Department of Labor
Fiduciary Investment Advice Rule and Exemption Developments
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Over the past decade, the U.S. Department of Labor ("DOL") has been engaged in a long-running effort to expand the circumstances under which a person will be considered an investment advice fiduciary for purposes of Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the parallel provisions of the Internal Revenue Code ("Code").

Any changes to the definition of an investment advice fiduciary for purposes of ERISA and the Code will directly impact when a person will be subject to ERISA's duties of care and loyalty (and the potential liability for breaches of those duties). In addition, advisers who are fiduciaries must also navigate the prohibited transaction provisions of ERISA and the Code by complying with the conditions of one or more prohibited transaction exemptions when managing or advising on retirement plan or IRA assets.

On November 3, 2023, DOL published a new set of regulatory proposals, including:

- A proposed regulation re-defining who is a "fiduciary" by reason of providing investment advice to a plan or an IRA (the "2023 Proposed Regulation");
- Proposed amendments to Prohibited Transaction Exemption 2020-02 ("PTE 2020-02"), which provides exemptive relief for eligible investment advice fiduciaries, if certain conditions are met;
- Proposed amendments to PTE 84-24, currently the primary source of prohibited transaction exemptive relief for the sale of insurance and annuity products to ERISA plans and IRAs; and
- Proposed amendments to PTEs 77-4, 75-1, 80-83, 83-1 and 86-128 that would eliminate the ability of investment advice fiduciaries to rely on the exemptions and would make other changes to PTEs 75-1 and 86-128.

This outline provides an overview of the 2023 Proposed Regulation and key changes to PTE 2020-02.

I. Summary of the 2023 Proposed Regulation

The 2023 Proposed Regulation would significantly expand the universe of activities deemed to be fiduciary investment advice for purposes of ERISA and the Code. It would capture a broad swath of communications and relationships that financial professionals and institutions have with "Retirement Investors" -- defined to include ERISA plans, plans defined in the Code (including IRAs and HSAs, among others) as well as individuals who are owners, fiduciaries, participants or beneficiaries of such plans.

Broadly, under the proposal, a person becomes an investment advice fiduciary by receiving a fee or other compensation in connection with making certain types of recommendations to Retirement Investors, if the relationship between the advisor and the Retirement Investor meets certain criteria. The 2023 Proposed Regulation would replace the current regulation's five-part test with a new definition that draws elements from prior DOL proposals, PTE 2020-02 and the current regulation. If finalized substantially as proposed, investment advisers would be subject to the requirements of ERISA and the Code in connection with a broad array of communications with clients and prospects, including but not limited to those related to:

- IRA rollovers and transfers;
- Account types
- Plan and IRA distributions;
- Plan investment line-ups;
- Investment strategies and policies – even where no specific security is mentioned;
- Investments not involving securities, such as annuities, CDs or other banking products and digital assets;
- Selecting an asset manager, investment fund or investment adviser; and
- Proxy voting.

Below, we discuss in greater detail the 2023 Proposed Regulation.

A. Current Investment Advice Definition

Existing DOL regulations use a "five-part test" under which a person is an "investment advice" fiduciary if, for a fee, the person:

1. Renders advice to a plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
2. On a regular basis;
3. Pursuant to a mutual understanding;
4. That such advice will be a primary basis for investment decisions; and that
5. The advice will be individualized to the needs of the plan.

The DOL has come to view this test, which has been in place since 1975, as too narrow. As a result, in DOL's view, persons who occupy a position of trust and confidence for retirement investors are nevertheless able to avoid fiduciary status.

B. Proposed Investment Advice Definition

Under the 2023 Proposed Regulation, a person would be an investment advice fiduciary if the person: (1) provides advice or makes a covered recommendation; (2) provides such advice or recommendation to a "Retirement Investor"; (3) provides the advice or recommendation in circumstances where the Retirement Investor has reason to believe the person intends to act as a fiduciary; and (4) the advice or covered recommendation is provided for a fee or other compensation. Each of these elements of the newly proposed test are discussed, below. For all practical purposes, if the proposed definition is adopted, the five-part test would no longer exist.

