

Frequently Asked Questions - Department of Labor Fiduciary Rule & Prohibited Transaction Exemption 84-24



In February 2021, the Department of Labor (DOL) finalized Prohibited Transaction Exemption 2020-02 (PTE 2020-02), which also included DOL's new interpretation of the 5-part test under its 1975 regulation defining who is an investment advice fiduciary under the Employee Retirement Income Security Act of 1974, as amended (ERISA), and Section 4975 of the Internal Revenue Code (Code). Specifically, the DOL's revised interpretation of the 5-part test creates risk that insurance producers may be construed as fiduciaries under ERISA and the Code when providing advice (1) to retirement plan participants about when to roll over plan assets to an individual retirement account or annuity (IRA), and (2) to IRA owners about how to invest in their IRAs.

To assist producers, Athene is providing the following Frequently Asked Questions (FAQ). This FAQ includes questions about subjects that a producer should understand, including the DOL's 5-part test and revised interpretation of that test, as well as general guidance for complying with PTE 84-24, a DOL class exemption that may be used in connection with the sale of annuities in connection with a retirement plan or IRA rollover transaction. This FAQ is based on Athene's current understanding of ERISA and the federal tax code, which is subject to change and differing interpretations. This FAQ is provided with the understanding that Athene is not providing and nothing herein should be construed as legal advice. For additional guidance or specific questions regarding a producer's sales practices, producers are encouraged to consult with their sales organization or legal advisor.

Q1. When does the DOL's Fiduciary Rule apply or how might I know if I am a fiduciary under the rule?

A1. Most commonly in annuity sales, a producer may be considered an investment advice fiduciary (fiduciary) under ERISA when the producer makes a recommendation, for direct or indirect compensation, to retirement plan participants or IRA owners about when to roll over all or part of their retirement savings from a retirement plan to an IRA, from one IRA to another IRA, or advice how to invest their plan or IRA funds, if the producer otherwise meets all the conditions of the five-part test.

Q2. What is the five-part test?

A2. In 1975, DOL issued a regulation that adopted a five-part test for determining when recommendations rise to the level of fiduciary investment advice. Under this regulation, the five-part test is met when a producer for a fee or other direct or indirect compensation:

Elements of the Test	Commentary
Renders advice to a plan, plan fiduciary, plan participant or IRA owner as to the advisability of investing in, purchasing, or selling securities or other property of the plan or IRA	This element is met whenever a producer provides advice or a recommendation to roll over assets from a plan to an IRA, from one IRA to another IRA, or advice how to invest plan or IRA assets.
On a regular basis	<p>DOL has clarified that a single, discrete instance of advice to roll over assets from a plan to an IRA (or IRA to another IRA) would not meet the regular basis prong. However, advice to roll over plan assets (or IRA assets) can also occur as part of an ongoing relationship or as the beginning of an intended future ongoing relationship. As a result, this element of the five-part test may be satisfied by a single instance of advice if the producer will be regularly giving advice regarding the IRA in the course of a lengthier financial relationship.</p> <p>Similarly, sporadic interactions between a producer and a client may not meet the regular basis element of the five-part test if the producer is not providing advice regarding the IRA as part of those interactions.</p>



Pursuant to a mutual agreement, arrangement, or understanding	Whether this element of the test is satisfied depends on the reasonable understanding of each party. A written disclosure disclaiming any mutual agreement, understanding or arrangement would be considered but may not be definitive. Rather, the totality of the circumstances of the transaction and interactions, including marketing materials, should be considered in evaluating whether the parties had a reasonable understanding that a mutual agreement was reached. DOL has emphasized that producers who do not wish to enter into an ongoing relationship should make that fact consistently clear in their communications and act accordingly.
The advice will serve as a primary basis for investment decisions with respect to a plan or IRA assets	The advice does not have to serve as the single most important factor for investment decisions to satisfy this element of the test, rather, it must just be an important factor. DOL has indicated that it likely would consider investment advice meeting a best interest or similar standard of conduct as serving as a primary basis for investment decisions, thus meeting this element of the five-part test. However, while satisfying the other laws may implicate parts of the test, DOL noted that fiduciary status only applies if all five prongs are satisfied.
The advice will be individualized based on the particular needs of the plan, plan participant or IRA owner.	This prong of the test is met whenever the particular investment advice is customized based on the needs of the client. As such, whenever an applicable standard of conduct is applied, whether it be suitability, best interest, or otherwise, DOL will likely consider this factor met.

Q3. I think I am (or might be) a fiduciary. What does that mean?

A3. There are two consequences if a producer is considered a fiduciary when providing investment advice or recommendations to plan participants or IRA owners: that producer (A) is subject to fiduciary duties under ERISA, and (B) is forbidden from engaging in certain “prohibited transactions” involving plan or IRA assets unless a prohibited transaction exemption applies. As a fiduciary, a producer must fully comply with their fiduciary duties or risk significant governmental oversight and penalties, as well as potential private litigation.

Q4. What are my fiduciary duties?

A4. When a producer is considered a fiduciary in the context of providing investment advice or recommendations to plan participants or IRA owners, ERISA imposes certain fiduciary duties on the producer, including prudence and loyalty. Broken down, these duties require that a producer’s advice and/or recommendations be in the client’s best interest and that the producer act in good faith and make no misrepresentations. These obligations are collectively known as fiduciary duties and create a higher standard of care (and potential liability) compared to a non-fiduciary producer’s normal standard of care in recommending a suitable annuity transaction.

Q5. What are prohibited transactions?

