



*These guidelines are intended to assist insurance agents and agency management in determining when agents may be acting as fiduciaries because they are providing investment advice as defined by the Department of Labor (DOL).*

*If investment advice is provided by an agent to a customer with respect to the purchase of a qualified annuity, then a DOL exemption or "PTE" will be necessary for the agent to receive any compensation on the sales transaction. Ignoring the requirement to use an exemption when acting as a fiduciary in a sales transaction can result in the assessment of significant penalties.*

## **What is Investment Advice?**

Investment advice has been defined by the DOL and is deemed to be provided when the factors listed below are present in a sales transaction. While, as a technical matter, all factors below must be present in order for an agent to be providing investment advice, as you can see, whether some factors are present is an analysis that is highly sensitive to the specific facts and circumstances of each sale. Consequently, if the agent believes that any two or more factors are present in a sales transaction he/she should act as if fiduciary status applies and utilize an appropriate exemption.

### **1. An agent is providing investment advice if he/she gives advice to a customer related to:**

- a. The value of securities or other property or**
- b. makes recommendations on the advisability of purchasing, investing in, or selling securities or other property.**

Note: for the purpose of determining if this factor has been met, qualified annuities or IRAs are considered "other property". Additionally, the DOL has indicated that advice or a recommendation to roll money over from a qualified pension arrangement (e.g. 401(k)) into an IRA or from IRA to IRA is a recommendation that meets 1b above.

### **2. On a regular basis,**

Note: for purposes of this factor, any prior sales transaction with this customer, particularly the prior sale of a qualified annuity, is likely to mean that the "regular basis" factor is present.

### **3. Pursuant to a mutual understanding that the advice or recommendation will serve as a primary basis for the customer's decision to purchase the annuity.**

Note: This factor can be implied when the agent has a long-standing relationship of providing financial or product related advice to the customer or his/her immediate family. It is possible to create evidence that this factor was not present by using an appropriate disclosure/disclaimer as described in the last section of this document that is acknowledged by the customer. However, the disclaimer will not be dispositive if the agent says and does things that contradict the disclaimer in making the sale.

### **4. The advice is individualized and based upon the customer's needs.**

Note: This factor will generally be met since current suitability standards require that agents become familiar with the individual customer's financial situation, risk tolerance, liquidity needs and recommend products that are appropriate based on this information.

<sup>1</sup>These guidelines are provided by American Equity as educational materials. It is the exclusive responsibility of the agent to determine if they are providing investment advice and therefore acting in a fiduciary capacity when making a sale. American Equity will not be responsible for any penalties assessed by the DOL, the IRS or any claims made by agent's customers. American Equity disclaims any liability for misinterpretation or misapplication of this material. Laws and regulatory standards can change. American Equity has no obligation to update or refresh these materials.

## **Activities that are NOT Investment Advice**

This section describes sales activities that are not considered investment advice. This list is not exclusive but is provided to give a sense of activities that agents can engage in with little risk of being a fiduciary.

### **1. Providing General Financial Education.**

Agents may provide general financial education to the customer, including but not limited to modeling<sup>2</sup> or examples demonstrating the following:

- the benefits of tax deferred growth,
- the benefits of guaranteed income,
- risk/return analysis and risk tolerance,
- the importance of overall investment diversification,
- the need for liquidity,
- the long-term versus short-term nature of some investments, or
- surrender charges or other general fee terminology associated with possible investments.

### **2. Compare Insurance Products (even emphasizing one insurance product over another)**

Agents may decide which products to present to the prospective customer and how to position each product while presenting it for the customer's consideration. An agent is not required to use an equal amount of words or time to discuss each annuity option. However, if fiduciary status is to be avoided, then the agent must avoid recommending a single specific IRA.

An agent can compare two insurance products using objective standards such as availability of fixed return, withdrawal features, fees, investment optionality and in doing so, may demonstrate the relative merits of each qualified annuity option presented to the customer. This information may, in the view of the agent, demonstrate that one IRA option is superior for this customer above other IRAs. However, if fiduciary status is to be avoided, the agent **MUST** avoid making subjective statements that recommend purchasing or investing in one particular IRA.