1. Provides Advice or Makes a Covered Recommendation

The 2023 Proposed Regulation identifies three types of recommendations that can give rise to fiduciary advisor status, if the other elements of the definition are met.

The first type of covered recommendation includes those that are largely included in the current regulation – recommendations as to the advisability of acquiring, holding, disposing of, or exchanging securities or other investment property - and also includes recommendations as to investment strategy and those related to investments after a rollover, transfer or distribution from a plan or IRA.

In the preamble, the Department notes that it intends to broadly interpret "investment strategy," including where no specific security is mentioned, such as a recommendation to utilize, for instance, a margin strategy or a laddered CD or bond strategy. The preamble identifies non-security investments, such as certain types of annuities, banking products and digital assets as examples of "other investment property." As to rollover and similar recommendations, the Department contends, as it has previously, that a person should not be able to avoid ERISA fiduciary status by limiting their recommendations to the investment of IRA assets after a rollover from an ERISA plan. In this regard, the Department's view seems to be that any recommendation related to post-rollover investment of IRA assets necessarily involves a recommendation to take the rollover. If this is in fact the DOL's position, it may be difficult for a financial institution to avoid fiduciary status by only providing investment education related to the rollover decision, and then providing advice only after the rollover or distribution decision has been made. Commenters may seek clarification from the Department in this regard.

The second type of covered recommendation includes those related to the management of securities or other investment property and encompasses recommendations related to investment policies, investment strategies, portfolio composition, selecting other persons to provide management or advice services, selecting account types, and the voting of proxies. The preamble notes the Department's view that recommending another fiduciary advisor or investment manager is often "inseparable" from recommending specific investments.

One significant frustration with the Department's prior proposals has been a lack of clarity around whether and how a person could engage in marketing and sales activities regarding their own abilities, services and products. Many in the retirement services industry have argued that a "hire me" conversation should not give rise to fiduciary status and that in order to be meaningful, such conversations must be permitted to include a description of the services and capabilities being marketed. By including as a covered recommendation those related to selecting "other persons" to provide fiduciary services, the Department attempts to carve out some room for "hire me" conversations, saying in the preamble that, a person will not become a fiduciary "merely by engaging in the normal activity of marketing" or "touting the quality of one's own advisory or investment management services." However, it is also clear that DOL continues to believe that fulsome descriptions of investment products or services accompanying marketing discussions likely fall outside of these "hire me" and some initial sales conversations could be fiduciary in

nature. Ultimately, the Department contends that "the complete facts and circumstances surrounding each" communication must be considered.

The third type of covered recommendations are those regarding rollovers, transfers or distributions from a plan or IRA, including advice regarding whether to engage in the transaction, the amount and form of the transaction and the destination of the assets. In its preamble discussion, the Department reiterates its belief that rollover and distribution recommendations will typically involve investment advice to the ERISA plan and plan participant, such that ERISA's fiduciary duties would apply to the advice. In addition, DOL indicates that a recommendation not to take a distribution or rollover from an ERISA plan requires the same evaluation as a recommendation to do so. Currently, some financial institutions do not permit financial professionals to recommend that a participant take a rollover or distribution from an ERISA plan unless the financial professional can access certain information (e.g., information about the plan's fees or terms sufficient to enable a comparison against the financial institution's IRA products). While not addressed in the preamble, it is possible that, under the 2023 Proposed Regulation, a financial professional taking this approach would be deemed to be recommending that the participant stay in the plan rather than take a rollover or distribution. If so, there may be little room for firms to discuss options with a plan participant without making some form of covered recommendation.

2. A Person Makes a Covered Recommendation to a Retirement Investor

The 2023 Proposed Regulation would apply to covered recommendations made to any of the following recipients: an ERISA covered plan, a fiduciary, participant or beneficiary of an ERISA covered plan, a "plan" for purposes of section 4975(e)(1) of the Code, and an owner, beneficiary or fiduciary of such a plan. While the preamble and regulation refer to "IRAs" when discussing Code plans, this term includes, in addition to individual retirement accounts and individual retirement annuities, Health Savings Accounts, Archer MSAs and Coverdell educational savings accounts.

