



August 1, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
c/o Office of Exemption Determinations
Employee Benefit Security Administration
Attention: D-11933
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington DC 20210

RE: Second set of comments regarding the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions; RIN 1210-AB82; Docket ID: EBSA-2017-0004 ([82 Fed. Reg. 31278](#))

The National Federation of Independent Business (NFIB) submits these comments for the record to the Employee Benefit Security Administration (EBSA) regarding the “Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions” (RFI) published in the July 6, 2017, edition of the *Federal Register*.

NFIB is the nation’s leading small business advocacy association, representing small and independent businesses in Washington, DC, and all 50 state capitals. A nonprofit, nonpartisan organization founded in 1943, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. The membership of NFIB includes small and independent businesses directly impacted by the Fiduciary Rule.

EBSA published a final Fiduciary Rule on April 8, 2016.¹ The final rule established an applicability date for the definition of fiduciary and prohibited transaction exemptions of April 10, 2017. On April 7, 2017, EBSA published a subsequent final rule delaying the applicability date for certain parts of the 2016 final rule, including the definition of fiduciary, until June 9, 2017.² In the same notice, EBSA delayed the applicability date

¹ [81 Fed. Reg. 20946](#).

² [82 Fed. Reg. 16902](#).

for the prohibited transactions exemptions (PTEs), including the Best Interest Contract exemption, until January 1, 2018.

The RFI seeks comments on two aspects of the Fiduciary Rule. The first aspect is regarding “the advisability of extending the January 1, 2018, applicability date of certain provisions in the Best Interest Contract (BIC) Exemption, the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and Prohibited Transaction Exemption 84-24.” The second aspect is regarding “public input that could form the basis of new exemptions or changes/revisions to the rule and PTEs.”

NFIB submitted a first set of comments, on the first aspect regarding the advisability of a further delay, on July 6, 2017. This second set of comments addresses the second aspect with responses to specific questions making recommendations to improve parts of the Fiduciary Rule.

General Recommendation

The RFI is part of a review directed by the President’s Memorandum of February 3, 2017 (Memorandum).³ The Memorandum set three specific criteria that EBSA should review to determine if the 2016 final rule aligns with the Administration’s goals outlined in the same document. These criteria are:

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

EBSA acknowledged the impact of this rule on advisers and consumers in delaying the applicability date of the 2016 final rule until June 9, 2017, and by delaying the

³ [82 Fed. Reg. 9675.](#)

applicability date of the PTEs until at least January 1, 2018. Accordingly, NFIB recommends that EBSA rescind all parts of the rule that are not yet applicable. The outstanding requirements will impose disproportionate burdens on small financial advisers that have limited resources to invest in compliance. Consequently, small and independent businesses that want to offer retirement benefits to their employees will face fewer affordable options in their community.

NFIB expressed several concerns about the Fiduciary Rule in its responses to the NPRM for the 2016 final rule⁴ and the NPRM of March 2, 2017.⁵ Those responses are attached to these comments as part of NFIB's submission for the record regarding the RFI.

Responses to Specific Questions in the RFI

EBSA should rescind all parts of the rule that are not yet applicable, but in light of the possibility that EBSA might fail to do so, NFIB makes the following specific recommendations in response to questions 3, 4, 5, and 10 in the RFI.

RFI Question 3. Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?

NFIB Response: The rule and PTEs do not appropriately balance the interests of consumers, nor do they effectively allow advisers to meet their needs. The 2016 final rule created a situation in which it is likely that some advisers would be unwilling or unable to serve small and independent businesses. The reduced choice and availability will hurt the competitiveness of these businesses to attract and retain talent. Further, it directly limits the ability of employees at small businesses to invest and save. These outcomes run counter to the criteria in the Memorandum that directed this review of the 2016 final rule by EBSA.

EBSA acknowledged the impact of this rule on advisers and consumers in delaying the applicability date of the 2016 final rule until June 9, 2017, and by delaying the applicability date of the PTEs until at least January 1, 2018. Therefore, EBSA should remain consistent with this acknowledgement and recognize that the rule and PTEs do not appropriately balance the interests of consumers, nor do they effectively allow

⁴ [80 Fed. Reg. 21928](#).

⁵ [82 Fed. Reg. 12319](#).

advisers to meet their needs. EBSA should rescind all parts of the rule that are not yet applicable to address these harmful impacts.

