Morgan Lewis

INVESTMENT ADVICE ANALYSIS AND CORRECTIONS DECISION TREE AND WORKSHEET

ERISA/PTE 2020-02

This decision tree and worksheet are intended to be used as a framework by your firm's legal and compliance departments to understand if fiduciary investment advice may have been provided to a retirement investor when acting in a nondiscretionary capacity, and if so, whether the advice may have resulted in a nonexempt prohibited transaction under US retirement laws.

The decision tree and worksheet are focused solely on the US retirement laws, including the definition of fiduciary investment advice under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"), and Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees ("PTE 2020–02"). They do not include consideration of how the US Securities and Exchange Commission's Regulation Best Interest, Investment Advisers Act fiduciary standards, or other banking, insurance, or state standards may apply to interactions with retirement investors.

The decision tree and worksheet are meant to be used in conjunction with and supported by our more fulsome written analysis of the subject matter, which contains certain limitations and risk assessments not included herein. We note that this decision tree and worksheet are not intended to provide legal advice with respect to the implications of any specific interaction. Firms should consider the facts and circumstances of each interaction to determine if a nonexempt prohibited transaction has occurred.

The term "plan" includes an employer-sponsored retirement plan that is subject to Title I of ERISA. The term "IRA" includes individual retirement accounts and other types of tax-exempt accounts, such as health savings accounts and Coverdell education accounts subject to Section 4975 of the Code.

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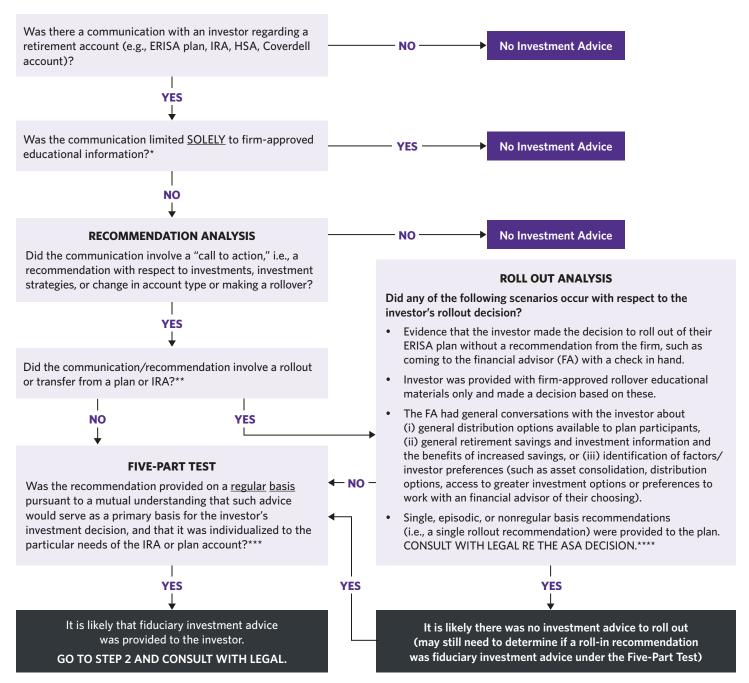
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Please note that more detailed memoranda and analysis can be provided upon request.

PROHIBITED TRANSACTION CORRECTION DECISION TREE NONDISCRETIONARY ADVICE

Step 1: Was "fiduciary" investment advice provided?



^{*}This can consist of information regarding the investor's options, helping evaluate information about their existing retirement plan, providing a side-by-side comparison of the features of plans or IRAs, offering a list of factors to consider when determining whether to roll assets over into an IRA, and any "Hire Me" conversation. See also IB 96-1.