3. Circumstances where the Retirement Investor has Reason to Believe the Person intends to Act as a Fiduciary

The 2023 Proposed Regulation states that a person provides investment advice if he or she makes a covered recommendation to a Retirement Investor in circumstances that would lead the Retirement Investor to believe such person intends to act as a fiduciary, i.e., to enter into a relationship of trust and confidence. The Department provides that a person intends to act as a fiduciary in three situations, which are briefly outlined, below.

Discretionary Authority or Control. The person, either directly or through an affiliate, has discretionary authority or control with respect to a transaction involving securities or other investment property of the Retirement Investor. The Department states in the preamble that such a person necessarily has a relationship of trust and confidence with Retirement Investor and therefore acts as a fiduciary. In contrast, the current regulation includes similar language, but is limited to persons who exercise discretion with respect to a plan and does not include those who

have discretion over the assets of a single Retirement Investor, such as one plan participant or beneficiary.

Regular Basis, Individualized and May be Relied on as Advice. A person, either directly or indirectly, makes recommendations on a regular basis to investors in the marketplace as part of the investment advice provider's business, and the recommendation is provided under circumstances indicating that the recommendation is individualized and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.

Despite retaining elements of the current rule, the new formulation represents a breathtaking departure from it. Because the "regular basis" element of the current test is applied to each and every Retirement Investor, this element has most directly frustrated the Department's efforts to attach fiduciary status to one-time rollover recommendations. The new formulation – which applies the "regular basis" requirement to the business of the advisor – essentially captures any person associated with the financial services industry. The Department argues that the "updated regular basis requirement" appropriately limits the scope of the rule to those "in whom retirement investors may reasonably place their trust and confidence" and is an objective test. In our view, this is the most aggressive change in the proposed rule and is hard to square with a test that is intended to evidence a trust and confidence-based relationship with a particular Retirement Investor.

This provision also repurposes other elements of the current regulation's five-part test, requiring that the covered recommendation be provided "under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest." Here, the Department argues that the new formulation is an "improvement" over the current test because it would focus on the overall circumstances surrounding the recommendation. Relevant circumstances, in the Department's view, would include how an investment professional describes themselves (e.g., as a financial consultant, financial planner or wealth manager) and the services they provide, but would not include disclaimers of fiduciary status, for instance. The new formulation also lowers the bar for the level of reliance a Retirement Investor must place on the recommendation rather than forming a "primary basis" for the investment decision, the recommendation "may be relied upon . . . as a basis" for an investment decision. These changes, along with the shift in focus from a mutual understanding between an advisor and a plan to the Retirement Investor's expectations and the potentially "outcome determinative" nature of investment recommendations, mean that despite using similar terms as the current regulation, the proposal is vastly broader.

If finalized, the new formulation will inevitably subject to legal challenges that the Department acted beyond the scope of its authority. The outcome of such a challenge may turn, at least in part, on whether the Department can successfully argue that this provision is appropriately limited to relationships involving "trust and confidence."

Fiduciary Acknowledgment. A person is an investment advice fiduciary if they represent or acknowledge to a Retirement Investor that they act as a fiduciary – including, for example, a general acknowledgement that advice will be provided in a fiduciary capacity or a written acknowledgment of fiduciary status that is required for compliance purposes (such as under ERISA section 408(b)(2)). Additionally, the Department states that disclaimers of fiduciary status should be viewed skeptically and in light of the surrounding facts and circumstances including, but not limited to, whether the firm or its representatives hold themselves out as trusted advisers.

4. Broad Definition of Fee or Compensation

In order for a person to be deemed an investment advice fiduciary, ERISA and the Code require that an advice provider receive a "fee or other compensation, direct or indirect." The 2023 Proposed Regulation broadly defines this term to include an explicit fee or compensation (to the person or any affiliate) for the advice and any fee or compensation (to the person or any affiliate) that would not have been paid but for the recommended transaction or the provision of advice.

The definition also includes a non-exhaustive list of examples of compensation which includes: "commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation."

