

([http://ads.lifehealthpro.com/RealMedia/ads/click\\_lx.ads/www.lifehealthpro.com/annuities/annuity-sales-strategies/1577130428/Position3/default/empty.gif/387767476c46574332356b4141345459?x](http://ads.lifehealthpro.com/RealMedia/ads/click_lx.ads/www.lifehealthpro.com/annuities/annuity-sales-strategies/1577130428/Position3/default/empty.gif/387767476c46574332356b4141345459?x))

**FILED UNDER:** ANNUITIES, SALES STRATEGIES

## What happens to incentive trips under the DOL fiduciary rule?

Opinion

---

**OCT 11, 2016 | BY KEVIN W. MECHTLEY, J.D.**

---



Whether or not incentive trips will continue under the DOL fiduciary rule likely comes down to a company's risk appetite. (Photo: iStock)

---

As a compliance consultant with a specialty in the DOL fiduciary rule, I have received the following question a countless number of times: *Are agent incentive trips really gone in a post-DOL fiduciary rule world?*

My answers? *Yes. And maybe.*

As you might expect, this analysis requires a bit of background and some deep diving into DOL's preambles that precede the rule. This article will attempt to explain the *Yes* and the *Maybe* answers above, and also forecast the future of agent incentive trips in the annuity industry.

### Background

In October 2015, Senator Elizabeth Warren's office released a report on agent sales incentives in the annuity industry titled "Villas, Castles and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry." The report argued that trips and non-cash incentives create conflicts of interest for sellers of annuity products and that additional regulation was necessary to curb these conflicts.

---

## RELATED



### DOL 101: The fiduciary rule's impact on IMOs

An attorney-turned-financial consultant addresses a pressing but often overlooked question raised by the DOL rule: What does it mean for...

Enter: The Department of Labor fiduciary rule.

At the time, most industry insiders saw that Sen. Warren's report was strategically released as a backdrop to the fiduciary rule, as the DOL began gearing up for an anticipated challenge with certain industry parties who did not agree with the rule's execution of its aims.

### **Related: DOL 101: The fiduciary rule's impact on annuity carriers**

Regardless of which political or philosophical perspective you may have when it comes to defining a conflict of interest, one thing is clear: The fiduciary rule clearly discourages carriers and independent marketing organizations (IMOs) from continuing to offer the production-based incentives detailed in Sen. Warren's report.

## **The annuity product line of demarcation**

The fiduciary rule provides that producers selling annuity products that are purchased with qualified money are now "fiduciaries," with new duties of prudence and loyalty taking over where a "suitability" standard once stood. The DOL provides that a fiduciary's receipt of variable commissions is considered a "prohibited transaction" but that annuity sellers can seek relief from a "prohibited transaction exemption" (or PTE) to continue receiving customary compensation, so long as the compensation is "reasonable."

The DOL drew a line of demarcation for fixed annuity products for the purpose of the PTEs. First, it reissued an amended PTE 84-24 (or "new" PTE 84-24) for "fixed rate annuity contracts," and second, it issued a new PTE — the Best Interest Contract Exemption (BICE) for fixed indexed and variable annuities. (Note that the fiduciary rule also broadly applies to all other financial products sold with qualified money — the scope of which this article does not address). Hence, it is critical to recognize the difference between the two PTEs when analyzing whether agent incentives, trips and other non-cash compensation may be earned by annuity advisors under the rule.

***Continue reading...***



*Prohibited Transaction Exemption (PTE) 84-24 was drafted with "simple commission payments in mind." (Photo: iStock)*

## **Incentives under PTE 84-24**

PTE 84-24 has been in existence since 1977, but the DOL provided significant revisions to the exemption under the new rule. In the preamble to PTE 84-24, the DOL notes that the exemption was originally crafted with "simple commission payments in mind," and that many of the new compensation structures created since that time no longer fit within the scope of the exemption.

Under the new rule, the DOL determined that it was important to specify exactly what types of commissions are permissible in order to seek relief from each prohibited transaction exemption. To that end, the DOL provided an explicit definition of "Insurance Commission" in the new PTE 84-24. Section VI(f) of PTE 84-24 provides:

*(f) The term "Insurance Commission" mean a sales commission paid by the insurance company to the insurance agent or broker or pension consultant for the service of effecting the purchase of a Fixed Rate Annuity Contract or insurance contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees, or marketing payments.*

It is important to note how limited this definition seems to be written. Also note that the

Next, in the preamble to PTE 84-24, the DOL provides that the exemption “does not extend relief ... to revenue sharing or other payments *not within the definition of Insurance Commission.*” As a result, it appears the DOL is firing a warning shot to annuity sellers that receipt of forms of compensation or benefits outside the scope of this limited “Insurance Commission” definition may be beyond the scope of PTE 84-24.