### **3. Identify Products Equivalent to the Customer's Existing IRA**

Agents may identify products similar to a customer's existing IRA available in the marketplace and may compare and contrast features of available and similar IRAs. However, agents should be careful to note that no two products from different issuers are going to be identical and the differences should also be identified for the customer including new surrender charges or other fees that may apply in the new product. Again, to avoid fiduciary status agents should refrain from recommending a particular IRA.

### **4. Providing Customers with Pre-Approved Sales Materials for a Variety of Annuities**

Provided that the agent avoids recommending that the customer purchase a particular IRA, agents may provide customers with links to videos, illustrations or other pre-approved marketing materials associated with more than one annuity that fits within the customer's risk tolerance and achieves the investment goals articulated by the customer.

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<sup>2</sup>When using modeling with a customer always use models from reliable sources approved by your agency or firm and disclose the assumptions behind the model to the customer.

### **Activities that Increase the Likelihood that Investment Advice is Being Provided**

Each of the following activities are very likely to meet the first element of the definition of Investment Advice as identified in the first section of this document. Therefore, it is important to determine if any other factor listed in the first section of this document may be present. So, by way of example, if any of these activities are undertaken with a customer to whom the agent had previously sold an IRA or other qualified annuity, the agent is likely providing Investment Advice and is likely a fiduciary.

1. Recommending that a client invest their assets in a particular IRA or other qualified annuity.
2. A recommendation to substitute or replace an IRA with a new, specific qualified annuity.
3. A recommendation to roll assets out of a 401(k) or IRA or to withdraw assets from a 401(k) or IRA if the reason for the rollover or withdrawal is to purchase a product that can generate a payment of direct or indirect compensation for the agent.
4. Directing the client in the investment of, or personally allocating/reallocating the assets held in, a qualified annuity among investment options available in that annuity is a little different than the other activities listed above. Engaging in this particular activity likely, by itself meets the definition of Investment Advice. Once an agreement to actively allocate or manage investments is reached there is a presumption that it is prudent to reallocate on a periodic or regular basis and that the delegation to the agent to reallocate means that the customer is relying on the agent as the primary source of investment advice. Consequently, this type of activity implies that several other factors in the definition of Investment Advice will be present.
5. Telling the customer that you are: "a fiduciary", "acting as a fiduciary" or are "like a fiduciary". When these representations are made by the agent in a sales transaction then the agent will be deemed to meet all elements of the Investment Advice definition and will be a fiduciary. It is very important that agents avoid using the term "fiduciary" and in fact disclose that they are getting paid for this transaction and **are not acting in a fiduciary capacity** unless the agent will comply with an exemption.

### **What If a "Recommendation" is Necessary?**

Up to this point we have stressed that when agents avoid recommending a particular IRA, they generally are not acting as a fiduciary. However, it is impractical to think that recommendations will never be made. In sales situations where any of the items, 1 through 3 described immediately above are clearly expected or needed by the customer, then the following steps should be taken:

- A. If the agent never sold an IRA or pension product to this customer in the past,** then we recommend placing the following disclaimer on letterhead and having receipt acknowledged by a customer signature or e-mail prior to application for the product.

"Information and/or recommendations provided by the sales agent are intended to be part of the sales presentation and are not intended to serve as the primary basis for the customer's decision to purchase a particular IRA product. Customers should always consult with their accountant, tax advisor or other financial advisor before purchasing investment vehicles. The customer acknowledges that he/she is solely responsible for the selection of the particular IRA being purchased."

- B. If the agent has sold an IRA or pension product to this customer in the past,** then the agent is likely to be considered a fiduciary upon making any of the recommendations listed in 1 through 3 above, and the agent should utilize an appropriate exemption. See documents entitled "Summary of PTE 84-24" and "84-24 Disclosures" for the particular product you are selling. Note that 84-24 is not the only exemption approved by the DOL. However, it is a simple exemption and AEL is providing the disclosures necessary for use of that exemption for its qualified annuity product line.