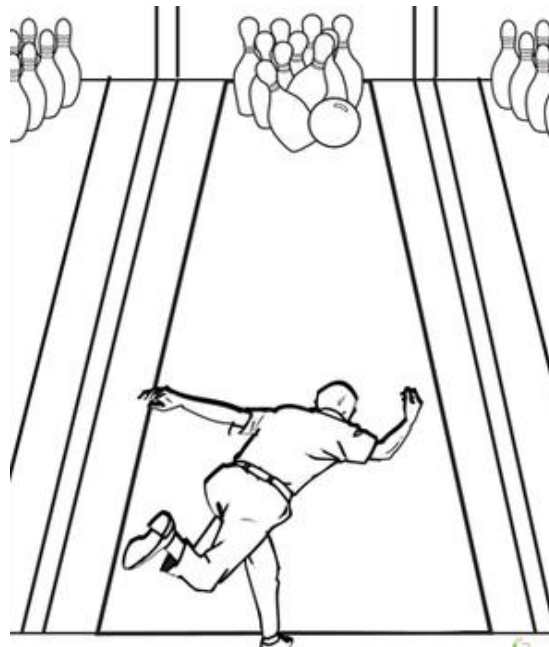


What Not to “Spare” When Dealing with IRA and Plan Rollovers

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February 2021

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“Striking” at the Heart of the Most Recent Guidance

In this brief presentation, we strike at some of the central ERISA-related guardrails that financial institutions, plan sponsors and others may wish not to spare when they consider staying away from the foul lines contained in the Department of Labor’s most recent exemptive relief and other guidance with respect to rollovers to IRAs.

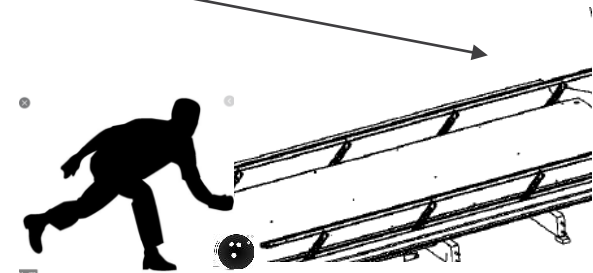
Rollovers: A Primary Concern of the DOL

- “Rollover recommendations are a primary concern of the Department, as Financial Institutions and Investment Professionals may have a strong economic incentive to recommend that investors roll over assets into one of their institution's IRAs, whether from a Plan or from an IRA account at another Financial Institution, or even between different account types.”
- “The decision to roll over assets from a Title I Plan to an IRA, in particular, may be one of the most important financial decisions that Retirement Investors make, as it may have a long-term impact on their legal rights and remedies and their retirement security.”

Before You Take the Lane: Guardrails Will Likely Be Needed

- Financial firms will want to decide whether they wish to provide investment education or provide recommendations when discussing rollovers.
- If they decide that they do not wish to be “investment advice” fiduciaries, they may want to put in place effective guardrails to attempt to assure that their discussions about rollovers do not rise to the level of being “fiduciary advice.”
- If they decide that they wish to accept being (or are concerned that may become) a fiduciary with respect to rollover conversations and then choose to comply with PTCE 2020-2, guardrails may also be important.

Bumpers/
Guard Rails



The Setup

- A prohibited transaction exemption will be required for a rollover to the extent the person is an investment advice fiduciary.
- Investment advice must meet all prongs of a “Five-Part Test” to result in investment advice fiduciary status.
- Certain recommendations may constitute investment advice for these purposes.

When is a Prohibited Transaction Exemption for a Rollover Needed?

All Three Must Be Present:

Element 1. Recommendation of a rollover (that constitutes “advice”)



Element 2. “Investment advice” expected to be provided on a “regular basis”



Element 3. Five-Part Test (discussed later) otherwise satisfied





Element 1: What May (and May Not) Constitute a “Recommendation of a Rollover?”