### **Related: DOL 101: The fiduciary rule's impact on insurance-only agents**

Some had commented to the DOL’s proposed rule that the limited “Insurance Commission” definition in proposed PTE 84-24 would create uncertainty in the industry as to what constitutes a permissible commission under the exemption. However, in the final PTE 84-24 the DOL noted that it was not persuaded by these requests to expand the definition of Insurance Commission but did note the following:

“The Department specifically provided relief for such payments in the *Best Interest Contract Exemption*. That exemption addresses the payment structures that have developed since PTE 84-24 was originally adopted. *The Department intends that relief for such payments be provided through the Best Interest Contract Exemption* on the grounds that the exemption was drafted to specifically address the unique conflicts of interest that are created by these types of payments.”

As a result, it appears that any payments outside the scope of the Insurance Commission definition would require the fiduciary to seek relief under the BICE, not PTE 84-24. As the DOL puts it: “For parties who are interested in broader relief in this area, *the Best Interest Contract Exemption is available.*”

In short, incentive trips are going to be a problem for annuity sellers wanting to rely on PTE 84-24. This is the explanation for the “Yes” answer to the question posed at the beginning of the article.

***Continue reading...***



*BICE was created to hold more financial institutions accountable for customer conflicts of interest. (Photo: iStock)*

## **What about the Best Interest Contract Exemption (BICE)?**

As we saw in the PTE 84-24 preamble, the DOL created a new PTE — the Best Interest Contract Exemption (BICE) to account for all the new commission payment structures that have developed in the time since PTE 84-24 was released. The DOL also created the BICE to try to hold financial institutions more accountable for any conflicts of interest involved in the sale with the new requirement of a “Best Interest Contract” that must be signed by the customer and the advisor’s supervising financial institution. Without such a consumer contract and an approved supervising “financial institution,” the advisor can’t earn any commissions.

What does this mean for the future of incentives?

A review of the preamble to the BICE does reveal a bit of guidance. In a section about the substance of the “Policies and Procedures Requirement,” the DOL notes that “the Financial Institution and related parties could not use or permit the use of bonuses, prizes, travel, entertainment, cash or noncash compensation that a *reasonable person would expect to cause the preferential recommendation of a specific investment product ...*”

**Related: Final fiduciary rule: the benefits and burdens for indexed annuities**

Note that the BICE does not state that trips or other incentives should be prohibited, but it does provide that “if [a party] choose[s] to rely upon conflicted payment structures, they should be prepared to make an enforceable commitment to safeguard Retirement Investors from biased advice that is not in the investor’s Best Interest.”

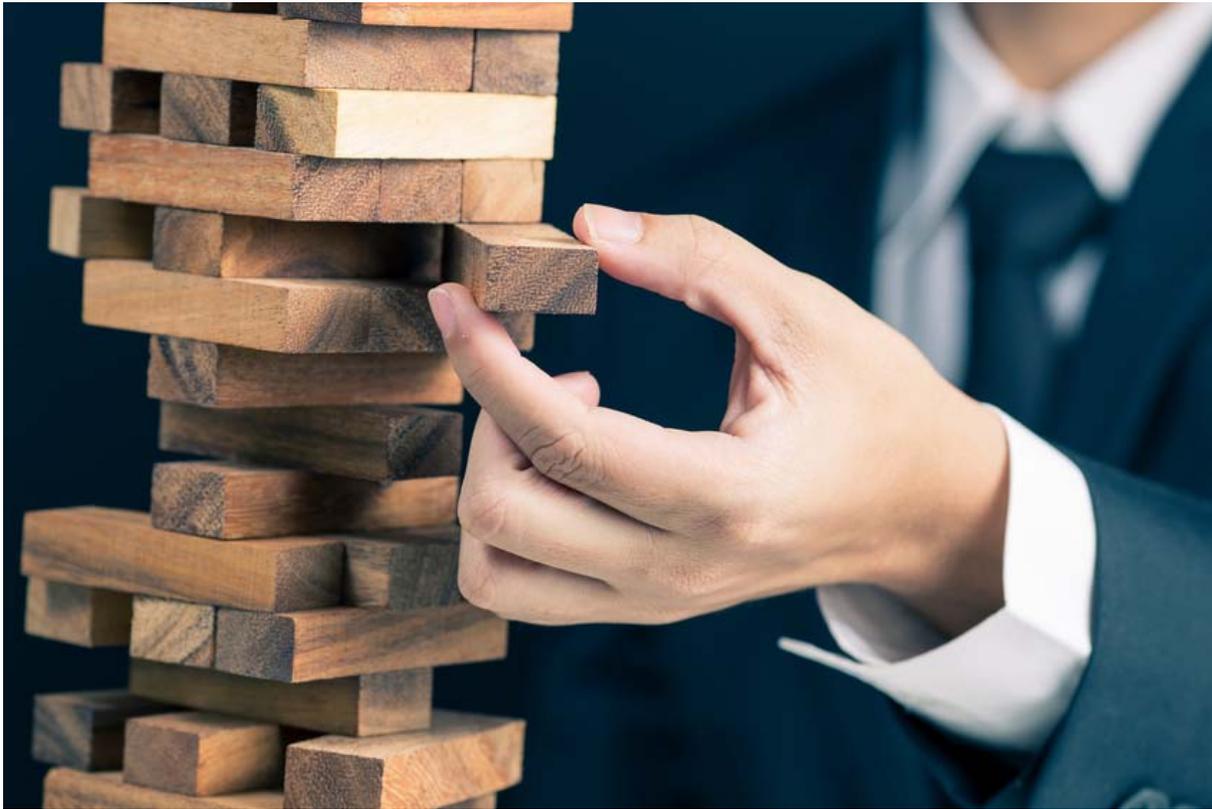
In other words, it appears that if a firm wants to offer cash and non-cash incentives to its advisors that could conceivably create a conflict of interest for its advisor, the firm will need to be able to defend the incentive practice if later challenged (read: sued) by clients under the BICE contract. What is the line of defense? You have to be able to meet the burden that a “reasonable person” would not think the trip, bonus or incentive causes any “preferential recommendation” of that product.

