



AMERICAN BENEFITS
COUNCIL

July 21, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11933
Suite 400
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB82 – Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

Dear Sir or Madam:

On behalf of the American Benefits Council (the “Council”), this letter responds to the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (“RFI”) published in the Federal Register on July [5], 2017. Specifically, this letter addresses the advisability of extending the January 1, 2018 applicability date.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

SUPPORT FOR A DELAY AS A MEANS TO ADDRESS IMPORTANT PLAN SPONSOR ISSUES

As a plan sponsor organization, we believe we can best contribute to the overall dialogue by focusing on the issues for large plan sponsors and their participants. In that regard, there were a number of issues for plan sponsors that were not addressed in the new definition of a fiduciary and the related exemption changes (collectively referred to herein as the “Fiduciary Rule”). We support a delay of the January 1, 2018 date because it would give everyone the opportunity to take a fresh look at what was not addressed, including issues that have been determined to be critical for plan sponsors since the Rule’s release.

It is also our understanding that because of the upcoming review of the Fiduciary Rule, there is significant uncertainty regarding many elements of the Rule and corresponding delays in determining certain compliance plans. Our plan sponsors need resolution of the uncertainty before the Rule becomes fully applicable. For this reason also, we support a delay. The fiduciary definition rule was a massive DOL regulatory project that included multiple proposed regulations that involved multiple agency personnel; the process for reviewing and revising it to make it workable will take time.

RECOMMENDED FRAMEWORK FOR REVIEW OF PLAN SPONSOR ISSUES

Before turning to examples of specific plan sponsor issues, we would like to share certain observations on the Fiduciary Rule issue in general. We understand the view that the fiduciary rules need to keep pace with innovation in plan design and the evolution of the marketplace. However, in gathering comments from sponsors, we heard a consistent concern that the new rules were in conflict with, and would undermine, the direction that employers are moving and the pressing needs of participants in terms of facilitating employee engagement. We believe we must be very cautious about adding cost and potential liability for employers at a time when plan sponsors are trying to efficiently utilize internal and outside resources to enhance education and encourage more effective consumerism.

It is notable that the Council's strategic report, *A 2020 Vision*, includes a specific recommendation regarding enabling employers to better provide financial education and investment advice, including through advisers affiliated with plan investment offerings along with appropriate participant protections. This recommendation reflects our view of the importance of a balanced regulatory approach that supports the valued interaction between plan participants, sponsors, and service providers without unnecessary complexity or risk of liability to sponsors.

CERTAIN PLAN SPONSOR ISSUES FOR CONSIDERATION DURING THE DELAY

The following issues relate to critical services rendered to our plan sponsors by service providers that implicate the exemptions, such as the Best Interest Contract Exemption, that become fully applicable on January 1, 2018. It is these types of issues that need to be reviewed during a period of delay.

Status of call center employees: Under the Fiduciary Rule, call center personnel employed by the plan sponsor's service provider can easily become fiduciaries through casual "suggestions" and information provided to plan participants. And by reason of their being employed by the plan service provider, this fiduciary advice can easily be a prohibited transaction, triggering liability for the call center employee, the service

provider, and the plan sponsor (e.g., co-fiduciary liability for failing to monitor the call center). Again, this will discourage employee engagement, and place very intense monitoring burdens on plan sponsors.

Plan sponsors need a clear safe harbor under which call center employees can continue to provide helpful information to plan sponsor employees without becoming a fiduciary and possibly triggering liability.

Plan sponsor protection from liability: If (1) plan sponsors provide clear administrable guidelines to their service provider regarding call center communications, and (2) these guidelines limit call center communications to those that do not give rise to fiduciary status, then it is critical that plan sponsors have a clear safe harbor from liability, without intense burdens to monitor their call centers on a constant basis.

Encouraging plan contributions: As noted, plan sponsors would like to engage with their employees to help those employees achieve a secure retirement through maximum utilization of the retirement plan. Generally, with respect to basic plan functions, like encouraging employees to contribute to the plan, the plan sponsor relies on its service provider, which handles day-to-day operation of the plan and interactions with plan participants.

The Fiduciary Rule, as reflected in Q&As-9 and 10 of “Conflict of Interest FAQs (Part II – Rule),” would unfortunately preclude service provider employees from encouraging employees to contribute more to the plan. As Q&A-10 makes clear, only employers can provide that encouragement without becoming a fiduciary, not service providers. If service providers provide such encouragement, they would be fiduciaries and would be committing a prohibited transaction. In May, Q&A-12 of the “Conflict of Interest FAQs (Transition Period)” further confirmed this conclusion.

For employers that outsource plan functions – which is the overwhelming majority of employers – this prohibition would have the effect of reducing savings and would frustrate plan sponsors’ objective to help their employees. We know of no policy reason to prohibit service providers from encouraging employees to achieve a secure retirement by contributing to the plan.

THE NEED FOR CERTAINTY AND CLARITY

Unfortunately, retirement plans are becoming a source of increasing costs and potential liability for plan sponsors. Plan sponsors need certainty and clarity in the rules, and they do not need new sources of liability and cost. Moreover, they need to be able to retain plan services and to be able to choose between fiduciary and non-fiduciary services, based on the services involved and the ongoing role of the employer.

During a period of delay, it is critical that the issues underlying the Fiduciary Rule be reexamined with these concerns in mind. We thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style with a large initial "L".

Lynn D. Dudley
Senior Vice President,
Global Retirement and Compensation Policy