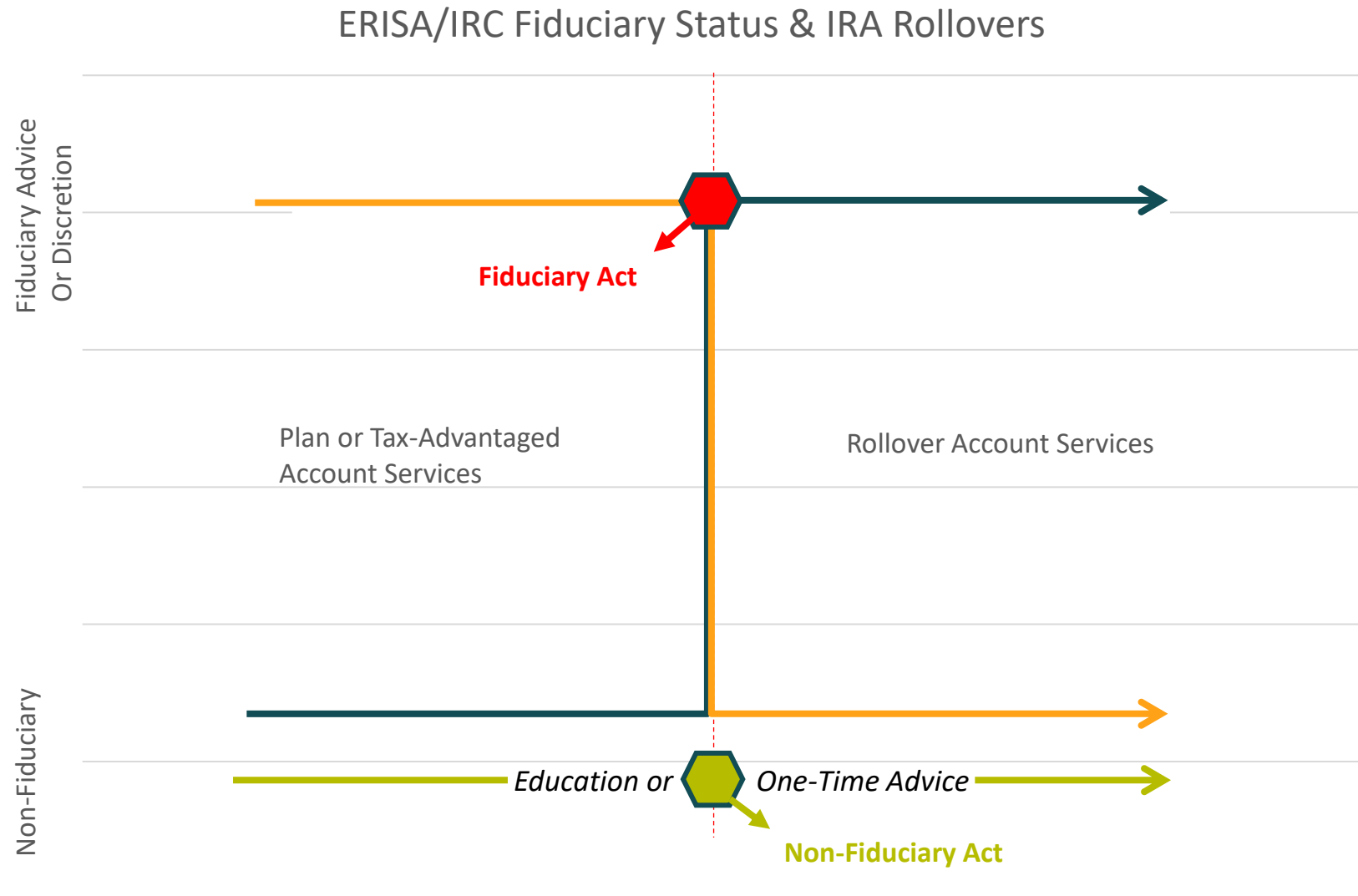
### Five requirements regarding a retrospective review =

