



AFL-CIO

AMERICA'S UNIONS

**American Federation
of Labor and
Congress of Industrial
Organizations**

815 16th St., NW
Washington, DC 20006
202-637-5000
aflcio.org

EXECUTIVE COUNCIL

RICHARD L. TRUMKA
PRESIDENT

ELIZABETH H. SHULER
SECRETARY-TREASURER

TEFERE GEBRE
EXECUTIVE VICE PRESIDENT

Michael Sacco
Robert A. Scardelletti
Harold Schaltberger
Clyde Rivers
Cecil Roberts
Leo W. Gerard
Gregory J. Junemann
Nancy Wohlforth
RoseAnn DeMoro
Fred Redmond
Matthew Loeb
Randi Weingarten
Rogelio "Roy" A. Flores
Fredric V. Rolando
Diann Woodard
Newton B. Jones
D. Michael Langford
Baldemar Velasquez
James Boland
Bruce R. Smith
Lee A. Saunders
Terry O'Sullivan
Lawrence J. Hanley
Loretta Johnson
James Callahan
DeMaurice Smith
Sean McGarvey
J. David Cox
David Durkee
D. Taylor
Kenneth Rigmaiden
Stuart Appelbaum
Harold Daggett
Bhairavi Desai
Paul Rinaldi
Mark Dimondstein
Harry Lombardo
Dennis D. Williams
Cindy Estrada
Capt. Timothy Canoll
Sara Nelson
Lori Pelletier
Marc Perrone
Jorge Ramirez
Eric Dean
Joseph Sellers Jr.
Christopher Shelton
Lonnie R. Stephenson
Richard Lanigan
Robert Martinez
Gabrielle Carteris
Mark McManus

Submitted electronically to EBSA.FiduciaryExamination@dol.gov.

July 21, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933
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

Ladies and Gentlemen:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is pleased to respond to Question 1 in the Department of Labor's ("DoL" or "Department") Request for Information¹ regarding the advisability of extending the January 1, 2018 applicability date of provisions in certain prohibited transaction exemptions (PTEs). Each of these PTEs is related to the Department's final Fiduciary Rule defining who is a "fiduciary" of an employee benefit plan for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code"), as a result of giving investment advice for a fee or other compensation with respect to assets of a plan or Individual Retirement Account ("IRA"). For the reasons detailed below, the AFL-CIO strongly opposes delaying the applicability date of these provisions.

The AFL-CIO is a voluntary, democratic federation of 55 national and international labor unions that collectively represent 12.5 million working people. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get

¹The notice was published in the Federal Register on July 6, 2017 (82 Fed. Reg. 31278), and is available at <https://www.federalregister.gov/documents/2017/07/06/2017-14101>

a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded, and that their workplaces are safe. Further, to help our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men and make their voices heard in corporate boardrooms and the financial system.

Union members have a tremendous investment in the private-sector pension and retirement savings system. Over 80% of union workers employed in private industry participate in workplace retirement plans, compared to just over 45% of non-union workers.² While the vast majority of private-sector union workers are covered by defined benefit pension plans (65% compared to 10% of non-union workers), an equal percentage (44%) of union and non-union workers participate in defined contribution plans.³ More than one-in-four dollars in ERISA-covered retirement plans (27%)—totaling \$ 2.3 trillion in assets—are in collectively bargained defined benefit and defined contribution plans.⁴ Thousands of union members serve as fiduciary trustees jointly responsible with management-appointed representatives for administering and overseeing the assets of multiemployer retirement plans. Union workers and retirees from both the private and public sectors have retirement money invested through IRAs. Like their non-union counterparts, many union members transfer money from workplace retirement plans into IRAs when they leave a job.

With so much at stake for working people, the AFL-CIO and our affiliate unions have advocated for legislative and regulatory improvements to strengthen protections for workers and retirees since ERISA’s enactment.

Regulatory Background

ERISA includes a broad definition of “fiduciary” by reason of having given investment advice. The statute provides generally, “[A] person is a fiduciary with respect to a plan to the extent... (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so....”⁵

²U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2016, Bulletin 2785* (July 2016) t. 2 (private industry workers), available at <https://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.pdf>.

