

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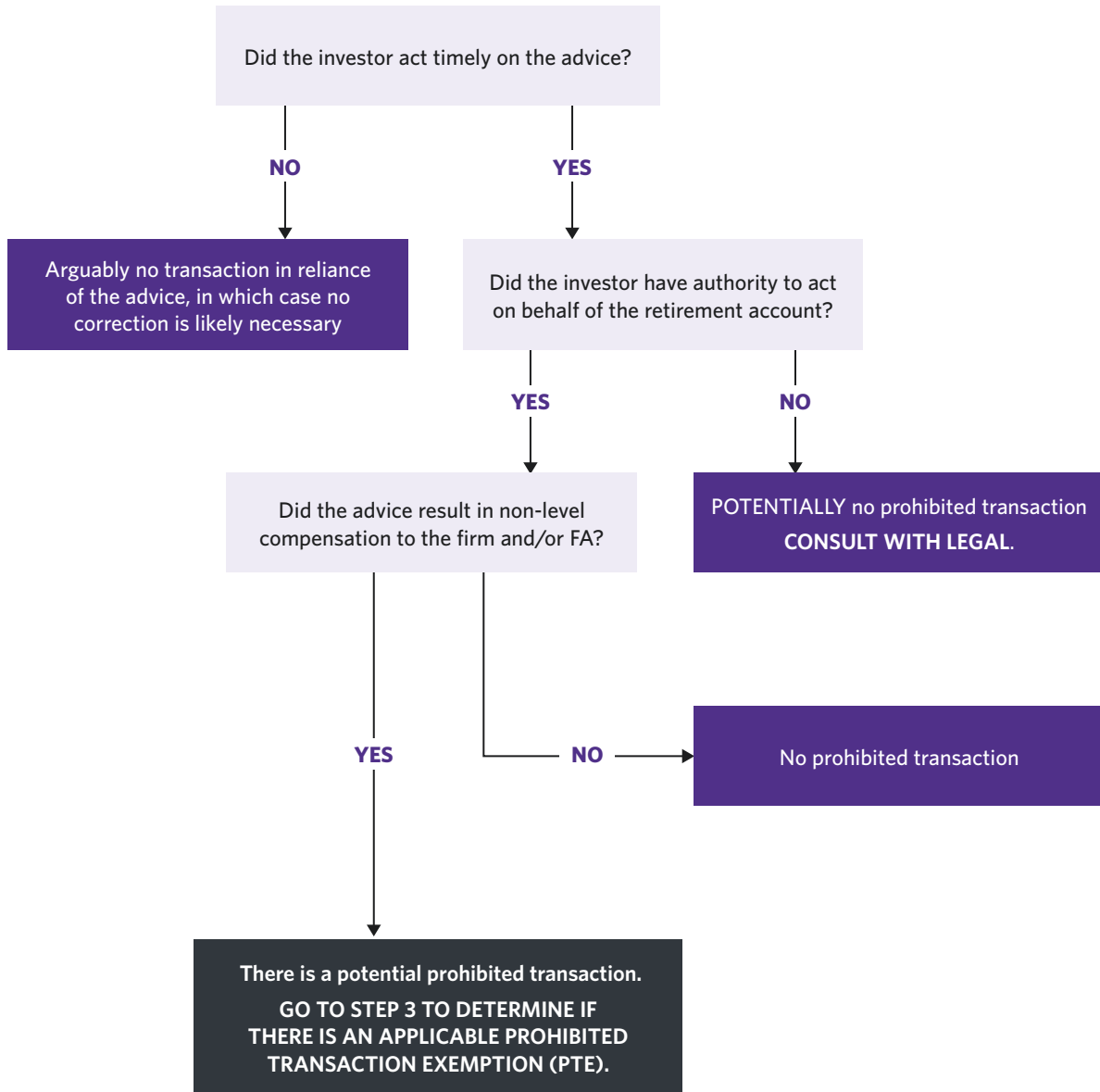
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*Please note that more detailed memoranda and analysis can be provided upon request.*



# PROHIBITED TRANSACTION CORRECTION DECISION TREE NONDISCRETIONARY ADVICE

## Step 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 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.

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

### 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.

**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

BACKGROUND INFORMATION	
Financial Professional Name:	
Investor Name:	
Status of Investor:	<input type="checkbox"/> Existing customer   <input type="checkbox"/> New customer   <input type="checkbox"/> Prospective Customer (choose one)
Description of Incident:	
Description of Information Provided to Investor:	Examples include firm-approved marketing materials, education materials, financial models, or other (please describe).
Other Important Information/ Relevant Facts:	

## INSTRUCTIONS

Use this worksheet to record and document answers to the questions in the decision tree and any notes or information pertinent to your analysis.

**Was there a communication with an investor regarding a retirement account?  
(e.g., ERISA plan, IRA, HSA, Coverdell account)**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Was the communication limited SOLELY to Firm approved educational information?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Did the communication involve a “call to action” i.e. a recommendation, with respect to investments, investment strategies or change in account type or making a rollover?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Did the communication/recommendation involve a roll out or transfer from a plan or IRA?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Did any of the scenarios as listed under “Roll Out Analysis” under Step 1 of the Decision Tree occur with respect to the investor’s roll-out decision?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Was the recommendation provided on a regular basis pursuant to a mutual understanding that such advice would serve as a primary basis for the investor’s investment decision, and that it was individualized to the particular needs of the IRA or plan account?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Have you disclosed any conflicts that were not previously disclosed in written materials provided to the customer?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Did the investor act timely on the advice?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Did the investor have authority to act on behalf of the retirement account?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Did the advice result in non-level compensation to the Firm and/or FA?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Were all requirements of PTE 2020-02 met?**

YES       NO

**Explanatory Notes:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Action Item**

**Nest steps:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Supervisor/Manager Actions**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**