What May Constitute a Recommendation of a Rollover?	What May Not Constitute a Recommendation of a Rollover?
<ul style="list-style-type: none">• “A recommendation to roll assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the five-part test, constitutes fiduciary investment advice.”• “Recommendation” is not defined by the Department of Labor• Regulation Best Interest (“Reg BI”) issued by the Securities and Exchange Commission and prior guidance issued by FINRA provide meaningful color:<ul style="list-style-type: none">• No bright line test.• Factors used in determining if there is a recommendation:• Could the communication be viewed as a “call to action”?• Would the communication influence the investor to trade a particular security or group of securities?• How tailored is the communication to a specific customer or group of targeted customers?	<p>“Hire Me” Conversations. The Department of Labor has stated that it “does not believe that there should be significant concerns about introductory ‘hire me’ conversations.” The Department indicated that the following would not be regarded as a “recommendation” that constitutes investment advice:</p> <p>“I have been working with our mutual friend, Bob, for fifteen years, helping him to invest for his kids’ college tuition and for retirement. I would love to talk with you about the types of services my firm offers, and how I could help you meet your goals. Here is my business card. Please give me a call on Monday so that we can discuss.”</p> <p>BUT: “To the extent, however, that the marketing of advisory services is accompanied by an investment recommendation, such as a recommendation to invest in a particular fund or security, the [recommendation could fall outside of ‘hire me’ conversations].”</p> <p>Investment Education. Communications providing general investor education or limited investment analysis tools would generally be excluded from the definition. See Interpretative Bulletin 96-1.</p>

Element 2:

What May (and May Not) Constitute a “Regular Basis”?

What May Be Considered a “Regular Basis”?

“[T]he Department does not intend to interpret ‘regular basis’ to be limited to relationships in which advice is provided at fixed intervals . . . but, instead, believes the term ‘regular basis’ broadly describes a relationship where advice is recurring, non-sporadic, and expected to continue.”

“In circumstances in which the investment advice provider has been giving advice to the individual about investing in, purchasing, or selling securities or other financial instruments through [ERISA plans or IRAs], the advice to roll assets out of a Title I Plan is part of an ongoing advice relationship that satisfies the regular basis prong.”

“Advice to roll assets out of a Title I Plan into an IRA where the investment advice provider has not previously provided advice *but* will be regularly giving advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the regular basis prong.”

“When insurance agents or broker-dealers frequently or periodically make recommendations to their clients on annuity or investment products or features, or on the investment of additional assets in existing products, they may meet the “regular basis” prong of the five-part test.””



What May Not Be Considered a “Regular Basis”?

“A rollover transaction should [not] satisfy the regular basis prong [merely] on the grounds that it can be viewed as involving two separate steps—the rollover and a subsequent investment decision. These two steps do not, in and of themselves, establish a regular basis.”

“For example, if a Retirement Investor who is assisted with a rollover expresses the intent to direct his or her own investments in a brokerage account, **without any expectation of entering into an ongoing advisory relationship and without receiving repeated investment recommendations from the investment professional**, the Department would not view the regular basis prong as being satisfied merely because the investor subsequently sought the professional’s advice in connection with another transaction long after receiving the rollover assistance.”

“[The regular basis prong is not] satisfied merely because the investor subsequently sought the professional’s advice in connection with another transaction long after receiving the rollover assistance [to a brokerage account].”

“[The regular basis prong is not] satisfied merely because the investor subsequently sought the professional’s advice in connection with another transaction long after receiving the rollover assistance [to a brokerage account].”



Element 3: What is “Investment Advice” Under the “Five-Part Test”?



- A person may be an investment advice fiduciary if the person:
 - 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;
 - on a regular basis;
 - pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary or IRA owner;
 - where the advice serves as a primary basis for investment decisions with respect to plan assets; and
 - where the advice is individualized based on the particular needs of the plan.



What May (and May Not) Be Regarded as a “Mutual Agreement”?

