



AIG Annuities

# Compliance Bulletin



Effective: February 1, 2022

## Department of Labor (“DOL”) fiduciary obligations – are you ready?

The full compliance date for the new Department of Labor (DOL) fiduciary guidance is February 1, 2022. Beginning on that date, sales, rollovers, transfers, and allocation recommendations involving an ERISA plan and/or an IRA, which are now considered fiduciary advice, become subject to the full set of requirements under applicable DOL guidance. If you are a fiduciary with respect to a fixed, index or variable annuity recommendation, you must comply with these rules.

**This bulletin provides a general review of information we have provided over the past year to help prepare you for this new landscape. It is critical that you begin to comply with the new rules on February 1, 2022.**

## Am I a fiduciary under the DOL Rule?

You may be a fiduciary if you do all of the following with respect to an ERISA plan and/or an IRA:

1. Provide individualized advice;
2. For a fee (this includes commissions);
3. On a regular basis (e.g., in many cases a rollover recommendation will either begin or continue an ongoing relationship “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.

## If I am a fiduciary – what now?

Two important considerations as a fiduciary are:

- To make prudent recommendations; and,
- To eliminate or otherwise address conflicts of interest

Making prudent recommendations involves following a prudent and thorough process to determine whether a recommendation, such as a rollover, is prudent and in the best interest of the client. Addressing conflicts of interest is particularly important when receiving commissions, which are considered “third party compensation” and thus create a conflict of interest for the fiduciary’s recommendations. To receive such commissions, the fiduciary generally must rely on a prohibited transaction exemption (PTE). There are many tools available to help financial professionals understand the PTEs available to them and navigate the new responsibilities under each PTE. You may refer to Compliance Bulletins we have previously issued regarding the new rule. See below for more information about the PTEs.

## How do I comply with PTE 84-24?

Most independent agents will likely seek to use PTE-84-24. The National Association for Fixed Annuities (NAFA) has published a helpful guide, DOL Fiduciary Rule 3.0: Best Practices. The Best Practice Checklist from that guide is attached as the last 2 pages of this bulletin and sets forth steps for complying with PTE 84-24, the exemption most likely to be used by independent agents.

Note that for your convenience, the company has developed a new PTE 84-24 Disclosure and Acknowledgement Form. Copies of the completed form are to be retained by you and your client. We may request a copy from time to time in order to comply with carrier responsibilities.

## How do I comply with 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 advisers (“Financial Institutions”) and their registered representatives or investment adviser representatives. This exemption is similar to the SEC’s Regulation Best Interest and includes the following requirements for Financial Institutions and their representatives:

- Impartial conduct standards
  - Prudent recommendations (a higher standard than best interest but SEC Reg BI and, if applicable, NAIC best interest regulations will help demonstrate compliance)
  - reasonable compensation (both sales compensation (e.g., commissions, trails) and product fees are reasonable)
  - no materially misleading statements
- Disclosure of fiduciary status, any material conflicts of interest and the specific reasons for the rollover recommendation

In addition, Financial Institutions must:

- Mitigate conflicts of interest such as that incentive practices would not encourage a financial professional to place their interests ahead of the client's interest
- Maintain records and allow DOL and Treasury Department access
- Conduct retrospective compliance review, including an annual review by compliance and report signed off on by the firm's CEO, which are retained and made available to the DOL upon request

**We will not serve in the role of a financial institution for purposes of PTE 2020-02 in connection with recommendations made by unaffiliated financial professionals.** If you are a registered representative of a broker-dealer, your firm will likely act as your financial institution for purposes of this PTE.

**AIG's guidance is not intended to be legal advice.** AIG encourages financial professionals to consult their own legal and compliance professionals regarding the applicability of PTE 2020-02 and the new interpretation of the five-part test, or PTE 84-24; any fiduciary status that triggers the need to rely on an exemption and guidance regarding satisfaction of the requirements of any applicable PTE.

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M6233B56 (01/22)

# MAKING A ROLLOVER RECOMMENDATION

## BEST PRACTICES CHECKLIST

For the purposes of this best practices guidance, we are going to assume that the rollover recommendation made by the independent insurance producer satisfies the five-part test. We will also assume that the producer receives a fee or other compensation for that advice. Accordingly, the producer is an investment advice fiduciary under Title I of ERISA and the Code. As stated previously, when a producer considers whether to recommend a rollover from an ERISA plan and would be subject to Title I, the producer must employ a **prudent and thorough** fiduciary process to determine whether a rollover is in the best interest of the participant.

✓ **Gather the relevant information necessary to analyze the options available to the participants.**

- o The producer needs to know what investments are available in the plan, what services are available in the plan, and the costs of those services and investments.
- o Typically, this information can be found in the participant's quarterly benefit statement and in the annual 404(a)(5) participant disclosure.
  - ◆ Gathering this information can be difficult, as not all participants will be able to provide that information at the time they want a recommendation. How the producer proceeds if the information is not available depends on several other factors. For example, if the producer is going to rely on PTE 2020-02, that exemption has specific requirements about a diligent and thorough effort to obtain this information, to explain its importance to the participants if they don't have it, and to document alternative information used in its absence, such as the Form 5500 plan data or benchmarking data.

✓ **Analyze that information and other relevant factors in order to make a recommendation that is in the best interest of the participant.**

- o This individualized recommendation should consider the rollover option as well as the option to leave assets in the plan, comparing the relative advantages and disadvantages of all options.

✓ **Document the reasons why the recommendation is in the participant's best interest.**

- o The producer should remember that the ERISA fiduciary obligation applies concurrently with state insurance suitability or best interest requirements, and the producer must comply with both sets of requirements. (NOTE: NAIC MDL 275 requires such documentation.)

✓ **To receive permissible compensation for the recommendation, comply with the conditions and requirements of a Prohibited Transaction Exemption (PTE).**

- o While PTE 2020-02 is available to insurance companies and agents to use for compliance relief, independent insurance producers will most likely use PTE 84-24 as the appropriate compliance pathway for annuity sales in the rollover space.
- o PTE 84-24 conditions that must be satisfied include:
  - ◆ Transaction is effected in the ordinary course of business
  - ◆ Transaction is at least as favorable to the plan as an arm's-length transaction with an unrelated party would be
  - ◆ Combined total of all fees, commissions, and other consideration is not in excess of reasonable compensation
- o PTE 84-24 disclosures that must be provided include:
  - ◆ The nature of the affiliation or relationship the producer has with the issuing insurance company and any limitations the insurance company places on the producer to recommend the annuity contract
  - ◆ The sales commission paid by the insurance company to the producer, expressed as a percentage of gross annual premium for the first year and any succeeding renewal years
  - ◆ A description of any charges, fees, discounts, penalties or adjustments which may be imposed under the annuity contract in connection with the purchase, holding, exchange, or termination of the contract

✓ **Prior to finalizing the transaction, have the Client execute the 84-24 disclosure form, acknowledging in writing receipt of the disclosures and approving the purchase of the contract.**

✓ **Maintain appropriate record-keeping protocols.**

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