RFI Question 4. During the transition period from June 9, 2017, through January 1, 2018, Financial Institutions and Advisers who wish to utilize the BIC Exemption must adhere to the Impartial Conduct Standards only. Most of the questions in this RFI are intended to solicit comments on the additional exemption conditions that are currently scheduled to become applicable on January 1, 2018, such as the contract requirement for IRAs. To what extent do the incremental costs of the additional exemption conditions exceed the associated benefits and what are those costs and benefits? Are there better alternative approaches? What are the additional costs and benefits associated with such alternative approaches?

NFIB Response: The incremental costs of the additional exemption conditions represent a substantial portion of the increased burden on advisers in the 2016 final rule. The most onerous aspect of the 2016 final rule, which is likely to have the most harmful impact on small advisers and small businesses, is the language in the BIC exemption that renders it ineligible for use if the contract contains “a provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution,” or “[a]greements to arbitrate or mediate individual claims in venues that are distant or that otherwise unreasonably limit the ability of the Retirement Investors to assert the claims safeguarded by this exemption.”

NFIB recommends that EBSA rescind the requirements of the BIC exemption that are not yet applicable. Such action would continue to protect investors because advisers must continue to adhere to the Impartial Conduct Standards, but would limit the risk of litigation that makes it too risky or expensive for advisers to serve the small business market based on the amount of assets they and their employees hold.

RFI Question 5. What is the likely impact on Advisers’ and firms’ compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?

NFIB Response: As stated in the response to question four, NFIB recommends that EBSA eliminate the contract requirement, leaving advisers to adhere to the Impartial

Conduct Standards. These standards are sufficient to hold advisers to act in the best interest of their clients without the stifling consequences of increased litigation risk.

RFI Question 10. Could the Department base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to the Department? Are there ways to structure such a streamlined exemption that would encourage firms to provide input regarding the design of such a model set of policies and procedures? How likely would individual firms be to submit model policies and procedures suggestions to the Department? How could the Department ensure compliance with approved model policies and procedures?

NFIB Response: Instead of adopting such a potentially confusing and inflexible exemption, EBSA should rescind all parts of the rule that are not yet applicable.

* * * * *

EBSA acknowledged the harmful impact of the 2016 final rule by initiating the RFI. Accordingly, NFIB recommends that EBSA rescind all parts of the rule that are not yet applicable. Those outstanding requirements will disproportionately burden small financial advisers due to their complexity, and small and independent businesses that want to offer retirement benefits to their employees. Nothing in these comments should be construed to indicate support for provisions of the Fiduciary Rule that have taken effect.

NFIB appreciates the opportunity to submit comments to EBSA regarding the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions.

Sincerely,



Daniel Bosch
Senior Manager, Regulatory Policy



July 21, 2015

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210–AB32 – “Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice” and associated proposed exemptions

These comments are submitted for the record to the Employee Benefits Security Administration (EBSA) on behalf of the National Federation of Independent Business (NFIB) in response to the notice of proposed rulemaking for the “Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice” and associated proposed exemptions (proposed rules) published in the April 20, 2015 edition of the *Federal Register*.

NFIB is the nation’s leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

NFIB believes that these proposals are likely to have a substantial impact on small businesses. We are concerned that the changes to the definition of fiduciary could substantially transform the way in which financial service providers deliver services to small businesses and their employees. This could result in providers no longer being able to offer these services to small businesses in an affordable manner. Consequently, it is the employees of these small businesses – the very individuals these rules purport to benefit – that stand to lose access to retirement benefits. In addition, if small businesses cannot offer retirement benefits they will be less competitive with larger businesses, thus hurting innovation and job opportunities for everyone.

Why small businesses need access to affordable retirement plans

NFIB believes that simplification of the regulations and reduction in the costs associated with retirement plans are important to American small business. For small businesses, employee benefit decisions are based on two principles: 1) what can the business afford, and 2) what do the employees want. The point is simple: employee benefits are not free.

If the business can afford the expense of a retirement plan, small business owners have a variety of reasons to offer one. These reasons include: providing their employees with an opportunity to save for retirement, attracting quality employees, instilling worker loyalty and encouragement to stay with the business, rewarding successful employees, and taking advantage of the tax deductions retirement plans offer.

For a small business owner considering whether to offer a retirement plan, the primary threshold that must be crossed is whether or not the business can afford the administrative costs of the plan. And for small businesses, the administrative and start-up costs of a retirement plan are disproportionately higher than they are for larger businesses.

A 2005 study from the U.S. Small Business Administration's Office of Advocacy (Office of Advocacy) found that the administrative cost per participant in retirement plans increased considerably for smaller businesses when compared to their larger counterparts¹. For example, for companies with more than 500 employees that offered defined contribution plans, the administrative cost of offering a retirement plan ranged from approximately \$30 to \$50 per participant. However, for companies with fewer than 50 employees, the administrative costs ranged from \$106 to \$439. As the study notes:

“There appears to be a rough minimum of administrative costs for [retirement] plans. The average total payment of administrative costs is nearly the same for companies with five and fewer employees as it is for companies with 6-10 employees and is only slightly higher for companies with up to 50 employees.”