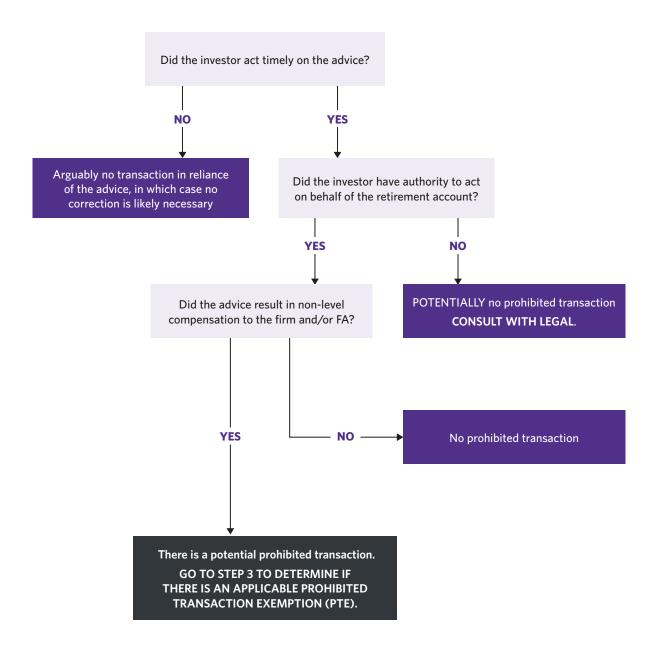
^{**}An IRA rollover comprises two distinct and separate decisions. First, the decision to roll assets out of (or otherwise take a distribution from) a retirement plan (roll out). Second, the decision to roll assets into another plan or an IRA and what investment products and services to use for the rolled assets (roll in). See also SEC Staff Bulletin re: Account Type Recommendations (Mar. 2022).

^{***}Regular basis is defined as recurring, nonsporadic advice that has been provided to the plan or IRA. See ASA decision and Carfora et al v. Teachers Insurance Annuity Association of America et al, No. 21 Civ. 08384 (S.D.N.Y. Sept. 28, 2022) (the "TIAA decision").

^{****} The courts have provided clarification regarding what is considered necessary to meet the "regular basis" requirement of the five-part test, thus causing advice to be deemed fiduciary investment advice under the retirement laws. A recommendation to an ERISA plan (including to a plan participant) cannot be combined with recommendations to a rollover IRA for establishing the "regular basis" prong of the five-part test. Rather, according to the court decisions to date, the "regular basis" applies to each plan or IRA individually. But note that advice provided to different participants in the same plan could potentially be combined to meet the "regular basis" requirement of the five-part test. See *American Securities Ass'n v. U.S. Dep't of Labor*, 8:22-cv-330-VMC-CPT (M.D. Fla. Feb. 13, 2023) (the ASA decision). We note that the DOL has stated it may appeal the ASA decision.

PROHIBITED TRANSACTION CORRECTION DECISION TREE NONDISCRETIONARY ADVICE

Step 2: Fiduciary investment advice may have been provided to Retirement Investor. Was there a potential prohibited transaction?



PROHIBITED TRANSACTION CORRECTION DECISION TREE NONDISCRETIONARY ADVICE

Step 3: Is there an available exemption?

Were all the requirements of PTE 2020-02 met?

- Compliance with "Impartial Conduct Standards,"
- · Acknowledgment of fiduciary status,
- · Written disclosures about the scope of the investment relationship,
- Disclosure of associated conflicts of interest,
- Documentation of the reason why the rollover recommendation was in the investor's best interest (where applicable),
- Applicable 2020-02 policies and procedures, and
- Within the scope the exemption's coverage (i.e., doesn't cover extensions of credit, doesn't cover internal plans, limits on principal trades)

NO YES

Consult with Legal Department to determine if another PTE may be available.

Should Consider Self-Correction Under PTE 2020-02. If the violation did not result in investment losses to the investor or if the firm made the investor whole for any resulting losses, PTE 2020-02 allows for self-correction of the violation within 90 days. The firm is required to notify the DOL within 30 days of correction. Must include the self-correction in the annual Retrospective Report as required by PTE 2020-02.

