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## MEMORANDUM

**CONFIDENTIAL**

**ATTORNEY-CLIENT PRIVILEGE**

TO: **CLIENT**

FROM: Lindsay Jackson  
Dan Kleinman  
Caitlin Onomastico  
Michael Richman  
Helen Rizos  
Natalie Wengroff  
Dan Wentworth

DATE: February 13, 2023 WORKING DRAFT

SUBJECT: PTE 2020-02 Annual Retrospective Review Report Template

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The below template provides a proposed annual retrospective review report framework for firms to consider and adopt as they complete their first annual retrospective review and report, as required by the U.S. Department of Labor ("DOL") Prohibited Transaction Exemption 2020-02 ("PTE 2020-02").

The framework below provides an overview of the report requirements based on current DOL guidance along with sample report provisions for your consideration.

**NOTE:** As business models vary significantly among firms, firms will need to tailor their annual retrospective review and report to align with their specific PTE 2020-02 compliance framework, lines of business, oversight structure, processes, and policies and procedures. Accordingly, this template is not intended as a substitute for the text of PTE 2020-02 and DOL guidance; please think of this as a starting point for you to react to.

You will need to draft and review your own retrospective review methodology and written report with your legal counsel and other advisors. We are here to help.

*As a reminder:*

- The PTE 2020-02 Retrospective Review Report (the "Report") must be provided to a "Senior Executive Officer" of the Financial Institution for their review and certification;
  - "Senior Executive Officer" is defined as any of the following: the Chief Compliance Officer, Chief Executive Officer, President, Chief Financial Officer, or one of the three senior officers of the Financial Institution.
- The retrospective review, the Report, and the certification must be completed no later than 6 months following the end of the review period (so you have some flexibility in establishing your reporting period);

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- Items corrected outside of the PTE 2020-02 correction regime may not need to be included in the Report;
- There is no prescribed form or format for the Report or detail on its scope or how testing is to be designed, implemented, and documented;
- The Report, certification, and supporting data must be retained for 6 years (so don't lose it ☺ -- just saying); and
- The Report, certification, and supporting data must be made available to the DOL within 10 days of its request.

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## [FIRM] Prohibited Transaction Exemption 2020-02 Retrospective Review Report

For the Review Period [\_\_\_\_] to [\_\_\_\_]

Dated [\_\_\_\_]

### [TABLE OF CONTENTS]

#### I. Executive Summary

*[The executive summary should include background on the firm, including whether it is registered as a broker-dealer, investment adviser, bank or other financial institution. As an example:]*

[FIRM] is registered as a [broker-dealer / investment adviser / bank / insurance company] with [insert applicable regulator]. [FIRM] and [FIRM]'s Investment Professionals provide [insert description of services].

This PTE 2020-02 Retrospective Review Report (the "Report") details [the FIRM]'s retrospective review for the period noted above pursuant to Section II(d)(2) of PTE 2020-02. The Report is intended to fulfill the conditions of Section II(d) of PTE 2020-02. The Report includes the methodology and the results of the firm's retrospective review. *[If there are notable findings/corrections or issues, we suggest including a brief summary of each type of issue generally and clarify the changes made to policies and procedures to address the issues in the future, as applicable. Additionally, if there are significant changes to the lines of business or changes to the interactions or transactions in which the firm is relying on PTE 2020-02, we also suggest previewing these changes in this section.]*

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## II. Background: ERISA/Code Definition of Fiduciary Investment Advice Provider and PTE 2020-02

*[We suggest providing background as to why the firm needs to rely on the exemption. Please see an example overview of the prohibited transaction rules below. We note that this is not explicitly required by the exemption.]*

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") imposes a series of responsibilities and limitations, including prohibited transaction rules, on persons who are "fiduciaries" to ERISA plans, and section 4975 of the Internal Revenue Code ("Code") imposes prohibited transaction rules that parallel those under ERISA applicable to certain categories of ERISA plans and to certain types of accounts that are not subject to ERISA, such as non-ERISA individual retirement accounts ("IRAs").

Under the applicable sections of ERISA and the Code, a person is a "fiduciary" to a retirement account to the extent the person either: (1) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, or (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.