What May Be Regarded as a Mutual Agreement?	What May Not Be Regarded as a Mutual Agreement?
<p>“[F]iduciary status is determined by the facts as they exist at the time of the recommendation, including whether the parties, at that time, mutually intend an ongoing advisory relationship.”</p> <p>“With respect to determining whether there is ‘a mutual agreement, arrangement, or understanding’ that the investment advice will serve as ‘a primary basis for investment decisions, the Department intends to consider the reasonable understanding of each of the parties, if no mutual agreement or arrangement is demonstrated.”</p> <p>“Written statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions will not be determinative, although such statements will be appropriately considered in determining whether a mutual understanding exists.”</p> <p>“A financial services provider should not, for example, expect to avoid fiduciary status through a boilerplate disclaimer buried in the fine print, while in all other communications holding itself out as rendering best interest advice that can be relied upon by the customer in making investment decisions.”</p> <p>“[E]xpectation [about a regular basis] can be shown by various kinds of objective evidence . . . such as the parties agreeing to check-in periodically on the performance of the customer’s post-rollover financial products.”</p>	<p>Agreement. Both parties agree that communications will not be “investment advice” that</p> <ul style="list-style-type: none">• Will be provided on a regular basis;• Serve as a primary basis for investment decisions with respect to plan assets;• Will be individualized based on the particular needs of the plan; and <p>Acting in conformity with that agreement. “While financial services professionals may contractually disclaim engaging in activities that trigger elements of the five-part test, such as rendering advice that can be relied upon as a primary basis for the Retirement Investor’s investment decisions, they must do so clearly and act accordingly to demonstrate that there is in fact no mutual agreement, arrangement, or understanding to the contrary.”*</p> <p>—</p> <p>* Consider:</p> <ul style="list-style-type: none">• Oral communications• Written presentations and pitches• Marketing materials:<ul style="list-style-type: none">• ([The DOL] “also intends to consider marketing materials in which Financial Institutions and Investment Professionals hold themselves out as trusted advisers, in evaluating the parties’ reasonable understandings with respect to the relationship.”

Conditions of PTCE 2020-02

The Department of Labor Issued PTCE 2020-2 in part to cover rollovers.

- Compliance with the impartial conduct standards.
- Compliance with written disclosure requirements.
- Documenting the basis for rollover recommendations.
 - Query whether some may find the documentation requirements burdensome.
- Maintaining conflict mitigation policies and procedures.
- Conducting annual compliance reviews.
- Maintaining records that demonstrate compliance with the exemption.
- Other provisions:
 - Written acknowledgment of fiduciary status
 - Additional requirements for covered principal transactions
 - Limited self-correction mechanism

Conditions of PTCE 2020-02



Compliance with a prohibited transaction exemption means complying with **all** conditions.

There is generally no principle allowing mere substantial compliance.

FOUL LINE

Obtaining Background Information When Providing Rollover Advice Under PTCE 2020-2

- “[T]he Department expects that Investment Professionals and Financial Institutions evaluating [a] potential rollover [from an ERISA Plan to an IRA] 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” (e.g., so-called “404(c)” disclosure—see 29 C.F.R. 2550.404(a)-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.”

Required Comparisons for a Proper Rollover Recommendation Under PTCE 2020-2

- A Financial Professional may be required to review “the Retirement Investor's alternatives to a rollover, including leaving the money in his or her current employer's Plan, if permitted, and selecting different investment options.”
- The Department of Labor addressed concerns that a Financial Professional may need to “reallocate the plan investments into an ideal asset allocation” by noting that it “was not intended to suggest that Investment Professionals need to make advice recommendations as to investment products they are not qualified or legally permitted to recommend.”
 - The Department continued by saying that it was “merely indicating that a rollover recommendation should not be based solely on the Retirement Investor's existing allocation without any consideration of other investment options in the Plan.”
 - “A prudent fiduciary would carefully consider the options available to the investor in the Plan, including options other than the Retirement Investor's existing plan investments, before recommending that the participant roll assets out of the Plan.”



Required Comparisons for a Proper Rollover Recommendation Under PTCE 2020-2 (cont'd)

- The Department of Labor expressly referenced rules in the securities arena
 - “FINRA has recognized that broker-dealers making a rollover recommendation should consider investment options among other factors. ‘The importance of this factor will depend in part on how satisfied the investor is with the options available under the plan under consideration. For example, an investor who is satisfied by the low-cost institutional funds available in some plans may not regard an IRA's broader array of investments as an important factor.’” See Regulatory Notice 13-45.

Documentation of Rollover Recommendations Under PTCE 2020-02.

- “The written record serves an important role in protecting Retirement Investors during this significant decision.”
- “The documentation can provide an important opportunity for evaluation and oversight of these recommendations by Financial Institutions, Retirement Investors.”
- Query whether some may find the documentation requirements particularly burdensome.

