

# Product & Service Notice



Date: December 15, 2021  
To: Ameritas Field Associates  
RE: Prohibited Transaction Exemption

Form Number: PS 4331  
Product Area: Annuity

## Summary:

Ameritas agents will potentially find themselves offering fiduciary advice (and therefore subject to the requisite fiduciary requirements) when they recommend rollovers of retirement funds into or out of an IRA or an annuity.<sup>1</sup> This is the result of a new Department of Labor (DOL) interpretation of what constitutes fiduciary advice.<sup>2</sup> If providing fiduciary advice, agents will need to rely on an exemption to receive compensation for these transactions. The exemption that will be available to Ameritas agents will be PTE 84-24. Ameritas will not be monitoring for compliance with these rules.

## Additional Information:

The DOL recently issued a new interpretation of its regulation defining fiduciary advice. Although the interpretation is new, the rules are already applicable. Any agent offering a fiduciary rollover recommendation must have compliant processes in place at this time.

The DOL uses a five-part test to determine whether a recommendation constitutes fiduciary advice. The five-part test will be met, and thus the recommendation will constitute fiduciary investment advice if the agent:

- (1) renders advice to ERISA retirement plans, participants in those plans or IRA owners as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property;
- (2) on a regular basis;
- (3) pursuant to a mutual understanding;
- (4) that such advice will be a primary basis for investment decisions; and that
- (5) the advice will be individualized to the ERISA retirement plan, participants in the plan or the IRA owner.

The DOL has made it clear that recommendations or advice relating to qualified annuities or IRA's or rollovers into such products may constitute fiduciary investment advice. In the past, the DOL held that rollover recommendations would generally not meet the "regular basis" prong of the test. However, new guidance indicates that many rollover recommendations would now meet this prong. For example, the DOL has stated that if the participant and investment professional reasonably understand that the rollover recommendation is not made in anticipation of recurring recommendations, the rollover recommendation would not satisfy the "regular basis" part of the fiduciary test. If the following questions are all answered "yes," the transaction likely constitutes fiduciary investment advice:

1. Is the money to be used to purchase the recommended life insurance policy or annuity sourced from an ERISA retirement plan, a participant's account in a plan or an IRA (individual retirement account or individual retirement annuity)?
2. Did you recommend the transfer or withdrawal of the funds from the plan, participant account or IRA to purchase the life insurance policy or annuity?
3. When you made the recommendation to transfer or withdraw funds from the plan or IRA, was the advice provided in a manner\*\* that would cause you to be a fiduciary?

\*\* Fiduciary advice includes advice that is provided on a regular or ongoing basis, that serves as a primary basis for the decision to rollover the money or the IRA, and that is individualized to the needs and circumstances of the plan, the participant or the IRA investor.

Although Ameritas is not monitoring agent compliance with PTE 84-24, agents should maintain written documentation of compliance with the rule in situations that are subject to the rule.

Under ERISA, if the recommendation constitutes fiduciary advice pursuant to the five-part test, the agent cannot receive a commission for the rollover recommendation without an exception. The exception that will be available to Ameritas Agents will be PTE 84-24. This exemption requires that:

- The transaction must be effected by the agent in the ordinary course of its business.
- The transaction must be on terms at least as favorable to the participant as an arm's length transaction with an unrelated party would be.
- The combined total of all fees, commissions and other consideration received by the agent must be reasonable.
- The insurance agent must make certain disclosures to an independent fiduciary of the ERISA retirement plan (generally, the plan sponsor or committee) and the plan participant, or in the case of an IRA, the IRA owner, including the existence and nature of any affiliation between the agent and the insurance company whose policy is being recommended, the sales commission payable in connection with the recommended transaction (expressed as an absolute dollar figure or as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years) and any other costs associated with the purchase, holding, exchange, termination or sale of the recommended contract.
- The independent fiduciary or IRA owner must acknowledge the receipt of this information and approve the transaction in writing.

When additional purchases of annuities or insurance are made, the disclosures referenced above do not need to be repeated unless more than three years have passed since the initial disclosure was made or the contract being recommended is materially different from that previously recommended. PTE 84-24 also requires agents keep records relating to compliance with the PTE, including any disclosure forms, for no less than six years.

Ameritas will not be monitoring compliance with PTE 84-24, as it is the sole responsibility of the agent to comply.

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<sup>1</sup> Ameritas agents who are also Registered Representatives of Ameritas Investment Company, LLC (AIC) will receive further training and guidance regarding compliance with this DOL interpretation under PTE 2020-02.

<sup>2</sup> This new interpretation was put forth in the preamble to a new Prohibited Transaction Exemption, PTE 2020-02; Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82798 (December 18, 2020).

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