C. Key Issues for Investment Advisers

One-time Rollover and Distribution Recommendations. Under current regulations, a person is only deemed to be an investment advice fiduciary if they make multiple recommendations to the same plan or person (i.e., they do so on a "regular basis"). However, under the 2023 Proposed Regulation, one-time recommendations (including those to rollover from a plan to an IRA or otherwise take a distribution from a plan or an IRA) would often be investment advice, even if they do not involve providing on ongoing advice post-rollover or post-distribution, or if the services provided post-rollover or post-distribution do not involve an account otherwise subject to ERISA or the Code.

No Avenue for "Education-Only". Currently, some firms take the position that the firm can avoid being a fiduciary when discussing rollovers by providing information about the services or products than would be available in the IRA products offered by the firm. These firms view themselves as providing "education" rather than advice. While this approach may be viable under current regulations, it would not be under the Proposed 2023 Regulation.

Sales Versus Advice. While many investment advisers are comfortable that they can satisfy the substantive duties associated with acting in a fiduciary capacity, the 2023 Proposed Regulation presents a serious problem for advisers when communicating with prospective retirement clients or with existing clients regarding new or additional services. The Department in the preamble flatly rejected the idea that there is any meaningful difference between a conversation an adviser

has with a prospective client in which the adviser describes its services, philosophy, products and approach, on the one hand, and a conversation in which an adviser makes a fiduciary recommendation to the prospective client. Since ERISA and the Code forbid fiduciaries from giving advice that could cause the fiduciary to receive an additional fee, investment advisers may need to comply with PTE 2020-02 (discussed below) just to describe their services to a potential client.

II. Proposed Amendments to PTE 2020-02

Broadly speaking, PTE 2020-02 allows financial institutions and financial professionals to give fiduciary investment advice to ERISA plans, ERISA plan participants, and IRAs and to receive otherwise prohibited compensation resulting from that advice if certain conditions are satisfied. Further, the exemption permits a fiduciary to engage in riskless principal transactions and certain other principal transactions as described below. Unlike other existing statutory and administrative exemptions that only apply to particular transactions or investment products, PTE 2020-02 might be viewed as a "one stop shop" for providers of many types of fiduciary investment advice.

The proposed amendments to PTE 2020-02 would generally retain the structure of the exemption in its current form. Moreover, PTE 2020-02 would continue to provide broad exemptive relief in connection with the provision of non-discretionary investment advice. However, several important changes would be made to the exemption, including:

- The availability of PTE 2020-02 would be expanded to cover robo-advice arrangements that do not involve the participation of a human investment professional and to allow pooled plan providers to rely on the exemption in connection with advice to pooled employer plans;
- New disclosure requirements would be added, including with respect to compensation and conflicts of interest;
- The circumstances under which a financial institution could be disqualified from reliance on PTE 2020-02 would be greatly widened to include, among other things, a larger list of criminal convictions and convictions in foreign courts by a larger group of affiliates; and
- The exemption would affirmatively require financial institutions to correct, file reporting with the IRS, and pay excise taxes in connection with any non-exempt prohibited transactions the financial institution engaged in as a result of providing fiduciary investment advice.

III. Overview of Proposed Changes to PTE 2020-02

A. Expansion of Coverage

In its current form, PTE 2020-02 provides relief for advice provided by a covered financial institution (i.e., a registered investment adviser, bank, insurance company, or registered broker-dealer) through an investment professional the financial institution employs or otherwise supervises. PTE 2020-02 currently excludes from coverage advice generated by an interactive

website in which computer software models or applications provide investment advice without any personal interaction or advice with an investment professional (i.e., robo-advice). The DOL is proposing to remove this exclusion so as to allow financial institutions to provide robo-advice in reliance on PTE 2020-02 without the participation of an investment professional. The DOL noted that in order to rely on the exemption, a financial institution would need to ensure that robo-advice and to adopt policies and procedures that mitigate the conflicts of interest the financial institution faces in providing robo-advice. Additionally, the DOL sought comment on the ways financial institutions are currently using robo-advice programs, including whether such programs rely on artificial intelligence. This solicitation may indicate that the DOL is reviewing the SEC's proposed rule on conflicts of interests associated with the use of predictive data analytics by broker-dealers and investment advisers.