Bowling Score Sheet

Player Name	HDCP.	1	2	3	4	5	6	7	8	9	10	TOTAL
1												
2												
3												
4												
5												

Documentation of Rollover Recommendations Under PTCE 2020-02: Plans to IRAs.

- In the context of a rollover from an ERISA Plan to an IRA, the Department of Labor stated in the Final Preamble that the Investment Professional must consider and document:
 - The Retirement Investor’s alternatives to a rollover, including leaving the money in his or her current employer’s Plan, if permitted, and selecting different investment options;
 - The fees and expenses associated with both the Plan and the IRA;
 - Whether the employer pays for some or all of the Plan’s administrative expenses; and
 - The different levels of services and investments available under the Plan and the IRA.
- “It would be difficult to justify a rollover recommendation that did not consider these factors.”

Documentation of Rollover Recommendations Under PTCE 2020-02: Rollovers Between IRAs; Changes in Fee Structure.

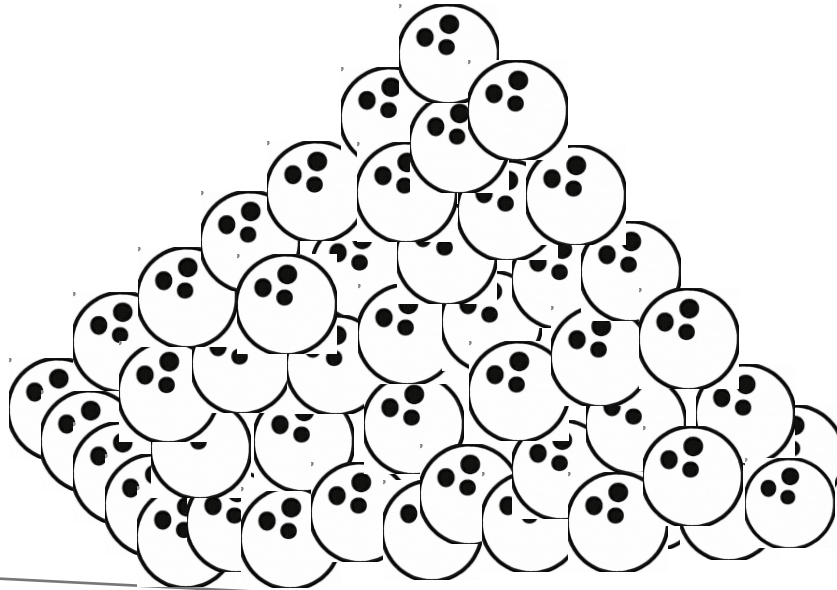
- “For rollovers from another IRA or changes from a commission-based account to a fee-based arrangement, a prudent recommendation would include consideration and documentation of the services that would be provided under the new arrangement.”
- “It would be difficult to justify a rollover recommendation that did not consider these factors.”

Certain Practical Considerations Regarding Documentation

- “[The Department assumes] that most financial services professionals already incorporate documenting the basis for rollover recommendations in their regular business practices.”
- “The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial advisor whose firms currently do not require rollover documentations and five minutes for financial advisors whose firms already require them to do so.”

Reviewing Recommendations under PTCE 2020-2

- “The exemption . . . does not mandate that a Financial Institution review documentation of each and every rollover recommendation.”
- “However, depending on the Financial Institution's business model and the other methods available to mitigate conflicts of interest, regular review of some or all rollover recommendations may be an effective approach to compliance with the exemption.”



Final Frame

- FAB 2018-02 (transition period guidance) to be eliminated as of December 20, 2021.
 - The Department of Labor generally stated it would not pursue prohibited transactions claims against investment advice fiduciaries who work to comply with “impartial conduct standards” that had been set forth in now-vacated exemptive relief issued in connection with the now-vacated 2016 Fiduciary Rule
- Consider Reg BI Guidance (if applicable)
 - Reg BI is generally intended to apply a best interest standard of conduct for all broker-dealers making recommendations to retail customers (extending both to retirement accounts and to other accounts).
 - Contains similar considerations with respect to rollovers.
- Other exemptions; more to come?

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