1. Conduct a retrospective review, at least annually, reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption;
2. Methodology & results of the retrospective review are reduced to a written report provided to a Senior Executive Officer;
3. Who certifies, annually, that: A) s/he has reviewed the report; B) policies and procedures are in place to achieve compliance with conditions of the exemption; and C) a prudent process is in place to modify such policies and procedures as business, regulatory, and legislative changes and events dictate, and to test their effectiveness on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of the exemption;
4. The review, report and certification are completed no later than six months following the end of the period covered by the review; and
5. The report, certification and supporting data is retained for a period of six years and are made available to the Department within 10 business days of request.



*“In circumstances in which the investment advice provider has been giving advice to the individual about investing in, purchasing, or selling securities or other financial instruments through tax-advantaged retirement vehicles subject to Title I or the Code, the advice to roll assets out of a Title I Plan is part of an ongoing advice relationship that satisfies the regular basis prong. Similarly, advice to roll assets out of a Title I Plan into an IRA where the investment advice provider has not previously provided advice but will be regularly giving advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the regular basis prong.”*

*See Preamble at p. 34.*



*“... the term ‘regular basis’ broadly describes a relationship where advice is recurring, non-sporadic, and expected to continue. When insurance agents or broker-dealers frequently or periodically make recommendations to their clients on annuity or investment products or features, or on the investment of additional assets in existing products, they may meet the ‘regular basis’ prong of the five-part test, and are appropriately treated as fiduciaries, assuming that they meet the remaining elements of the fiduciary definition.”*

*See Preamble at pp. 40 -41 and note that this interpretation has implications that extend well beyond rollovers.*

*“... fiduciary status is determined by the facts as they exist at the time of the recommendation, including whether the parties, **at that time**, mutually intend an ongoing advisory relationship. Every relationship has a beginning, and the five-part test does not provide that the first instance of advice in an ongoing relationship is automatically free from fiduciary obligations.”*

*See Preamble at pp. 40 -41.*

**Q3. Is the Department withdrawing Field Assistance Bulletin 2018-02 at this time?**

*No. FAB 2018-02 will remain in place until December 20, 2021. This date is unchanged from the period set forth in PTE 2020-02.*

**Q4. Is the Department delaying the application of its interpretation related to rollover recommendations?**

*No. ... Having disavowed the Deseret Letter both in its 2016 rulemaking and its 2020 exemption, the Department does not believe additional extensions are warranted or protective of plan participants' interests in sound advice.*

**Q5. Will the Department take more actions relating to the regulation of fiduciary investment advice?**

*"... The Department anticipates taking further regulatory and sub-regulatory actions, as appropriate, including amending the investment advice fiduciary regulation, amending PTE 2020-02, and amending or revoking some of the other existing class exemptions available to investment advice fiduciaries ... "*

**Q16. The exemption 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. What should financial institutions do to meet this standard of mitigation?**

*The DOL recognizes that firms cannot eliminate all conflicts of interest, however, and the exemption accordingly stresses the importance of mitigating such conflicts. For example, a firm could ensure 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. As much as possible, firms should carefully design differences in compensation between categories to avoid incentives that place the interest of the firm or investment professional ahead of the financial interests of the customer. Under this approach, financial institutions would avoid compensation that is likely to incentivize investment professionals to recommend one investment product over another comparable product based on the greater compensation to them or their financial institutions.*

**Q21. How will the Department enforce compliance with the exemption?**

*... For IRAs and other non-Title I 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. ...*

- Educate financial professionals and supervisors as to new interpretations;
- Determine how to respond to questions from Retirement Investors;
- Evaluate policies and procedures to ensure compliance w/ TEP;
- Determine whether rollovers are recommended -- If not, get attestation signed by client -- If so, document (internally, for now) the basis upon which it is deemed to be in client's best interest; and
- Review marketing materials, contracts and disclosures to determine whether they align w/ new interpretations and PTE 20-02 conditions; and
- Development strategy to implement full conditions by 12/20/21 and monitor DOL interim guidance.





