

Frequently Asked Questions

Department of Labor (DOL): Prohibited Transaction Exemption (PTE) 2020-02

<p>When will PTE 2020-02 be needed?</p>	<p>If a financial professional makes a recommendation to a client, which constitutes “investment advice” as defined by the five-part test, that results in more compensation, third-party payments (e.g., commissions, 12b-1 or trails, solicitor fees, etc.) or dual representation, then a prohibited transaction (PT) will result, and a prohibited transaction exemption (PTE) is necessary to avoid significant penalties.</p> <p>DOL has created several PTEs to permit receipt of otherwise prohibited compensation, including PTE 2020-02, which can be leveraged more broadly than many PTEs. An example of a more limited PTE is 84-24, which applies only to the receipt of “commissions” in connection with the sale of annuities or insurance products.</p>
<p>If the client is unable to provide me with documentation of their plan fees, can I still make a recommendation regarding the assets in the account?</p>	<p>According to the DOL, it “expects that Investment Professionals and Financial Institutions evaluating this type of potential rollover 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.”</p> <p>The Fi360 Decision Optimizer software includes access to alternative plan benchmark data, with a two-step process:</p> <ol style="list-style-type: none"> 1. Financial professionals can enter the plan’s name to find their total assets and average account balance from DOL’s Form 5500 database; 2. We then match that against our proprietary plan data set to retrieve the applicable benchmark data for similar sized plans. <p>Marrying the best information available from the Form 5500 with information proprietary to Broadridge Fi360 Solutions results in a benchmark value that is more current and complete than using Form 5500 data only.</p>

<p>What if the client still wants to rollover even though I recommended they stay in the current plan/account?</p>	<p>From time to time, a financial professional may make a recommendation to the client that the client chooses to decline. The Decision Optimizer enables that recommendation to be captured, and permits the financial professional the opportunity to document that it was not followed by the client.</p> <p>Because the investment recommendation was not followed, there is no prohibited transaction (PT), because there is no increased compensation in connection with the recommendation. In these instances, we recommend documenting the file that the client chose not to follow the recommendation.</p>
<p>If the client is unable to provide me with documentation of their plan fees, can I still make a recommendation regarding the assets in the account?</p>	<p>The PTE extends to all PTs that result from “investment advice.” However, in the context of recommending movement of assets between accounts (vs. purchasing or selling securities within an existing account), the DOL specifically referenced the following four scenarios in the preamble to the regulation, including recommending rolling over assets from:</p> <ol style="list-style-type: none">1. an ERISA-covered plan to an IRA;2. an ERISA-covered plan to another plan;3. one IRA to another IRA; and4. changing from a commission-based account to a fee-based account (or the other way around). <p>In any of the four scenarios, a recommendation to move from one account to another will be considered investment advice if all prongs of the five-part test are satisfied. If the advice results in a PT, then complying with a PTE will be necessary to avoid significant penalties.</p> <p>The Fi360 Decision Optimizer accounts for each of the scenarios by presenting the financial professional the opportunity to choose the relevant decision framework for the analysis being conducted.</p>
<p>Does this regulation only apply to Broker-Dealers or Registered Investment Advisers?</p>	<p>No, prohibited transactions under ERISA and/or the Internal Revenue Code (IRC) are not limited by the type of firm or the status of any individual. Any individual or financial institution (e.g, registered investment advisers, broker-dealers, banks, insurance companies, etc.) can engage in a PT under ERISA and/or IRC; PTE 2020-02 is only available to financial institutions and their representatives; however.</p>

What is required in the annual retrospective analysis report for PTE 2020-02?

Here are the requirements from the text of the final PTE available at: <https://www.federalregister.gov/d/2020-27825/p-833>

d. Retrospective Review.

1. The Financial Institution conducts a retrospective review, at least annually, that is 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. The methodology and results of the retrospective review are reduced to a written report that is provided to a Senior Executive Officer.
3. A Senior Executive Officer of the Financial Institution certifies, annually, that:
 - A. The officer has reviewed the report of the retrospective review;
 - B. The Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of this exemption; and
 - C. The Financial Institution has in place a prudent process to modify such policies and procedures as business, regulatory, and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of this exemption.
4. The review, report and certification are completed no later than six months following the end of the period covered by the review.
5. The Financial Institution retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law including 12 U.S.C. 484.

What changes result from DOL's delaying the full conditions of PTE 2020-02 from the original date of December 20, 2021 to February 1, 2022 and July 1, 2022?

On Monday October 25, 2021, the DOL published Field Assistance Bulletin 2021-02 (the "FAB") announcing: 1) an extension of its Temporary Enforcement Policy related to PTE 2020-02; and 2) a delay with respect to the deadline to comply with "the specific disclosure and documentation requirements for rollovers." The new deadlines are February 1, 2022 for PTE compliance generally and July 1, 2022 for meeting the rollover disclosure and documentation requirements.

Practically speaking, the FAB changes the primary compliance date from December 20, 2021 to February 1, 2022. With regard to rollovers, all the conditions of PTE 2020-02 take effect on February 1, 2022, except for providing the rationale for the recommendation to the Retirement Investor and the formal requirement to document the rationale. Regarding the requirement to document the rationale, we encourage firms and advisors to continue to document the rationale for any recommendation, as doing so will help promote compliance of the Impartial Conducts Standards, namely, the requirement to make a recommendation in the Retirement Investor's best interest.

All other requirements of the PTE, including the need to develop policies and procedures to promote compliance of the Impartial Conduct Standards, the Retrospective Review, Eligibility to use the PTE, and Recordkeeping will become effective on February 1, 2022. We encourage firms to continue working to develop and implement their compliance programs related to rollovers and transfers.

CONTACT US FOR MORE INFORMATION

To learn how you can leverage Decision Optimizer to comply with PTE 2020-02 and beyond, call 866.390.5080 or email fi360sales@broadridge.com.

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