A5. ERISA prohibits fiduciaries from acting with self-interest and/or conflicted interests and receiving payments from third parties. These prohibitions present complications when it comes to collecting compensation in connection with a recommendation to purchase an annuity as part of a retirement plan and IRA rollover transaction. The fiduciary producer’s compensation is almost always paid by a third party, the insurance company. Additionally, the receipt of the compensation creates a conflict of interest for the producer and can be considered as acting with self-interest. Prohibited transactions, such as receipt of compensation from a third party and acting with self or conflicted interests, are allowable only to the extent permitted under an applicable statutory or DOL granted prohibited transaction exemption.



Q6. If I am (or might be) a fiduciary, is it possible to receive compensation if my recommendation results in the purchase of an IRA or a rollover transaction?

A6. Yes, if the transaction meets all of the requirements of one of the available prohibited transaction exemptions (PTE). PTEs are either statutory or DOL-granted exceptions that carve out situations where fiduciary producers can collect compensation, even if engaging in prohibited transactions, if they meet all of the criteria of the applicable exemption. For sales of annuities, the applicable exemptions are PTE 2020-02 and PTE 84-24. While PTE 2020-02 may be useful for some situations, Athene will not be utilizing the exemption at this time. As such, this FAQ is focused primarily on PTE 84-24.

PTE 84-24 provides an exception that allows fiduciary producers to effect a retirement plan participant’s or IRA owner’s purchase of an annuity or insurance contract and allows the producer to receive sales compensation in connection with the sale of the annuity or insurance contract if all of the requirements of the exception are met. While plan-IRA transactions may not create a fiduciary relationship, producers that are unsure of their fiduciary status may want to take measures to fit within a PTE like PTE 84-24 to protect themselves and the compensation they receive in the event they are deemed a fiduciary.

Q7. What are the requirements to comply with PTE 84-24?

A7. The key conditions of PTE 84-24 are:

PTE 84-24 Requirements	The Requirements in Practice
The transaction is effected by the producer in the “ordinary course” of business as a producer	The producer’s recommendation should be a usual transaction or practice recommended as part of the producer’s ongoing business model.
The terms of the transaction are at least as favorable as an arms’ length transaction with an unrelated third party	An arms’ length transaction refers to a transaction wherein producers and clients act independently without influencing the other and where both parties act in their own self-interest without any collusion between the producer and client. Both parties should have access to all material and pertinent information, including all necessary disclosures, so as to be fully informed prior to the transaction.
Combined total commissions received by the producer is “reasonable”	What is considered reasonable is specific to the facts and circumstances of the transaction and determined by the market. However, certain reimbursement payments to fiduciaries which are not allocable to direct expenses from the transaction are automatically classified as unreasonable.
A PTE 84-24 disclosure has been provided to, acknowledged and approved by the plan participant or IRA owner	PTE 84-24 requires that the following be disclosed to the client in writing: <ul style="list-style-type: none"> • Whether the producer is an affiliate of the insurance company and the nature of such affiliation or relationship • The limitations on the products that can be recommended by the producer • The sales commission, expressed as a percentage of gross annual premium payments • A description of any charges, fees, discounts, penalties, or adjustments that may be imposed in connection with the purchase, holding, exchange, termination or sale of the proposed annuity

Any producer intending to rely on PTE 84-24 should take all steps necessary to disclose the above information to the client as part of the sale in order to ensure the availability of PTE 84-24.



Q8. If I am (or might be) a fiduciary and intend to rely on PTE 84-24, when should I provide my client with the written disclosures required by PTE 84-24?

A8. PTE 84-24 requires producers to provide the required disclosures in writing to their clients before a sale and the client must acknowledge (sign) the written disclosure and approve the transaction. To assist producers in complying with PTE 84-24, Athene has developed a form (PTE 84-24 Disclosure and Acknowledgment (Form 25198)) producers may use in connection with sales of annuities involving qualified funds. Note that producers must complete the form by disclosing his or her compensation.

This form is available on Athene Connect. Producers are not required to use Athene's form and may use a different version of the required disclosure to comply with PTE 84-24. Additionally, producers will not be required to send their disclosure form to Athene (however, if sent to Athene, Athene will file the form in the client's contract file). The PTE 84-24 disclosure must be signed by the producer and client, and a copy must be left with the client. A copy of the written disclosure also must be kept in your personal files for each client, including those that do not accept your recommendation.

Note: Your sales organization may require a different disclosure form in connection with PTE 84-24 or may intend to utilize PTE 2020-02. Be sure to check with your back office for guidelines.

Q9. How long do I need to maintain documentation regarding the recommendation to comply with PTE 84-24?

A9. All written documentation should be maintained for 6 years following the date of the transaction in order to verify compliance in the event of a DOL or Internal Revenue Service (IRS) audit.

Q10. What are the penalties if it is determined that I am a fiduciary, but I have not met the obligations of a PTE?

A10. Failure to comply could be prohibitively expensive. Civil penalties may be assessed under ERISA Section 502(l) against fiduciaries who breach fiduciary responsibility under part 4 of Title I of ERISA or any other person who knowingly participates in such a breach or violation. The penalty can be calculated as 20% of the applicable recovery amount. The applicable recovery amount is often tied to the losses incurred by the plan, disgorged profits, and amounts necessary to correct the breach.

In addition, the IRS is authorized to assess an excise tax in connection with a prohibited transaction between a covered plan and a disqualified person. The initial amount of the tax is 15% of the amount involved for each year (or part of the year) in the tax period. If the transaction is not corrected within the tax period, an additional tax of 100% of the amount involved is imposed. The amount involved is the money given or received, and, if services are performed, any excess compensation given or received.

Finally, ERISA provides for private causes of action for individuals and plans who have sustained damages against fiduciaries who breach any applicable fiduciary duty to the individual or plan. Monetary damages are available in causes of actions brought on behalf of the plan. Equitable remedies (such as disgorgement, constructive trusts, injunctions, or special performance) may be obtained by individuals suing on their own behalf.



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