These higher relative administrative costs are a significant contributing factor in fewer small businesses offering retirement plans. According to the most recent data available from the NFIB Research Foundation, 27 percent of small businesses offer retirement plans². This is consistent with the offer rate identified by the Office of Advocacy³. In contrast, for larger firms, only 26 percent of workers do *not* report having a retirement plan available to them⁴.

For small employers seeking to attract talented employees to work at their companies, this inherent disparity places small business owners at a competitive disadvantage relative to their larger competitors. Historically, Congress sought to address these disparities in part by creating the Simplified Employee Pension Individual Retirement Accounts (SEP IRAs) and Savings Incentive Match Plan for Employees (SIMPLE) IRAs. NFIB supported the creation of these types of retirement plans because they offer a simpler and more affordable alternative to other retirement plans, such as 401(k) plans, which require additional administrative requirements and regulatory complexity.

These plans are popular with small businesses that offer retirement benefits. Subsequent questions from the NFIB Research Foundation survey found that 40 percent of those with plans offered 401(k) plans, while 41 percent offered either a SIMPLE or SEP IRA (30 percent and 11 percent, respectively).

With about as many small businesses offering SIMPLE or SEP IRAs as 401(k) plans, any changes to the regulatory code that make SIMPLE or SEP IRAs more difficult and costly to offer makes it increasingly likely that these small businesses will drop retirement benefits altogether – thus making it more difficult for employees to save for retirement and more difficult for small businesses to attract the skilled, talented employees they need to grow.

Small business owners wear many hats at their business. According to an *NFIB National Small Business Poll on Business Structure*, 87.5 percent of all small employers do not have at least one employee (excluding the owner) whose only job is personnel or human resources⁵, and according to an *NFIB National Small Business Poll on Time Allocation*, 68 percent do not employ a chief financial officer, or the equivalent, someone largely responsible for handling the firm's budget and/or books⁶. A small business owner's time is his or her most valuable resource, and every additional hour that a

small business owner has to spend complying with new benefit regulations is one hour less that they have to spend on growing their business.

NFIB believes the proposed rules will add cost and burden to these plans, for the reasons set forth below.

Proposed rules will limit the ability of small businesses to offer retirement plans

The EBSA's goal with the proposed rules is laudable. The agency seeks to reduce conflicts of interest for financial service providers that lead them to offer products with higher fees that may not be the best fit for the client. As part of this effort, the proposed rules include a revised definition of "fiduciary" status, which triggers certain prohibited transactions. In addition, the proposed rules expand fiduciary status regarding numerous products beyond traditional 401(k) plans. According to the *Federal Register* notice, "[i]f adopted, the proposal would treat persons who provide investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA and the Code in a wider array of advice relationships than the existing ERISA and Code regulations, which would be replaced."

While 401(k) plans are the most popular among small businesses that offer retirement plans, many more find them too expensive and burdensome to offer. Therefore, SIMPLE and SEP IRAs present a more affordable and easier alternative. It is critical that EBSA preserves the viability of these lower cost options. However, this expansive proposal will likely lead to SIMPLE and SEP IRAs being more costly to offer, either in terms of the owner spending more money on setting up the benefit, or in the amount of time a small business owner will spend on setting up the benefit. It is likely that a small business chose to offer a retirement plan because of the lower effort levels required to provide SIMPLE and SEP IRAs. Making these plans more costly to offer will lead to small businesses dropping plans altogether, rather than continuing to use IRAs or converting to 401(k) plans.

Additionally, the proposed rules would make these IRAs more costly for financial professionals to provide for small businesses and increases the likelihood that these providers avoid the small business market. The proposed rules would effectively prohibit providers from offering products to small businesses on which they earn variable compensation or sell products with which they have an affiliation, which is common in the SIMPLE and SEP IRA markets. In addition, even offering a small business a general list of investment products available would be considered by EBSA to be beyond basic information and instead treated as a sales pitch, which would be considered a prohibited activity.

Financial service providers may get around some of these prohibitions with the proposed "best interest contract exemption." However, there are two problems with this proposal. First, it is not clear if this exemption actually applies to SIMPLE and SEP IRAs, or if they only apply to individual IRAs. Second, the requirements of the exemption still impose considerable costs on the broker, which acts as a disincentive for brokers to offer services to small businesses. Accordingly, we have heard from large and small providers alike, including NFIB members, that the exemption is generally unworkable.

