

In April 2024, the Department of Labor published its final regulation setting forth the definition of fiduciary for the provision of investment advice to plans or IRAs under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). The package included updates to PTE 2020-02, which covers reasonable compensation received for fiduciary advice in conjunction with sales of a broad range of investment products and a very pared-down amended PTE 84-24, which covers compensation for non-security insurance contracts that are purchased as part of investment advice given by independent producers. To assist you in complying with PTE 2020-02, we have developed the following checklist, outlining the major requirements of the PTE.

The final PTE 2020-02 has some notable differences from the previous exemption as well as from the 2023 proposal, including:

- The PTE will now need to be used to cover compensation received for advice regarding rollovers from an ERISA-covered plan or IRA, regardless of what the end investment recommendation is. This could implicate life insurance or other investment products not typically covered by ERISA or the IRC's prohibited transaction rules.
- The PTE, as amended, also covers compensation for fiduciary investment advice related to principal transactions, pooled employer plans, and robo-advice arrangements. Further, the PTE makes clear that non-bank custodians of health savings accounts (HSAs) can act as financial institutions.
- The PTE allows for self-correction of good faith disclosure failures so long as the correct information is disclosed as soon as practicable, but no later than 30 days after it was due to be disclosed.
- The PTE also expands the circumstances under which a financial institution could be barred from relying on the PTE, to include foreign convictions and other circumstances in alignment with the recent changes to the QPAM exemption (PTE 84-14).
- Financial institutions must now correct nonexempt prohibited transactions, file Form 5330 to report these transactions to the IRS and pay IRC section 4975 excise taxes in connection with any compensation received for fiduciary investment advice for nonexempt transactions in which the financial institution is found to have participated.

Checklist: High-Level Requirements

- Investment professional (IP) and financial institution (Firm) must unequivocally acknowledge fiduciary status in writing.
- IP must provide certain disclosures to the retirement investor including:
 - The scope of the investment relationship.
 - Any limitations on the investment advice given.
 - Material facts about any conflicts of interest.
 - Specific written disclosure about the impartial conduct standards (sample can be found in the proposed regulation package).
 - The reasons for any recommendation.
- Advice given must comply with applicable federal securities laws regarding "best execution."
- IP can receive third-party compensation, both direct and indirect; however, IP must comply with the impartial conduct standards:
 - IP must act with prudence (care obligation).
 - IP must act in the sole interest of the retirement investor (loyalty obligation).
 - IP must give advice free from misleading statements.
 - IP must charge no more than reasonable compensation.
- Firm must prudently design, establish, maintain, and enforce policies and procedures designed to ensure IPs' compliance with the impartial conduct standards.
- Firm must establish, maintain, and enforce policies and procedures designed to detect and mitigate any conflicts of interest and ensure compensation practices are not creating incentives for IP and Firm to not comply with the impartial conduct standards.
- There should not be quotas or awards that encourage noncompliance with the impartial conduct standards obligations.
- Policies and procedures must be available to the DOL within 30 days of request.
- Firm must conduct a retroactive review at least annually that is reasonably designed to detect and prevent violations of the exemption.
- Retroactive review includes report to and certification by a senior executive.
- Firm must correct any prohibited transaction, pay excise tax, and file Form 5330 for any nonexempt prohibited transactions discovered.
- Firm has enhanced record-keeping requirement for transactions and related materials.