

Department of Labor
“Fiduciary Rule” Resource
**Your Fiduciary
Obligations**

Important information for agents offering
retirement products in the qualified marketplace
between June 9, 2017 and January 1, 2018



FOR AGENT USE ONLY. REGISTERED REPS SHOULD TALK WITH THEIR BROKER DEALER
FOR MORE INFORMATION ABOUT THEIR OBLIGATIONS UNDER THE FIDUCIARY RULE.

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Overview

While you may have heard that the Department of Labor (DOL)'s new Conflict of Interest Rule ("Fiduciary Rule") has faced challenges and uncertainties in its path to becoming law, it is important to know that many important elements of the Fiduciary Rule will, in fact, become operative June 9, 2017. That means that the standard of care that you must employ with your clients when marketing and recommending insurance products in the qualified marketplace will be that of a fiduciary. In addition to the fiduciary standard, other portions of the Rule will also go into effect on June 9, 2017, including the "Impartial Conduct Standards" and other disclosure requirements. Remember, these new requirements are only applicable to the purchase of qualified products, including the expansion of ERISA-like standards to IRAs and qualified rollovers.

So what does it mean to be a fiduciary? What are the Impartial Conduct Standards? Most importantly, what changes must be made to comply? This document will help explain the important elements of the Rule that will be going into effect on June 9, 2017 and will remain in place until January 1, 2018. At that time, new compliance requirements may be coming. As a result, this document only explains your fiduciary and compliance obligations for the transition period between June 9, 2017 and January 1, 2018.

Keep in mind that President Trump has ordered the DOL to review the Fiduciary Rule in its entirety and as a result, changes could be coming to the final Rule. This document is thus subject to change if needed. However, it is vital that you understand that unless and until changes do take place, if at all, the Rule is coming and will have a major impact on the industry – especially the annuity industry. As a result, this document is a good starting point resource for you to understand the changes coming, and learn to adopt the new standards of the Rule so that you can continue to provide your clients valuable retirement planning advice and qualified products to help meet their goals.

Background and Current Status of the DOL Fiduciary Rule

April 2016	February 2017	April 2017	June 9, 2017	January 1, 2018
Fiduciary Rule Published	Trump Memo to DOL to Examine Rule	DOL Delays Rule 60 Days w/ Changes to Exemptions	New Implementation Date for Substantial Parts of DOL Rule	Remainder of DOL Rule Implemented, Including Best Interest Contract Exemption (unless DOL revises)

As you can see above, the DOL Rule has undergone changes since it was originally published in April 2016. While it may still undergo further changes pending DOL's review of the Rule per President Trump's Memorandum, one thing is clear – on June 9, you will be a fiduciary when advising on qualified money. This is due to DOL's expansion of the definition of the term "fiduciary" to include investment advice provided to Individual Retirement Accounts (IRAs) and their owners. In the past, the definition of fiduciary was more limited under ERISA and did not create this obligation. DOL's intent was to revise ERISA to limit certain perceived conflicts of interest and provide tighter compliance boundaries around compensation. DOL believed that the marketplace had shifted considerably away from traditional pensions to individually managed retirement plans, requiring updates to ERISA and related exemptions to account for this shift. The result is the "Fiduciary Rule" – the most substantial DOL regulatory undertaking since ERISA was created in 1974.

Prohibited Transaction Exemptions

By expanding the definition of fiduciary to include IRAs, DOL expanded into a new segment of retirement products and reached a new group to regulate, specifically those in the fixed and indexed annuity world. Traditionally, those selling fixed and indexed annuities have been compensated for their sales with a heaped, variable commission model, where all compensation is paid up front and varies based on the amount of premium paid. Under ERISA, this model is considered a “prohibited transaction” for fiduciaries. However, there are exemptions that allow for this compensation model to continue, which are called “prohibited transaction exemptions” (or PTEs). If the agent and/or financial institution follow the requirements of a PTE, then such compensation may still be paid. This is called “seeking exemptive relief” for a prohibited transaction. In other words, in order to continue receiving variable commissions, an exemption must be followed.

Before the delay of the Rule, which was announced in April 2017, there were two applicable PTEs that applied in the annuity marketplace – the new “Best Interest Contract Exemption” (or BICE) and newly revised PTE 84-24. The BICE was a brand new creation by DOL, but PTE 84-24 had been around since 1979 (but had been revised several times, most recently in 2006). The BICE was applicable to indexed annuities (and other retirement products), while newly revised PTE 84-24 only applied to traditional, fixed annuity products, such as MYGAs, traditional declared rate annuities, SPIAs or DIAs.