³U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2016, Bulletin 2785* (July 2016) t. 2 (private industry workers), available at <https://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.pdf>.

⁴Calculated from U.S. Dept. of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2014 Form 5500 Annual Reports* (Sept. 2016 v. 1.0) t. A6, available at <https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2014.pdf>.

⁵29 USC § 1002(21) (A).

To the detriment of retirement savers, 1975 DoL regulations considerably narrowed this definition by defining a “fiduciary” as someone who renders advice on a regular basis to a plan, pursuant to a mutual agreement, arrangement or understanding between the adviser and the plan or a plan fiduciary that the advice will serve as the primary basis for investment decisions with respect to plan assets.⁶ The result of these new requirements was that many investment professionals who advised on retirement assets had no legal obligation to act as fiduciaries—i.e. to put their clients’ best interests ahead of their own financial interests or to disclose their conflicts of interest. Subsequent DoL guidance constricted the regulatory definition of fiduciary investment advice even further.⁷

Taken together, the 1975 DoL Rule and subsequent guidance created a regulatory regime riddled with loopholes that favored the financial interests of the professional investment adviser at the literal expense of her client—an approach clearly at odds with any sound public policy that seeks to improve the retirement income security of our nation’s working families.

The Final Rule

On April 8, 1916, after a prolonged and exhaustive rule-making process and extensive findings about the pernicious impact of conflicted investment advice on Americans’ retirement security,⁸ the Department issued a new Rule providing for a functional definition of investment advice, consistent with ERISA’s broad statutory language and the approach taken by other regulators.⁹

⁶29 CFR § 2510.3-21(c)(2015).

⁷A 1976 Advisory Opinion concluded that “a valuation of closely-held employer securities that an employee stock ownership plan (ESOP) would rely on in purchasing the securities would not constitute investment advice under the regulation.75 Fed. Reg. 65264-65265 (Oct.22, 2010) (citing Advisory Opinion 76-65A (AO 76-65A) (June 7, 1976). A 1996 Interpretive Bulletin set out broad circumstances in which investment-related information, provided to participants and beneficiaries in self-directed individual account pension plans, would not be considered advice, but education—even, in some circumstances, when that “education” identified a specific investment option. 29 CFR §2509.96.1 (2015). In 2005, another Advisory Opinion concluded that advising a participant to take a pension plan distribution—even when paired with a recommendation about investing that distribution—did not constitute investment advice, so long as the recommendation is from someone not otherwise a fiduciary. Advisory Opinion 2005-23A (Dec.7, 2005)(AO205-23A), available at <http://www.dol.gov/ebsa/regs/aos/ao2005-23a.html>.

⁸ After a 104-day public comment period, the Department first issued a proposed revised definition of fiduciary in October 2010. A two-day public hearing and another comment period followed in 2011. On April 20, 2015, a notice for another proposed rule was published, and DoL extended the initial 75-day comment period to 90 days; several hundred comment letters were submitted in response, along with more than 70,000 petition signatures. In August 2015, DoL also held a four-day hearing on its proposal and related PTEs which was followed by yet another public comment period. Interspersed throughout this nearly five-year period were a great many meetings at which all stakeholders shared information and perspectives with officials and staff from DoL and the Executive Office of the President. DoL also consulted and coordinated with the SEC to ensure appropriate alignment with any potential SEC advice Rule.

⁹The Rule’s facts-and-circumstances approach to determining whether an investment recommendation has been made mirrors the Financial Industry Regulatory Authority’s (“FINRA”) facts and circumstances approach to determining whether the current-law duty of care imposed on brokers, the so-called suitability standard, is triggered. See FINRA Regulatory Notice 11-02 (effective Oct. 7, 2011) at 2.

According to the new Rule, a person renders investment advice when she receives compensation, directly or indirectly, for a recommendation that is individualized or specifically directed to an employee retirement plan, such as a traditional pension or 401(k); a plan participant, such as an employee saving for retirement in her company's 401(k); an IRA; or an IRA owner.¹⁰ The new Rule, thus, closes the previous regulatory loopholes that defeated retirement investors' common sense expectations that their professional adviser was working in their best interest.