OR

Consider Correction Outside of PTE 2020-02. Complete Form 5330 and pay excise taxes.

OTHER POTENTIAL PTES*

PTE 75-1: Permits the purchase or sale of securities, including nonproprietary mutual fund shares in a principal transaction between a plan or plan asset fund and a broker-dealer.

PTE 77-4: Permits an investment manager to invest plan assets in the manager's proprietary mutual funds.

PTE 80-26: Allows for short-term lending or extensions of credit to plans for limited purposes.

PTE 80-83: Permits a fiduciary to cause a plan to purchase a security when the proceeds of the securities may be used to retire or reduce debt of the fiduciary.

PTE 81-8: Permits a plan to enter into short-term purchases, acquisitions, holdings, sales, exchanges, or redemptions of short-term investments with certain parties in interest.

PTE 83-1: Permits the sale of certificates in an initial issuance by the sponsor of a mortgage pool to a plan when the sponsor is a fiduciary to the plan.

No correction required under **PTE 2020-02**

PTE 84-24: Permits fiduciaries to receive commissions in connection with the sale of insurance or annuity contracts to a plan and, in certain instances, shares of nonproprietary mutual funds.

PTE 86-128: Permits the purchase or sale of securities in agency transactions where the broker is, or is affiliated with, a fiduciary with respect to the plan.

ERISA Section 408(b)(8): Permits an investment manager to invest plan assets in bank collective trusts.

^{*}Please note that each PTE is subject to certain coverage limitations and transactional conditions.

RETIREMENT LAWS INVESTMENT ADVICE DECISION TREE WORKSHEET

BACKGROU	ND INFORMATION	
Financial Pro	fessional Name:	
Investor Nam	ie:	
Status of Inve	estor:	☐ Existing customer ☐ New customer ☐ Prospective Customer (choose one)
Description o	f Incident:	
Description of Information Provided to Investor:		Examples include firm-approved marketing materials, education materials, financial models, or other (please describe).
Other Import Relevant Fact	ant Information/	
pertinent to you Was there a c (e.g., ERISA p	neet to record and docur ar analysis. ommunication with lan, IRA, HSA, Cov	cument answers to the questions in the decision tree and any notes or information an investor regarding a retirement account?
	□NO	
Explanatory N	lotes:	
W as the comr	munication limited	SOLELY to Firm approved educational information?
□ YES	□NO	
Explanatory N	lotes:	

	nmunication involve a "call to action" i.e. a recommendation, with respect to investments, t strategies or change in account type or making a rollover?
□ YES	□NO
Explanator	y Notes:
Did the co	mmunication/recommendation involve a roll out or transfer from a plan or IRA?
□ YES	□NO
Explanator	y Notes:
respect to	the scenarios as listed under "Roll Out Analysis" under Step 1 of the Decision Tree occur with the investor's roll-out decision?
□ YES	□ NO
Explanator	y Notes:
such advic	commendation provided on a regular basis pursuant to a mutual understanding that e would serve as a primary basis for the investor's investment decision, and that it was zed to the particular needs of the IRA or plan account?
□ YES	□NO
Explanator	y Notes:

to the cust	-	onflicts that were not previously disclosed in written materials provided
□ YES	□ NO	
Explanator	y Notes:	
Did the inv	estor act timel	ly on the advice?
□ YES	□ NO	
Explanator	y Notes:	
Did the inv	estor have aut	hority to act on behalf of the retirement account?
□ YES	□ NO	
Explanator	y Notes:	
Did the ad	vice result in n	on-level compensation to the Firm and/or FA?
□ YES	□ NO	
Explanator	y Notes:	

Were all re	equirements of PTE 2020-02 met?		
□ YES	□ NO		
Explanato	ry Notes:		
Action Ite	m		
Nest steps	s:		
Superviso	r/Manager Actions		
Signature		Date	

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