After the delay of the Rule, nearly all of the conditions of the BICE have been pushed back until January 1, 2018. DOL also gave indexed annuity providers the option to utilize the 2006 version of PTE 84-24 (in other words, before the new 2016 revisions to PTE 84-24). Both exemptions require the incorporation of the “Impartial Conduct Standards” – that is:

- Acting in the client’s best interest
- No materially misleading statements
- Receipt of no more than reasonable compensation

However, many of the other requirements have been delayed until 2018. The result is that you are able to rely on the 2006 version of PTE 84-24 for fixed and indexed annuities between June 9, 2017 and January 1, 2018 and do not have to use the BICE until 2018. PTE 84-24 requires, among other things, a disclosure of your sales commission paid by the insurance company, a description of your relationship with the company, and any fees/charges associated with the recommended product. More on PTE 84-24 on page 5. To recap:

Before Delay of the Rule	After Delay of the Rule
<p>One Exemption Applicable to Indexed Annuities:</p> <ul style="list-style-type: none"> • Best Interest Contract Exemption <p>BICE required supervising financial institution and significant disclosures. PTE 84-24 only applied to traditional fixed annuities.</p>	<p>Two Exemptions Applicable to Indexed Annuities for the 2017 Transition Period:</p> <ul style="list-style-type: none"> • BICE (with changes) • PTE 84-24 (2006 version) <p>Both exemptions will incorporate the Impartial Conduct Standards, including: (1) Best Interest Standard, (2) No Materially Misleading Statements, and (3) Reasonable Compensation. No supervising financial institution needed with PTE 84-24.</p>

Key Takeaway: *As a fiduciary, if you are paid a commission on the sale of an annuity product in the qualified marketplace, you must seek relief from a PTE in order to comply with the Rule. For 2017, that will most likely be the 2006 version of PTE 84-24.*

Fiduciary Investment Advice

Investment advice triggers fiduciary status in the qualified marketplace – so what does it mean to give investment advice and how do you do so in a compliant fashion? It starts with a couple simple requirements. First, **investment advice** is defined as providing direct or indirect advice for a fee or other compensation for:

- A recommendation to acquire, hold, dispose of, or exchange qualified monies, including 401ks and IRAs;
- A recommendation as to how that property should be allocated after it is rolled over or transferred; or
- A recommendation as to management of securities or other property (e.g., portfolio composition).

Key Takeaway: *In order to trigger the fiduciary standard, fiduciary investment advice must be provided for a fee or other compensation.*

In addition, a **“recommendation”** is required of the agent. So what is a “recommendation” under the Rule?

- A recommendation is a communication that would reasonably be viewed as a suggestion that the advice recipient (your client) take a particular course of action.

Generally speaking, some communications do not give rise to a “recommendation.” These include:

- General communications (e.g., newsletters, radio show, widely attended speech)
- Investment education (e.g., general financial concepts)
- Plan information (e.g., helping understand plan fees)
- Asset allocation models (e.g., models showing risk appetite with age)
- Interactive investment materials (e.g., demonstrating by example that shifting assets to certain buckets results in portfolio makeup changes)

It should be noted that fiduciary advice is broadly construed and can be triggered the more individualized you make your recommendation to a client or potential client. If a client perceives the recommendation was made directly to them, it will be considered a recommendation under the Rule. While a PTE is not triggered until compensation is paid, you still may be providing investment advice without knowing you are. As a best practice, keep communications generalized until you are prepared to make an actual recommendation.