Further, PTE 2020-02 is currently unavailable where the investment professional or financial institution is a named fiduciary or plan administrator (or an affiliate thereof) of an ERISA-covered Plan, unless the investment professional or financial institution was selected to provide advice by an independent fiduciary. The proposed amendments would provide an exception for pooled plan providers, who would be permitted to provide advice to a pooled employer plan under PTE 2020-02. The DOL noted in the preamble to the proposed amendments, however, that PTE 2020-02 would not allow a pooled plan provider to retain an affiliate as an advice provider to a pooled employer plan. It is somewhat unclear whether the proposed amendments would allow an affiliate of a pooled plan provider that is a financial institution to provide advice (such as rollover advice) to participants of a pooled employer plan.

B. Impartial Conduct Standards

PTE 2020-02's impartial conduct standards require financial institutions and investment professionals to:

- Provide advice that is the best interest of the retirement investor;
- Receive only reasonable compensation;
- Seek to obtain best execution of the investment transaction reasonably available under the circumstances; and
- Avoid making statements about the recommended transaction and other relevant matters that are materially misleading.

The proposed amendments to PTE 2020-02 would largely maintain the exemption's impartial conduct standards in their current form. However, the DOL is proposing to amend the requirement to avoid making materially misleading statements to explicitly prohibit financial institutions and investment professionals from omitting information that is needed to prevent its statements from being, under the circumstances, not misleading. The amendments would also clarify that the requirement applies to both written and oral statements.

C. New Disclosure Conditions

Currently, PTE 2020-02 requires that financial institutions provide certain disclosures to retirement investors prior to engaging in a recommended transaction. The proposed amendments to PTE 2020-02 would increase the disclosure requirements as described below:

- Acknowledgment of Fiduciary Status. PTE 2020-02 currently requires that the investment professional and its supervisory financial institution provide a written acknowledgment that they are fiduciaries under ERISA and the Code, as applicable, with respect to fiduciary investment advice provided to the retirement investor. The DOL now proposes to also require a statement that the investment professional and financial institution are providing "fiduciary investment advice." In the preamble to the proposed amendments, the DOL stated its view that a conditional acknowledgment that an investment professional or financial institution "may" be fiduciaries or that they are fiduciaries to the extent they meet the definition of fiduciary investment advice under the ERISA or the Code would not be sufficient to meet this requirement.

- Statement of Best Interest Standard of Care. The proposed changes to PTE 2020-02 would include a new requirement that financial institutions provide to retirement investors a statement of the best interest standard of care PTE 2020-02 imposes.

- Description of Services to Be Provided and Material Conflicts of Interests. PTE 2020-02 currently requires financial institutions to provide a written description of the financial institution's and investment professional's services and material conflicts of interest that is not misleading. The DOL's proposed changes would clarify that this requirement would be violated if the description is misleading in "any" respect. Further, the proposed amendments would require the financial institution to disclose whether (a) the retirement investor will pay for services directly or indirectly, including through "Third Party Payments" (defined to include gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit paid by a third party to a financial institution); and (b) the retirement investor will pay through commissions or transaction-based payments.

- Statement of Right to Obtain Additional Information upon Request. The proposed amendments to PTE 2020-02 would include a new requirement that financial institutions provide a statement that retirement investors may request, free of charge, specific information regarding costs, fees, and compensation that is described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature. The statement would need to describe how the retirement investor may obtain such information.

- Rollover Disclosure. PTE 2020-02 currently requires, with respect to rollover recommendations only, disclosure of the specific reasons why the rollover

recommendation is in the best interest of the retirement investor. The proposed amendments would codify guidance the DOL had previously provided stating that financial institutions should codify and disclose: (a) the retirement investor's alternatives to a rollover, including leaving the money in his or her current employer's plan, if applicable; (b) the fees and expenses associated with both the plan and the recommended investment or account; (c) whether the employer pays for some or all of the plan's administrative expenses; (d) and the different levels of services and investments available under the plan and the recommended investment or account. The DOL noted that a financial institution could charge a reasonable fee for this analysis that is separate from the fee it would receive for providing investment advice after the rollover occurs.