PTE 2020-02 is available to cover certain transactions involving persons who are fiduciaries by reason of rendering non-discretionary "investment advice for a fee or other compensation". Under DOL regulations, a person who is not otherwise a fiduciary will be treated as rendering investment advice within the meaning of this definition, causing that person to be a fiduciary, if all five factors of the following "5-part test" are met:

1. Renders advice 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, meaning it is recurring, non-sporadic, and expected to continue;
3. Pursuant to a mutual understanding, meaning either a clearly demonstrated agreement or by reasonable understanding;
4. That such advice will be a primary basis for investment decisions; not "the" primary basis or single most important determinative factor, but that the advice is important to the investor and could determine the outcome of the decision the investor makes; and
5. That the advice will be individualized to the plan.

When Investment Professionals<sup>1</sup> are fiduciaries under ERISA and/or the Code, they have important obligations designed to protect Retirement Investors. Financial Institutions and Investment Professionals that provide ERISA fiduciary investment advice are prohibited from receipt and retention of compensation that creates conflicts of interest, unless they qualify for an exemption from these prohibited transaction rules. The DOL issued a PTE for ERISA fiduciary investment advice providers who have conflicts of interest that could affect their interactions with Retirement Investors, PTE 2020-02. Eligible investment advice fiduciaries relying on PTE 2020-02 must satisfy all of its conditions.

### PTE 2020-02 Conditions

- The Financial Institution and Investment Professional must comply with the Impartial Conduct Standards when providing investment advice. The Impartial Conduct Standards require:
  - The Financial Institution and its Investment Professionals provide investment advice that is in Best Interest of the Retirement Investor. This generally requires that the advice be

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<sup>1</sup> Any capitalized term used but not defined herein shall have the meaning given to that term in the U.S. Department of Labor's Prohibited Transaction Exemption 2020-02.

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prudent and that the advice does not place the interests of the Financial Institution or the Investment Professional ahead of the interest of the Retirement Investor;

- Compensation received by the Financial Institution and Investment Professionals and their affiliates does not exceed reasonable compensation; and
- Statements about the recommendations and related matters are not materially misleading.
- Prior to engaging in a covered fiduciary investment advice transaction, the Financial Institution provides to the Retirement Investor a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional.
- Prior to engaging in a covered fiduciary investment advice transaction, the Financial Institution provides to the Retirement Investor a written description of the services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest that is accurate and not misleading in all material respects.
- Prior to engaging in a rollover (*i.e.*, a recommendation to roll out of a plan, IRA or account-type) recommended as a covered fiduciary investment advice transaction (*i.e.*, a rollout recommendation meeting the elements of the 5-part test, including the regular basis requirement), the Financial Institution provides to the Retirement Investor documentation of the specific reasons for the rollover recommendation. (**Note the recent decision in American Securities Assoc. [ASA] vs. U.S. Department of Labor [DOL], M.D.F.L. 2023, Case No. 8:22-cv-330-VMC-CPT**)
- The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions.
- The Financial Institution's written policies and procedures mitigate conflicts of interest so they do not create an incentive for a Financial Institution or Investment Professional to place their interest ahead of the interest of the Retirement Investor.
- Maintain records demonstrating compliance with the PTE for six years.
- 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.
- The methodology and results of the retrospective review are required to be reduced to a written Report that is provided to a Senior Executive Officer of the Financial Institution. The Senior Executive Officer is required to review this written Report and certify that:
  - (A) The officer reviewed the Report;
  - (B) The Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of PTE 2020-02; and
  - (C) The Financial Institution has in place a prudent process to modify 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

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which is reasonably designed to ensure continuing compliance with the conditions of PTE 2020-02.

### **III. PTE 2020-02 Applicability - Scope of [FIRM]'s PTE 2020-02 Reliance**

*[We suggest clarifying the scope of [FIRM]'s reliance on PTE 2020-02. This includes documenting the types of interactions and recommendations only where the firm is relying on the exemption. General discussion of where and under what circumstances the exemption is not being used should be avoided. For example, we understand that many firms take an education-only approach regarding certain retail investor interactions, including for rollover recommendations. Rather than clarifying which interactions have been deemed "education-only" as part of the Report, we suggest that the Report cover only the scenarios where a fiduciary investment advice recommendation is provided and where PTE 2020-02 is being relied on for the firm to receive additional compensation in connection with the recommendation. Moreover, where such a firm finds that recommendations were in fact provided and corrects the arrangement outside the correction provisions of the exemption, discussion of the error and correction method as part of the Report may be avoided. Additionally, for future iterations of this Report, if [FIRM] changes the circumstances in which it is relying on the exemption, we suggest noting that in this section.]*