Key Takeaway: *A “recommendation” gives rise to the definition under the Rule when it is individually tailored to the customer based on its content, context and presentation.*

Impartial Conduct Standards

One thing that is consistent regardless of which PTE you employ to comply with the Rule – the “**Impartial Conduct Standards**” must be followed. While many parts of the PTEs are on hold until January 1, 2018 via the delay of the Rule, the Impartial Conduct Standards will be effective as of June 9, 2017. As stated above, these include:

- Obligation to act in the customer’s best interest;
- Avoid materially misleading statements; and
- Receive no more than reasonable compensation

The obligation to act in the customer’s best interest is guided by two new duties – prudence and loyalty. These are described in more detail in the next section. “Avoiding materially misleading statements” means that your communications with your clients must be clear and without ambiguity – especially when it comes to describing fees, charges, compensation, and other important disclosures. DOL has stated that failure to disclose a conflict of interest could give rise to a materially misleading statement, so it is important to be comprehensive in your statements and disclosures, and not just list the things that look the best to the client. Last, the agent must not receive more than “reasonable compensation.” DOL notes that the determination of whether compensation is reasonable is guided by the market, and differential compensation is acceptable so long as it is based on neutral factors. DOL also provides that lowest cost does not always mean best – in other words, lowest compensation does not automatically equate to best product for the customer. This is where your expertise comes in to determine what constitutes the best product for your client’s needs and objectives.

Key Takeaway: *The Impartial Conduct Standards go into effect June 9, 2017 and require the agent to (1) act in the client’s best interest, (2) avoid materially misleading statements in all communications and disclosures, and (3) receive no more than reasonable compensation.*

Best Interest Standard vs. Suitability Standard

The suitability standard as we know it today requires that the agent have a “reasonable basis” for recommending a product to a client. In short, the product must be “suitable” for that client’s needs based on a number of factors, such as age, annual income, financial objectives, time horizon, existing assets, liquidity needs, and so forth. The “best interest” standard as required by the Fiduciary Rule raises the bar to include two new duties that are commonplace in ERISA. These include:

- **Duty of Loyalty**
- **Duty of Prudence**

The **duty of loyalty** means that you must not be influenced by any factor (including compensation) that rises above the interests of your client. In short, you must put your client’s interests above your own. In those circumstances where conflicts of interest exist, you must do your best to avoid them and when you cannot, disclose them to your client. Many of the same factors outlined above with suitability apply as well to the best interest standard through a similar duty to individualize your advice by fully understanding the client’s current position and goals. But the important difference is that you must then endeavor to select the best product available for that customer, not just a suitable one. The duty of loyalty requires it.

Similarly, the **duty of prudence** requires you to provide prudent advice that is consistent with the care, skill and diligence exercised by a “prudent agent” faced with similar circumstances. This requires, among other things, that you provide advice that matches up with what another similarly situated agent would do under the same scenario and with the same client. As a result, you must exercise care and diligence to discover exactly what your client is seeking and through your developed skillset and knowledge of products, provide prudent advice.

Is the single best product required? The best interest standard would appear to require the agent to comb through thousands of products to understand the single best product available in the marketplace for that client. This is not so. DOL specifically notes that the best interest standard does not require the agent to identify the single best investment out of all investments in the national or international marketplace, *assuming such advice were even possible*. Instead, the duties of prudence and loyalty require a heightened standard of care to the client and further require you to conduct a best interest review process. More on this process below.

Key Takeaway: *While several products may be “suitable” for a client, the best interest standard requires you to try to narrow the scope and recommend the best one you can offer to fit that client’s needs (without being swayed by any outside factor, such as compensation or other conflicts of interest.)*

Complying with the Fiduciary Rule

(PTE 84-24 and Best Practices)

As described above, many important components of the Fiduciary Rule will come into effect on June 9, 2017. The purpose of this section is to describe what that means for you and how you can take steps to ensure compliance with the more technical elements of the Rule. Beyond the obligation to employ a new “best interest” standard and comply with the other sections above relating to fiduciary advice and recommendations to your client, you must also satisfy important elements of a PTE whenever you receive compensation for your advice (e.g., recommending an indexed annuity to an IRA).

For the purposes of this section, we’ll assume this **PTE will be PTE 84-24 (2006 version)** for the period between June 9, 2017 and January 1, 2018. As you might recall, this version of PTE 84-24 includes indexed annuities in its permitted scope of products as a result of the April 2017 delay of the Rule with the new addition of the Impartial Conduct Standards. This section will also discuss several best practices regarding the Fiduciary Rule that will help best position your practice in a post-DOL Rule environment.

PTE 84-24

(2006 version)

First off, it is important for you to know that compliance with PTE 84-24 falls on your shoulders as an independent agent. While the suitability standard generally employs more of a shared compliance responsibility between agent and carrier, PTE 84-24 places compliance requirements directly at the agent level. This is because only you know your exact compensation as well as any conflicts of interest you may have through your IMO (if applicable) or any other third party. Many carriers will assist you with your compliance under this section and may even provide you with tools to help, but ultimately, it is your responsibility to put them into action.