The Rule also clarifies the types of communications that fall short of "recommendations," and are, therefore, non-fiduciary in nature, including broad categories of educational information and materials.

Cognizant of the value of preserving business model flexibility, the Department published a new exemption, the Best Interest Contract Exemption ("BICE"), from ERISA's prohibited transaction rules to permit investment advisers' compensation to continue to take a variety of forms, including commissions, and to allow them to offer proprietary products.¹¹ In order to ensure the advice provided is still in a client's best interest and to mitigate the adviser's financial conflicts, DoL placed important conditions on the use of this exemption. A key condition of providing advice that otherwise would be prohibited under ERISA and the Code, is that the advice provider enter into a written contract with its clients confirming that services will be provided under a fiduciary standard of care and that the adviser has adopted policies and procedures designed to mitigate conflicts of interest.

Sensitive to industry's need for a long transition period, the Department delayed the Rule's applicability date until April 10, 2017 and provided for a longer phased implementation of the BICE. Until January 1, 2018, financial institutions and advisers could take advantage of the BICE without executing the required written contract. They would, however, have to comply with the best interest standard; receive no more than reasonable compensation; make no misleading statements to the retirement investor; provide a single written disclosure; designate a specific person for addressing financial conflicts of interest; monitor advisers' adherence to the best interest standard; and comply with certain recordkeeping requirements.

On February 3, 2017, the President issued a Memorandum directing the Department to examine the Rule for the likely impact of certain specified harms and to update its 2015 economic and legal analysis. Notably absent from this Memorandum is any requested inquiry as to the likely impact of certain retirement investor gains.

On March 2, the Department solicited comments on a new proposal to delay the Rule's applicability date by 60 days, from April 10th to June 9th, on the questions raised in the Presidential Memorandum, and, generally, on Rule-related questions of law and policy. The AFL-CIO filed comments in opposition to any delay.

¹⁰29 CFR § 2519.3-21

¹¹ DOL issued other new and amended PTEs together with the final rule and the BICE. We do not address those PTEs here.

Despite the Department's own estimates of the tremendous costs to investors of conflicted advice¹², by Final Rule, promulgated on April 5, 2017, the Department delayed the applicability date for the Rule and related PTEs another 60 days, until June 9, 2017, and the applicability date for certain provisions of the BICE by nearly eight months.¹³

The Department now asks whether delaying the applicability date for the full conditions of the BICE beyond January 1, 2018 would reduce burdens on financial services providers and benefit retirement investors by allowing for more efficient implementation responsive to recent market developments.¹⁴ For the reasons discussed below, we believe any further delay is unwarranted and counter to the interests of retirement savers.

Full Implementation of the Rule Has Been Sufficiently Delayed

The implementation schedule for the final Rule and related PTEs was designed to give financial institutions and advisers a long transition period. As of now, advisers wishing to avail themselves of the BICE have until January 1, 2018 to come into complete compliance. By that date, advisers whose compensation continues on a commission basis, or who want their investment recommendations to be for proprietary products, must enter into an enforceable written contract with their clients. In that contract, these advisers must commit to comply with the best interest standard; receive no more than reasonable compensation; and make no misleading statements to the retirement investor, including IRA investors. The requirement that advisers make these written contractual commitments is especially important to IRA owners because, unlike participants in 401(k)s and other ERISA-covered plans, IRA owners otherwise do not have a statutory right to bring a claim against an adviser who violates their trust and breaches the best interest standard.

Without a Written Contract Requirement, Conflicted Advisers Can Benefit From the BICE— Without Consequence for Breach of Its Conditions

The financial services industry's vociferous opposition to the BICE obscures the reality that the BICE exists only to accommodate the industry's strong desire to continue paying investment advice providers using conflicted compensation structures. In particular, the BICE allows financial services companies to continue paying advisers through variable compensation arrangements that otherwise would be prohibited transactions under ERISA and the Code. This exemption from the general rule prohibiting conflicted advice must, by law, come with conditions to protect the retirement investor.