[FIRM] may act as an ERISA investment advice fiduciary and rely on PTE 2020-02 in the following contexts:

- Recommendations to Retirement Investors regarding the [purchase/sale] of [certain types of] investment products in retirement accounts
- Recommendations to Retirement Investors to transfer between brokerage/advisory retirement accounts
- Recommendations to Retirement Investors to rollover from an employer plan to an IRA
- Recommendations to Retirement Investors to rollover or transfer from an IRA to another IRA

PTE 2020-02 does not apply to non-retirement accounts. PTE 2020-02 also does not apply when the firm acts as a discretionary investment adviser to accounts, including retirement accounts. PTE 2020-02 does not apply to services provided to the firm's own retirement plan participants.

### **IV. [FIRM]'s Controls and Supervision Related to PTE 2020-02**

*[This section should include a general framework and overview of the controls [FIRM] has in place and how policies and procedures are monitored in relation to those controls. The specifics of how [FIRM] monitors compliance with PTE 2020-02 may not be as important as explicitly naming the groups or persons who have supervisory functions and responsibilities. The DOL noted that firms should ensure that their oversight departments or supervisors clearly understand whether they have supervisory roles in relation to PTE 2020-02. We suggest naming titles and roles instead for individuals. We suggest also describing the firm's supervisory structure in general terms, at a very high level, noting generally specific aspects that relate to PTE 2020-02, including a focus on compensation structures for the firm's Investment Professionals. Given that this is the first year and there is little detailed guidance regarding the Report's requirements, a less is more approach may be preferable to a very detailed articulation of the firm's operations and supervision systems]*

- A. [Compliance Department] is responsible for overall compliance with the conditions of PTE 2020-02 by:
  - i. Establishing and maintaining policies and procedures related to the provision of ERISA fiduciary investment advice and mitigation of conflicts, including periodic review of direct and indirect compensation received by the firm and its Investment Professionals.
  - ii. Evaluating and identifying necessary modifications to policies and procedures related to compliance with PTE 2020-02

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- iii. Establishing, maintaining and updating disclosures provided to Retirement Investors required by PTE 2020-02.
  - iv. Educating and training Investment Professionals on relevant PTE 2020-02 topics, including new disclosures and policies and procedures.
- B. [FIRM] maintains other control functions that perform responsibilities relating to PTE 2020-02 compliance, including:
- i. [The Risk Department] is responsible for business continuity, corporate governance and risk management.
  - ii. [The Legal Department] provides advice related to all facets of PTE 2020-02 interpretation.
  - iii. Other departments (Finance, Internal Audit, etc.) and their roles/responsibilities.
- C. Describe responsible [Board of Director Committee] oversight, including, but not limited to:
- i. [Governance Committee]
  - ii. [Risk Committee]
  - iii. [Audit Committee]
  - iv. [Best Execution Committee]
- D. Description of roles and responsibilities of other [FIRM committees] related to PTE 2020-02 compliance:
- i. [Conflicts committee]
  - ii. [Compensation Committee]
- E. Description of the Supervisory Control System
- o Led by [Chief Compliance Officer/ other Senior Executive Officer] who is responsible for developing, maintaining and enforcing supervisory control policies and procedures, including testing.
  - o Discuss [FIRM]'s hierarchy of control oversight.
  - o Establishing and executing [FIRM]'s supervision of Investment Professionals, including testing programs.

[FIRM] has established and maintains a supervisory system prudently designed to ensure that [FIRM] and its [Investment Professionals] comply with applicable provisions of PTE 2020-02. The system is led by [\_\_\_\_], responsible for developing, maintaining, and enforcing policies and procedures.

- [Describe compliance reviews, surveillance and testing, such as:
  - o Provide information on compliance manuals, written supervisory procedures, control process, and training programs on the firm's products/services and applicable regulatory requirements.
  - o Describe the compliance teams, working groups or committees responsible for reviewing and approving covered activities of [Investment Professionals].
  - o Describe what transactions or products are monitored and reviewed and the method in which they are reviewed (best execution, rollovers, principal trades, etc.).