Helpfully, the proposed amendments would include a new provision allowing a financial institution to self-correct a good faith error or omission in providing the required disclosures, so long as the financial institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. The financial institution would then be deemed to have not violated the disclosure conditions. Presumably, this self-correction could be performed without reporting to the DOL. The DOL also confirmed that the above disclosure requirements may be satisfied if the relevant information is included in disclosures already mandated by the DOL or other regulators, including disclosures mandated by SEC's Regulation Best Interest and Form CRS.

Although not included in the proposed amendments, the DOL sought comments on whether a condition should be adding requiring financial institutions to maintain a website containing the disclosures, a description of the financial institution's business model, associated conflicts of interest, and a schedule of typical fees. DOL stated that it has considered requiring the website to include a description of the financial institution's arrangements that provide Third-Party Payments, with a list of associated product manufacturers or other payors of Third-Party Payments, and detail on each payor's compensation arrangement. If a website disclosure requirement were imposed, a link would need to be included with the other above disclosures.

D. Policies and Procedure Revisions

PTE 2020-02 currently requires financial institutions to establish, maintain, and enforce policies and procedures that (a) are prudently designed to ensure compliance with the impartial conduct standards of PTE 2020-02 and (b) mitigate the investment professional's and financial institution's conflicts of interests to such an extent that a reasonable person would not view the financial institution's incentive practices to create an incentive for the financial institution and investment professional to place their interests ahead of those of retirement investors. The proposed changes to PTE 2020-02 would revise these policies and procedures requirements in two respects.

First, financial institutions would be prohibited from using quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in retirement investors' best interest. This change is

notable because in 2020, the DOL had considered prohibiting sales contests and similar incentives, but declined to do so on the basis that it had considered the policies and procedures requirement to be principles-based rather than prescriptive. Second, financial institutions would be required to provide their policies and procedures to the DOL within 10 business days of request.

E. Annual Retrospective Compliance Review Changes

PTE 2020-02 currently requires financial institutions to conduct an annual retrospective review reasonably designed to assist in detecting and preventing violations of the impartial conduct standards and the financial institution's policies and procedures. The methodology and results of the review must be set forth in a written report submitted to the Senior Executive Officer of the Financial Institution (the CEO, Chief Compliance Officer, Chief Financial Officer, President, or one of the three most senior officers of the financial institution), who must certify, within six months of the end of the annual review period that:

- The officer reviewed the report;
- The Financial Institution has in place policies and procedures required by PTE 2020-02; and
- The Financial Institution has in place a prudent process to modify such policies and procedures.

The Financial Institution must retain the report, certification, and supporting data for a period of six years and make them available to the DOL within 10 business days of DOL's request.

The proposed amendments would expand the retrospective review to require the financial institution to test compliance with all of PTE 2020-02's conditions, rather than the impartial conduct standards alone. Further, the Senior Executive Officer would also be required to certify that the financial institution has corrected, filed reporting with the IRS, and paid excise taxes with respect to any non-exempt prohibited transactions the financial institution engaged in as a result of providing fiduciary investment advice. This requirement would not appear limited to instances where the financial institution intended to comply with PTE 2020-02 but violated the conditions of the exemption. Thus, for example, if the financial institution intended to avoid acting as an investment advice fiduciary but inadvertently provided fiduciary investment advice and received compensation as a result of that advice, then the conditions of PTE 2020-02 would appear to require the financial institution to correct the transaction, file with the IRS, and pay excise tax. Presumably this requirement could also apply without regard to when a prohibited transaction is "discovered" by the financial institution. Thus, if a financial institution were to discover a prohibited transaction years after it occurred (after the applicable limitations period on excises taxes has already run), the financial institution could nonetheless need to correct the prohibited transaction and pay excise taxes if the financial institution intends to rely on PTE 2020-02 in acting as an investment advice fiduciary.