As you’ll recall from the above discussion on PTEs, you will most likely use PTE 84-24 whenever you recommend the purchase of an annuity with qualified money and you receive compensation. In other words, this process will be used, with minor exceptions, every time you are the writing agent on a qualified case between June 9, 2017 and January 1, 2018. PTE 84-24 has several requirements, but they can be broken into two sections for ease of understanding:

- **Non-Disclosure Requirements and**
- **Disclosure Requirements**

These will be discussed separately, though you’ll find that the Impartial Conduct Standards permeate through both.

PTE 84-24 Non-Disclosure Requirements	PTE 84-24 Disclosure Requirements
<p>These requirements are not specific to the required client disclosure/acknowledgment, but are nevertheless important for compliance with PTE 84-24:</p> <ul style="list-style-type: none"> • Impartial Conduct Standards (as described above) • Recordkeeping Requirement (retain disclosure and acknowledgment form and any additional information or documents provided to client for a period of 6 years) • Arm's Length Transaction (you and client are required to be on equal footing and have no shared financial interest in the transaction) 	<p>These requirements are specific to the required client disclosure/acknowledgment. Every sale will require this disclosure to be provided to the client prior to the execution of the transaction and also saved in your records. The disclosure must disclose:</p> <ul style="list-style-type: none"> • Your relationship as independent agent to the insurance company • Your sales commission • A description of charges, fees, discounts, penalties, or adjustments under the recommended contract • Your conflicts of interest that you may have beyond the receipt of the sales commission
Customer Acknowledgment	
<p>Following receipt of the disclosure and assuming compliance with the Non-Disclosure requirements above, the client will be presented an acknowledgment (which may be a part of the disclosure itself) that provides a space for the client to sign and acknowledge in writing the receipt of the disclosure and a notation that he or she approves the sale on behalf of the IRA.</p>	

In practice, carriers may be providing you a template of the PTE 84-24 disclosure and acknowledgment form that you can use to comply with the Rule. Your obligations may vary by carrier. For instance, some may require you to fill in your sales commission and/or list your specific conflicts of interest. Be mindful of these requirements so that your PTE 84-24 compliance process is complete before submitting an application to the carrier. For more information, reach out to your partner carrier(s) or your IMO (if applicable) to learn more about their PTE 84-24 processes.

Key Takeaway: *PTE 84-24 (2006 version) requires a specific disclosure/acknowledgment form to be provided to the customer that discloses your relationship to the carrier, your commission, a description of charges and fees of the recommended product, and your conflicts of interest. In addition, the client must acknowledge receipt of the disclosure and you should keep copies of all documents involved in the sale for at least 6 years.*

Fiduciary Rule Compliance Best Practices

In the new “Fiduciary World” there are several new best practices that independent agents should adopt and put into practice. The best practices discussed below do not represent an exhaustive list. Some have to do with specific requirements under the Rule. Others are presented as an extension of the Rule, but may help you to manage your new duties as a fiduciary.

1. Show your work.

Just as your math teacher used to tell you when you solved a complex math problem, solving a client’s retirement objectives also requires you to show your work – especially under the DOL Rule. This is important for a number of reasons. First, you are required to keep client records for at least six years under PTE 84-24, and having a complete file helps protect your recommendation much more than a lightly documented file. In addition, showing your work helps build the case for your ultimate product recommendation and how it lines up to address the client’s goals. Last, if you’re ever challenged under the Rule, you have great documentation showing your due diligence and your compliance with your fiduciary duty.

2. Build your own “best interest process.”

While there are many ways to build a best interest process, most come down to 4 basic steps:

- **Customer Profile**
- **Needs Analysis**
- **Product Filtering and**
- **Product Recommendation**

The idea here is to first ensure that you have performed a comprehensive review of the client’s current profile, including a documentation of current assets and initial discussions about financial, insurance, and retirement goals. Document everything. Once you have the customer profile, conduct a thorough needs analysis, including the client’s liquidity needs, income needs, risk tolerance, current assets, time horizon, and other relevant information. In some ways, this mirrors the suitability profile or “Know Your Customer” factors you may already use today. Once you have all of the information documented, and you are confident a fixed annuity is in the customer’s best interests to fill a specific need, consider all the products you can recommend and begin filtering them down by the information you have documented. Ultimately, you’ll likely land on a couple products that fit the client’s needs. At this point, documentation is the most important because you’ll want to demonstrate why the ultimate product you chose makes the most sense and how it helps fulfill the client’s needs and objectives compared to everything else you could have offered.