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- Describe any use of any technology tools to aid in surveillance.
- Describe frequency of reviews (daily, monthly, etc.).
- Describe testing process, including:
  - Training on process review, testing, and documentation
  - Frequency and types of products, personnel, interactions, and transactions tested
  - Documentation requirements, including current supervisory controls and applicable policies and procedures; and
  - Process for identifying, documenting and correcting deficiencies.
- Describe whether there is an oversight team that performs quality checks of the reviews to ensure they meet [FIRM] policies and procedures and DOL regulatory requirements.]

[FIRM] maintains written policies and procedures prudently designed to ensure that [FIRM] and its [Investment Professionals] comply with applicable provisions of PTE 2020-02. These are periodically reviewed by [\_\_\_\_] to ensure they are updated in light of business activities and regulatory guidance. In addition, [FIRM]'s procedures provide for testing by [\_\_\_\_] of policies and procedures on a periodic basis. This testing is conducted on a risk-based frequency depending on the nature of the activity.

- [List relevant testing details]

Direct supervision of [Investment Professionals] occurs through [\_\_\_\_] [*Clarify how these investment professionals are supervised*].

Surveillance of [Investment Professionals] activities occurs through the following automated means: [\_\_\_\_].

## V. Conflicts of Interest Mitigation

*[We suggest describing how [FIRM] identifies conflicts of interest and how those conflicts are mitigated. You may be able to tap the Firm's Reg BI conflict registry for this process, where available. This may include a description that addresses: What is the process? Where do mitigation steps take place? Are policies and procedures in place to mitigate conflicts? Have such policies and procedures been revised in order to mitigate conflicts? Are disclosures in place to mitigate conflicts? Have such disclosures been updated to reflect PTE 2020-02-specific conflict mitigation? This section is not intended to only include a list of the policies and procedures. Instead, this section should be drafted in a narrative form as to the specific process(es) [FIRM] has for identifying conflicts and how conflicts are mitigated. We suggest also noting that conflict identification and mitigation is an ongoing process and is reviewed/updated regularly in order to adhere to the requirements of PTE 2020-02.]*

## VI. Retrospective Review – Methodology

[FIRM]'s retrospective review methodology included the following steps:

- Review of PTE 2020-02
- Compilation, review, and, where necessary, updates to all relevant disclosure documents related to PTE 2020-02 compliance



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- Compilation, review, and, where necessary, updates to [FIRM]'s policies and procedures related to PTE 2020-02 compliance
- Utilization of the above-mentioned compliance reviews, surveillance and testing, including sampling, to collect information about compliance with policies and procedures related to PTE 2020-02

*[The DOL emphasizes the importance of sampling in the PTE 2020-02 adopting release, noting that "for large Financial Institutions that conduct large numbers of transactions each year, sampling may not be the sole means of testing compliance, but it is an important and necessary component of any prudent review process, and should be performed in a manner designed to identify potential violations, problems, and deficiencies that need to be addressed." We suggest that sampling sizes and approaches be done consistently with other similar types of internal audit functions.]*

- Review of results of the above-mentioned compliance reviews, surveillance, and testing.
- Review of any relevant escalations and customer complaints
- Review of any self-corrections under PTE 2020-02
- Review of any relevant regulatory inquiries/exams

## **VII. [PRIOR YEAR] Review – Follow-up Items from Previous Retrospective Review**

*[This section is a placeholder and will be blank for the first Report. [FIRM] will use this section to itemize any opportunities for improvement identified in the previous retrospective review and will detail the improvements made as a result.]*

## **VIII. [CURRENT YEAR] Review – Assessment and Results**

*[When completing the section, we suggest referencing how the DOL describes the intended purpose of the retrospective review process, which is "to (1) detect any business models creating conflicts of interests, (2) test the adequacies of the policies and procedures, (3) identify any compliance areas for improvements, and (4) update and modify [the FIRM]'s compliance system based on the review results."]*

The [name of committee or department] conducted an assessment of the following items:

### 1) Disclosures Required by PTE 2020-02

- a. Review of the adequacy of disclosures in light of business changes and experiences.