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### **Commission-Based Compensation Policies (For Illustrative Purposes)**

1. Avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales;
2. minimizing compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors;
3. eliminating compensation incentives within comparable product lines by, for example, capping the credit that an associated person may receive across mutual funds or other comparable products across providers;
4. implementing supervisory procedures to monitor recommendations that are: Near compensation thresholds; near thresholds for firm recognition; involve higher compensating products, proprietary products, or transactions in a principal capacity; or, involve the rollover or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in a Title I Plan account to an IRA) or from one product class to another;
5. adjusting compensation for associated persons who fail to adequately manage conflicts of interest; and
6. limiting the types of retail customer to whom a product, transaction or strategy may be recommended.

### **Self-Correction is available for Financial Institutions, provided:**

1. Violation did not result in losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for resulting losses;
2. Financial Institution corrects the violation and notifies DOL of the violation and correction with 30 days of the correction;
3. Correction occurs no later 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation;
4. Financial Institution notifies the person(s) responsible for conducting the retrospective review and the violation and correction is specifically set forth in the written report required by the exemption.

An Investment Professional or Financial Institution will be **ineligible** to rely on the exemption for 10 years following:

1. Conviction of any crime described in ERISA Section 411 arising out of investment advice to Retirement Investors;
2. Receipt of a written ineligibility notice issued by the Department for:
  - A. Engaging in a systematic pattern or practice of violating the conditions of this exemption;
  - B. Intentionally violating the conditions of this exemption;
  - C. Providing materially misleading information to the DOL in connection with the Financial Institution's or Investment Professional's conduct under the exemption.

[DOL: Improving Investment Advice for Workers & Retirees, page 286.](#)

1. An Investment Professional shall become ineligible immediately upon:
  - A. Date of trial court's conviction of a covered crime, regardless of whether that judgment is under appeal;
  - B. Date the DOL issues written notice to the Investment Professional;
2. A Financial Institution shall become ineligible following:
  - A. The 10<sup>th</sup> business day after the conviction of the Financial Institution (or another Financial Institution in the Controlled Group)<sup>1</sup> of a covered crime, regardless of whether that judgment is under appeal;
  - B. 21 days after the date of the written ineligibility notice is issued to the Financial Institution (or another Financial Institution in Control Group).

[DOL: Improving Investment Advice for Workers & Retirees, page 286-287..](#)

*<sup>1</sup> A Financial Institution is in the same Controlled Group with another Financial Institution if it would be considered in the same “controlled group of corporations” or “under common control” with the Financial Institution, as those terms are defined in Code section 414(b) and (c), in each case including the accompanying regulations.*

### Financial Institutions who become ineligible:

- Will have a one-year winding down period during which relief is available under the exemption subject to the conditions of the exemption other than eligibility;
- After the one-year period expires, the Financial Institution may not rely on the relief provided in this exemption for any additional transactions.

[DOL: Improving Investment Advice for Workers & Retirees, page 287-288.](#)

DOL has created an “opportunity to be heard”:

- If Financial Institution (or another Financial Institution in the same Controlled Group) is convicted of a crime:
  - Petition must be submitted to the DOL within 10 business days after the date of the conviction;
  - E-mail to [IIAWR@dol.gov](mailto:IIAWR@dol.gov);
  - DOL has sole discretion whether to grant the petition.
- If Financial Institution or Investment Professional received written ineligibility notice:
  - DOL will provide a written warning identifying specific conduct and providing a six-month “cure period”;
  - After six months, if conduct persists, opportunity to be heard, in person or in writing or both, **before** ineligibility notice is issued.

[DOL: Improving Investment Advice for Workers & Retirees, page 287-289.](#)



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