To that end, would a reasonable juror think that earning a fully paid trip to Hawaii for writing \$3 million of annual annuity business with one carrier creates a “preferential recommendation” to sell that carrier? On the other hand, what if an IMO awards a similar Hawaii trip based on your total annuity and life insurance business across all carriers? Does that make a reasonable juror comfortable that the advisor didn’t improperly steer business to cause a preferential recommendation?

This is why the answer is “Maybe” when it comes to the BICE. Maybe you feel comfortable offering that incentive because you are prepared to argue how it doesn’t cause a preferential recommendation ... maybe you don’t.

But the BICE doesn’t technically come out and say trips and incentives are gone.

***Continue reading...***



*What does the future hold? The answer likely comes down to a company's risk appetite. (Photo: iStock)*

## **Future of trips, bonuses and agent incentives in the annuity industry**

A conservative reading of the above would probably lead an insurer or third-party IMO to avoid all trips, bonuses and incentives and instead focus on levelizing commissions with differential payments based only on neutral factors (e.g. level of consumer service offered, complexity of the product sold, insurance guarantees and overall time expended).

Put a different way, the conservative approach would definitively answer the question posed above: "Yes and Yes."

Others may be interested in finding new and creative ways to comply with the spirit of the DOL rule, but still allow for some trips and other incentives. For instance, some companies may choose to completely avoid providing any incentive credits for qualified sales but will continue to offer them for *nonqualified* sales, which are outside the reach of the rule.

Others may try to create trips that are, in part, for education and training purposes, with invites not tied to sales, but perhaps tied to other factors such as persistency, tenure or "total disposition" of the company (e.g. no automatic qualification based on sales). Some may

Still others may attempt to disclose the trips to the consumer and argue they are not conflicts of interest that a reasonable person would think might lead to a preferential recommendation of a certain product. They may take the position that the BICE does not specifically say we can't offer a trip and that the competitive advantage over other carriers or IMOs is worth the gamble.

To this point, one IMO vice president facetiously posed this question to me recently: "What if we just make the agent trip location somewhere dreary or boring instead of the Bahamas? Will that make it an easier argument to the consumer that it isn't *really* a conflict of interest?"

He was joking, but perhaps it's a fair question. We are talking about the "reasonable person" standard, after all.

## Conclusion

Back to the original question: *Are agent incentive trips really gone in a post-DOL "Fiduciary Rule" world?*

"Yes" if you're relying on PTE 84-24.

"Maybe" if you're relying on the BICE.

"Perhaps no" if your incentive trip is booked somewhere boring?

### See also:

**DOL fiduciary proposal will squeeze pay, incentive trips, HRG insurer says**

**5 things to know about selling annuities under the DOL fiduciary rule**

**Confused about the DOL rule? Here are answers to 15 questions**

*Join us and Like us on Facebook.*

## Featured Video

---