F. Enlargement of Disqualification Provisions

PTE 2020-02 currently provides that a financial institution or investment professional may be disqualified from reliance on the exemption in a few ways, in each case for a period of ten years:

- First, if the investment professional, financial institution, or a member of the financial institution's controlled group is convicted of a crime described in section 411 of ERISA arising out of investment advice to a retirement investor. The proposed amendments would significantly expand the scope of disqualifying crimes to (a) remove the stipulation that the crime must arise from the provision of investment advice to be disqualifying, (b) add a long list of disqualifying financial crimes that would also be considered disqualifying crimes under PTE 84-14 (the Qualified Professional Asset Manager or "QPAM" Exemption), (c) expressly include convictions in foreign courts as disqualifying; and (d) provide that a conviction of a financial institution's affiliate, rather than controlled group member, would give rise to disqualification. Thus, if the proposed amendments are finalized, financial institutions who have obtained an individual exemption permitting reliance on the QPAM Exemption notwithstanding a disqualifying conviction may need to review whether they would also be disqualified from reliance on PTE 2020-02 absent an additional individual exemption. In connection with foreign (but not domestic) convictions, the financial institution would be permitted to submit a petition to the DOL requesting a waiver of disqualification.

- Second, if the DOL issues a finding that an investment professional, financial institution, or a member of the financial institution's controlled group has (a) engaged in a systematic pattern or practice of violating the conditions of PTE 2020-02 in connection with otherwise non-exempt prohibited transactions; (b) intentionally violated the conditions of PTE 2020-02 in connection with otherwise non-exempt prohibited transactions; or (c) provided materially misleading information to the DOL in connection with the financial institution's conduct under the exemption. The proposed amendments would add engaging in a systematic pattern or practice of failing to correct, file reporting with the IRS, and pay excise taxes with respect to any non-exempt prohibited transactions the financial institution, its affiliate, investment professional, or engaged in as a result of providing fiduciary investment advice as additional disqualifying conduct. It is unclear how the DOL would determine whether a financial institution has engaged in and failed to correct non-exempt prohibited transactions involving IRAs and other accounts not subject to Title I of ERISA because the IRS, rather than the DOL, retains jurisdiction to investigate prohibited transactions with respect to such accounts. Finally, the proposed amendments would also provide that any disqualifying conduct by an affiliate, rather than controlled group member, may disqualify the financial institution.

- Third, the DOL has proposed to revise the definition of a financial institution that is eligible to rely on PTE 2020-02 to exclude financial institutions that are "suspended . . . or otherwise prohibited" from making investment recommendations by any insurance, banking, or securities law or regulatory authority. The definition currently only excludes financial institutions that are "barred" from making investment recommendations.

PTE 2020-02 currently provides a one-year winding down period, during which a financial institution is permitted to rely on the exemption notwithstanding disqualification. The proposed amendments would shorten this period to six months and apply it to disqualified investment professionals in addition to financial institutions.

G. PTE 2020-02's Self-Correction Procedure

PTE 2020-02 permits financial institutions to correct violations of the exemption. If a financial institution follows the self-correction procedure, a non-exempt prohibited transaction would not be deemed to occur. In order to self-correct, a financial institution must:

- Correct the violation within 90 days of the date the financial institution learns or should have learned of the violation;
- Make the retirement investor whole for investment losses, if any;
- Notify the DOL within 30 days of the correction; and
- Report the correction in the financial institution's annual retrospective compliance review.

The DOL did not propose changes to these self-correction procedures. However, in the preamble to the proposed amendments, the DOL discussed the extent to which violations of PTE 2020-02 can or should be corrected through the procedure. In this respect, the DOL noted that a retirement investor may experience a loss that must be corrected (such as excessive compensation that must be returned to the retirement investor's account) even if the value of the retirement account did not decrease. The DOL stated that a failure to provide a disclosure in writing may be corrected if the information included in the disclosure was provided to a retirement investor verbally. Further, the DOL indicated that if a financial institution mistakenly causes a retirement investor's account to purchase the wrong asset, then the financial institution must correct this error as quickly as possible by ensuring the retirement investor's account is in the same position it would have been if the correct transaction had occurred. However, the DOL expressed doubt concerning whether a rollover recommendation that was not in the retirement investor's best interest can be corrected, suggesting that even if the retirement investor's account has performed well, the retirement investor may have been harmed by the loss of ERISA's protections in connection with an account that has rolled over from a plan, given that an IRA generally cannot be rolled back into the plan that provided the rollover distribution. The DOL solicited comment on whether it should provide clarification on the types of transactions eligible for correction.