The FIRM reviewed existing required disclosures by PTE 2020-02. These include the following disclosures:

- [Fiduciary acknowledgement required by PTE 2020-02]
- [Forms CRS]
- [Reg. BI disclosures]
- [Rollover disclosures]
- [Other disclosures]

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*[If applicable, specify if any modifications were made. If no modifications were made, note that no modifications were made/needed.]*

b. Review and testing of disclosure delivery

[FIRM] tested the delivery of disclosures required by PTE 2020-02. These included delivery of [relevant disclosures and recipients]. *[Include any findings and related improvements.]*

2) Policies and Procedures Required by PTE 2020-02

a. Review of policies and procedures in light of business changes and experience

[FIRM] reviewed the sufficiency of policies and procedures applicable to PTE 2020-02 in light of business changes and experience to determine if revisions were needed for ongoing PTE 2020-02 compliance. *[For this part of the review, consider business changes and changes to direct and indirect compensation received by the firm. Also consider incentive compensation programs for the firm's Investment Professionals, whether issues arose under those programs and/or any changes were made to those programs. Specify the overall review's findings and applicable improvements that were made. Firms may also consider legislative and regulatory developments that may necessitate revisions to the firm's policies and procedures.]*

b. Review and testing of compliance with PTE 2020-02 policies and procedures

[FIRM] reviewed compliance with PTE 2020-02 policies and procedures to assist in the detection and prevention of violations. The review utilized the compliance reviews and surveillance tools identified in Section IV of this Report. The review also considered relevant customer complaints related to PTE 2020-02 policies and procedures. This review included the following areas:

- Investment/account type recommendations
- Rollover recommendations
- Principal transactions
- Best execution
- *[We suggest that firms evaluate the ongoing reasonableness of the compensation received by the firm and its Investment Professionals. Given that assessing the reasonableness of compensation requires consideration of facts and circumstances, we have suggested including this evaluation as part of their review of policies and procedures described in the subsection above rather than through "testing".]*
- *[Include a general summary of any relevant findings, including categories of the types of escalations made to firm leadership and resolutions of issues detected. This does not require a list of every specific issue or escalation. We also suggest summarizing what general improvements were made in response to observed categories of issues.]*

3) Self-correction items under PTE 2020-02 for the review period, if any

[FIRM] had \_\_\_ violations of the conditions of PTE 2020-02 that resulted in self-correction under the conditions of PTE 2020-02 Section II(e).

*[Self-correction items are specifically required to be included in the Report. For any such violations, firms must "specifically set forth" the violation and the correction.<sup>2</sup> As the focus of the Report seems to be*

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<sup>2</sup> See PTE 2020-02 Section II(e)(4).

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*high-level and directed at systemic issues and failures, this list of individual items may be more effectively done through a chart attached as an appendix. Given that significant detail here could detract from the Report generally, we would think that general descriptions of the violations, grouped by types, and corrections may be the most helpful.]*

## 4) Review/testing of the recordkeeping required by PTE 2020-02

[FIRM] conducted a review of its recordkeeping processes and procedures to ensure compliance with PTE 2020-02 conditions. The review included the following systems/processes/functions: *[include description of delivery mechanisms/systems]*. This review noted/found *[include a summary of findings]*.

## **IX. Related Regulatory Examinations/Enforcement Actions**

- During the period of this retrospective review, [FIRM] had the following notable regulatory examinations and enforcement actions related to PTE 2020-02:
  - Describe any DOL, IRS, SEC, FINRA, OCC, or other regulatory examinations and/or enforcement actions, if applicable, related to PTE 2020-02, including the process for correcting regulatory examination findings.

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**Certification by Senior Executive Officer**

**CERTIFICATION OF SENIOR EXECUTIVE OFFICER  
PURSUANT TO  
SECTION II(d)(3) OF  
PROHIBITED TRANSACTION EXEMPTION 2020-02 (PTE 2020-02)**

I, \_\_\_\_\_, am the \_\_\_\_\_ of \_\_\_\_\_

and, as such, am a senior executive officer of [Financial Institution] within the meaning of Section V(l) of PTE 2020-02.

I hereby certify that:

- (A) I have reviewed [FIRM’s] Prohibited Transaction Exemption 2020-02 Retrospective Review Report Dated [\_\_\_\_] For the Review Period [\_\_\_\_] to [\_\_\_\_];
- (B) [FIRM] has in place policies and procedures prudently designed to achieve compliance with the conditions of the Department of Labor’s PTE 2020-02; and
- (C) [FIRM] 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 PTE 2020-02.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## **Appendix**

*[We note that including an appendix is not a PTE 2020-02 requirement and may not be applicable to your firm. If the firm wants to include an appendix, we suggest including the following items:]*

- Table of relevant disclosures
- Table of relevant policies and procedures
- Table of additional reports/documents/software used as basis for rollover recommendations