

Compliance Bulletin: DOL Fiduciary Rule Expanded

April 2021

Effective February 16, 2021, the United States Department of Labor (DOL) created a new prohibited transaction exemption (PTE), PTE 2020-02 and provided additional commentary in the preamble that expands the application of the **five-part test** used to determine if sales agents are acting in a fiduciary capacity when selling qualified annuities (“DOL Rule”).

This bulletin provides a general overview of the DOL Rule and its impact on annuity products and is not intended to be guidance to sales agents as to their fiduciary status or obligations under the DOL Rule. It is critical that sales agents independently undertake the steps necessary to determine whether a recommendation is subject to the DOL Rule and develop protocols by which sales agents are satisfying any resulting compliance obligation.

Five-part Fiduciary Test

The five-part test has not changed in substance but in commentary provided by the DOL, it has been expanded in scope. It is still used to determine whether a fiduciary relationship is formed under the DOL Rule, but the new preamble to PTE 2020-02 expanded the scope of the five-part test such that in practice it can be applied to far more recommendations today than before.

Am I a fiduciary under the DOL Rule?

You may be a fiduciary if you do all of the following:

1. Provide individualized advice;
2. For a fee (this includes commissions);
3. On a regular basis;
4. Pursuant to a mutual agreement with your client; and
5. That advice serves as a primary basis for investment decisions.

The **scope of application of this five-part test has been broadened**. Specifically:

- the interpretation of the “regular basis” part of the test has been expanded such that even if you intend for the recommendation to be a one-time event, it is deemed to be ongoing if you and/or your client anticipate any ongoing relationship involving additional recommendations
- when a rollover recommendation is made, there’s a presumption that an ongoing relationship exists or is anticipated to exist

Therefore, disclaiming fiduciary status at the time of sale with the intent of making a one-time recommendation may not be sufficient to discharge you from fiduciary status or compliance obligations under the DOL Rule.

Additionally, with respect to the mutual agreement part of the five-part test, the DOL made it clear in the preamble that mutual agreement cannot be disclaimed through boilerplate fine print used in account opening documents signed by the client, but rather must be in a clear, concise and potentially stand-alone disclosure that specifically addresses an absence of fiduciary status.

In summary, sales, rollovers, transfers, and allocation recommendations involving an ERISA plan and/or an IRA, in the context of either an existing client relationship or an anticipated future client relationship, may now be considered fiduciary advice.

If I am a fiduciary – what now?

You must determine whether you have any conflicts, including third party compensation (including commissions) and, if so, you must rely on a PTE or other available guidance in order to receive compensation.

Existing PTE 84-24

This PTE, which primarily applies to annuities, requires you to provide a disclosure form to the client at the time a recommendation is made, detailing:

1. your relationship with the insurance company, limitations on offerings, the amount of sales commission and other compensation, and
2. descriptions of any charges, fees, discounts, penalties, or adjustments associated with the product

This information must be specific to the product and to the compensation you are receiving with each client and particular recommendation.

PTE 84-24 also requires you to confirm that product and sales compensation is not in excess of “reasonable compensation.”

New PTE 2020-02

The new exemption PTE 2020-02 cannot be relied on if you are an independent agent or an IMO/BGA, but rather only by specific financial institutions, including broker dealers and registered investment advisors. This exemption is similar to the SEC’s Regulation Best Interest and includes the following requirements:

1. Impartial conduct standards
 - compliance with a best interest standard,
 - receipt of compensation not in excess of reasonable compensation, and
 - no materially misleading statements
2. Disclosure obligations including disclosure of fiduciary status when applicable
3. Recordkeeping requirements
 - DOL and Treasury Department must be allowed access to compliance records
4. Retrospective compliance review
 - Annual review by compliance and report signed off on by the firm’s CEO, and retained and made available to the DOL upon request

We will not be serving in the role of a financial institution for purposes of this exemption in connection with recommendations made by unaffiliated sales agents.

Best Interest Contract Exemption: Non-Enforcement Extended

The DOL extended their non-enforcement policy for fiduciaries who comply with the impartial conduct standards of the vacated Best Interest Contract Exemption (BICE). This Impartial Conduct Standard requires you to make a good faith determination of whether you are a fiduciary and, if so, act prudently and in the best interest of the client. This non-enforcement policy has been extended but will come to an end on December 20, 2021.

AIG’s guidance is not intended to be legal advice. AIG encourages sales agents to consult their own legal and compliance professionals regarding the applicability of the PTE 2020-02 and the new interpretation of the five-part test, as well as any fiduciary status that triggers the need to rely on an exemption.

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