Customer Profile	Needs Analysis	Product Filtering	Recommendation of Product
<ul style="list-style-type: none"> • Begin building suitability profile • Know Your Customer • Initial needs analysis • Documentation of current assets • Explain your product and service limitations 	<ul style="list-style-type: none"> • Review of Suitability Profile • Factors include financial goals, risk tolerance, income needs, time horizon, existing assets, liquidity needs, net worth, income, expenses, current portfolio, etc. • Must demonstrate need for an annuity 	<ul style="list-style-type: none"> • Some may rely on a technology solution to help filter products based on review of needs analysis • If no tech solution, use experience and training to filter out imprudent products • Filter down to possible products in best interest 	<ul style="list-style-type: none"> • Ultimate product recommendation must be justifiable based on customer needs/goals (accumulation, liquidity, income, guarantees, etc.) • Document rationale in detail • Provide all required disclosures prior to execution of contract forms (e.g., PTE 84-24 Disclosure and Acknowledgment)

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3. Embrace your new duties as fiduciary.

As outlined above, you have several new duties – including the duties of prudence and loyalty – to your clients in the qualified marketplace. Embrace these new duties and tell clients what the standard means for them. Letting them know that you have their interests above your own may be important for them to hear. Similarly, do not make any misleading statements about your role and the products you can offer. Avoiding misleading statements is a component of the Impartial Conduct Standards and is not just limited to your dealings with clients. It can also include the way you market your services and the way you advertise. Be mindful of these new duties and how they interact with your current practice.

4. Avoid (or disclose) material conflicts of interest.

Some conflicts are unavoidable, but many are. Be careful to avoid those conflicts of interest that may put you in a position where you are no longer putting your client's interest above your own. This can come into play if you have a certain sales goal or initiative that will result in an incentive or step up in compensation. Whenever possible, avoid conflicts. But if your situation makes those conflicts unavoidable, be sure to disclose them in full – and be open with your clients if they ask questions about your conflicts.

5. Set up your own checklist or reminders for DOL compliance.

As an independent agent, you may or may not have a full support staff or colleagues that can help keep you on track with all of your DOL Rule compliance. As a result, it might be helpful to put together a short checklist for yourself to help ensure you are complying with the Rule, taking steps to mitigate conflicts and addressing the requirements of a PTE in each sale.

6. Be careful not to accidentally trigger fiduciary advice.

Recall that fiduciary advice is broadly construed and can be triggered the more individualized you make your recommendation to a client or potential client. If a client perceives the recommendation to be made to him or her individually, it will be considered a recommendation under the Rule. While a PTE is not triggered until compensation is paid, you still may be providing investment advice without knowing you are, so be careful and keep your communications generalized.

7. Take a heightened approach to replacements and rollovers.

Recommending that a client stop doing one thing with their money and instead do another thing brings about heightened scrutiny whenever that rollover or replacement results in compensation payable to you. As a result, be sure to explain to the client why you recommend the new product and how it will better serve the client's financial needs and objectives. Describe the differences in fees, what benefits would be lost or gained, and document the ultimate reason you and your client agree that the new product is best.

8. Be flexible.

While we know that 2017 will include PTE 84-24 and the Impartial Conduct Standards as part of the required compliance regime, we do not know if President Trump's DOL will adopt the Rule as is, make changes to the Rule, or delay it further. As a result, be flexible and willing to adapt to changes in the regulatory environment. Ensure that your process is not so rigid that it cannot account for potential changes on the horizon.

Final Thought

The DOL Fiduciary Rule has certainly had a major impact on the retirement product industry, specifically the annuity industry. While no one knows what the future holds and what the regulatory environment will look like in a 1 year, 5 years, or 10 years, it is important to still recognize that the Fiduciary Rule will be law on June 9, 2017. Because PTE 84-24 puts compliance directly on agents, it is vital that you take the steps necessary to comply. Hopefully this document helps you understand the key sections of the Rule that are applicable in 2017. If you have any questions, don't hesitate to reach out to your partner carrier(s) or IMO, if applicable.