¹² A 60 day delay costs working people and retirees \$147 million over 12 months, snowballing to an estimated \$890 million over 10 years (using a three-percent discount rate). 82 Fed. Reg. 12319, 12320 (2017).

¹³The Rule also delayed the applicability of amendments to an existing exemption, Prohibited Transaction Exemption 84-24, until January 1, 2018. The Rule also extended until June 9, 2017 the applicability dates of amendments to other previously granted exemptions.

¹⁴ The Department also asks whether such a delay would carry any risk, whether it would otherwise be advantageous to advisers or investors, and what costs and benefits would be associated with such a delay. In addition, the Department asks the same questions about a delay in the January 1, 2018 applicability date for the Principal Transactions Exemption and amendments to PTE 84-24.

For IRA investors, the Best Interest Contract is particularly important. Unlike participants in 401(k) and other ERISA-covered plans, they otherwise lack a statutory claim against an adviser who breaches the best interest standard. IRAs are the single largest and fastest growing form of retirement savings—outstripping both private-sector defined benefit and defined contribution plans—with rollovers from employer-sponsored plans accounting for most IRA funding. According to the Department’s 2015 Regulatory Impact Analysis (“RIA”), rollovers to IRAs from employer-based plans will total nearly \$2.4 trillion in the five-year period ending in 2020, and financial advisers will continue to play a critical role in individual retirement savers’ IRA investment decisions.¹⁵ Delaying, or even worse, eliminating the requirement of a legally enforceable contract for these retirement savers means the Rule will provide them with a right—without a remedy.

We fail to see how any administrative burdens placed on conflicted advisers by the BICE contract requirement outweigh the benefits it provides to retirement investors. Advisers who are now taking advantage of the exemption should already be complying with its core conditions and the written contract imposes no additional conditions. It merely, but importantly, empowers retirement savers to enforce advisers’ commitments to adhere to those conditions. The contract requirement also reflects significant accommodation to the financial services industry. The contract need only be signed once, when the first recommended transaction is executed and, as industry lobbyists requested, the contracts may require mandatory arbitration of individual investor claims.

In our view, at the heart of industry’s objection to the full provisions of the BICE is their desire to insulate themselves from accountability should they breach its conditions, especially if they do so in a systematic way. Delaying full implementation of the BICE beyond January 1, 2018, would further their agenda but harm the interests of retirement savers.

Recent Market Developments Undercut Any Alleged Need for Delay

The Department correctly anticipated that the release of the Final Rule would spur market innovation, and the AFL-CIO welcomes the market developments we have seen thus far.¹⁶ And while we have every reason to believe that the market will continue to innovate in structuring new products and investment advice service models, this expectation in no way supports industry lobbyists’ argument that the Rule’s implementation must be delayed beyond January 1, 2018. The Department retains its full authority and responsibility to provide new approaches for ensuring conflicted advice providers mitigate their conflicts and adhere to the best interest standard; the Department can respond, as appropriate, to new developments in the marketplace as they arise.

¹⁵ According to the RIA, 54.5 percent of IRA investors with rollovers consulted a professional financial adviser as their primary source of information; sixty percent consulted a professional adviser in some capacity regarding a rollover decision. *Regulatory Impact Analysis* at p. 54. The AFL-CIO has seen entire groups of union members targeted by financial advisers who encouraged them to take lump sum distributions from their pension plans so that the adviser could manage the money without any apparent regard as to what was in each worker’s best interest.

¹⁶ A full discussion of these developments can be found in the March 17, 2017 comments submitted on by the Consumer Federation of America, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01021.pdf>, p. 18.

Indeed, our expectation is that many of these new market developments will lessen the need for the BIC exemption because they will lead advice that is truly conflict free

We appreciate the opportunity to submit these comments. Please do not hesitate to contact me with any questions you may have about them.

Very truly yours,

Shaun C. O'Brien
Assistant Policy Director for Health and Retirement