This situation is made worse by the "carve out" available to those selling plans to businesses with 100 or more participants. Providers are not prohibited from offering products to these larger plans. The reason is because EBSA believes that larger plans have more sophisticated benefits personnel and can therefore distinguish between general information and a sales pitch. Because smaller plans

cannot make that distinction – in EBSA’s opinion – small businesses cannot benefit from the exemption. This makes it all the more likely providers will not bother to offer services to small businesses.

In addition to the challenges the proposed rules present to SIMPLE and SEP IRAs, 401(k) plans will also be affected because of the expansion of activities that will now be considered fiduciary in nature, and accordingly, prohibited if fees are paid to providers based on which products are purchased. In the preponderance of cases, the amount of money made by the provider varies depending on what options a small business owner chooses.

Under the proposed rules, if a provider were contacted by a small business owner about potentially setting up a 401(k) or IRA plan for employees, that provider would not even be able to identify a list of a dozen or so investment options that are typical for the industry that small business is in. This is because the proposed rules treat this activity as actual investment advice rather than education.

The circumstance presented above leaves the small business owner in an unpleasant situation. He or she must choose one of two bad options. The first is that the owner would have to select the investment options him or herself. Not only is the owner likely not expert enough to do this well, but by doing so he or she takes on additional liability. ERISA holds fiduciaries to an expert standard, and if he or she is not an expert, then he or she must seek help from one. This leads to the second poor option, which is to search for and retain a qualified independent third party expert to do the selection for a fee.

Neither of these options would be viable for many small businesses. Therefore, the proposed rules would make it exceedingly likely that numerous small companies would forego offering a retirement plan altogether, rather than subject their business to the expensive, complicated, and stressful elements of offering a retirement plan.

The EBSA should not be taking action that reduces the number of small businesses that will be able to offer retirement benefits. According to the Office of Advocacy, small businesses employ about half of all of U.S. private sector employees⁷. Restricting the ability of these employers to offer a plan to employees would mean large numbers of employees would no longer have access to a retirement plan at work.

Proposed rules are an example of the need for small business regulatory reform

NFIB believes that these proposed rules demonstrate the need to reform the Regulatory Flexibility Act and its amending laws. Currently, agencies are required to perform an initial regulatory flexibility analysis prior to proposing a rule that will have a significant economic impact on a substantial number of small entities. While these analyses are helpful for agencies to realize the cost and impact a proposed rule will have on small business, agencies would get additional benefit from convening a Small Business Advocacy Review panel for rules of significant impact. These panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. NFIB believes all agencies – in particular the entire Department of Labor – would achieve better regulatory outcomes if required to go through such a procedure.

In this case, EBSA would have benefitted from asking small businesses that offer, or would like to offer, retirement plans how these proposed rules would impact their ability to do so. Perhaps if this was the case, the agency would have crafted proposed rules that better achieve the agency's goal of protecting investors – rather than create regulatory hurdles that will likely reduce the number of small business employees that have access to a retirement plan.

Conclusion

NFIB believes that these proposals are likely to have a substantial impact on small businesses. We are concerned that the changes to the definition of fiduciary could substantially transform the way in which financial service providers deliver services to small businesses and their employees. The result is likely to be that these advisors and providers are no longer able to offer these services to small businesses in an affordable manner. Consequently, it is the employees of these small businesses – the very individuals these rules purport to benefit – that stand to lose access to retirement benefits. In addition, if small businesses cannot offer retirement benefits they will be less competitive with larger businesses, thus hurting innovation and job opportunities for everyone.

NFIB appreciates the opportunity to comment on the proposed rules. Should EBSA require additional information, please contact NFIB's senior manager of regulatory policy, Dan Bosch, at 202-314-2052; or senior manager of legislative affairs, Matt Turkstra, at 202-314-2034.

Sincerely,



Amanda Austin
Vice President, Public Policy
NFIB

¹ Joel Popkin and Company. *Cost of Employee Benefits in Small and Large Businesses*. 2005. SBA Office of Advocacy.

² Dennis, William J., Jr. *NFIB National Small Business Poll: Payroll*. 2006. NFIB Research Foundation.

³ Kobe, Kathryn. *Small Business Retirement Plan Availability and Worker Participation*. 2009. SBA Office of Advocacy.

⁴ *Ibid.*

⁵ Dennis, William J., Jr. *NFIB National Small Business Poll: Business Structure*. 2004. NFIB Research Foundation.

⁶ Dennis, William J., Jr. *NFIB National Small Business Poll: Time Allocation*. 2012. NFIB Research Foundation.

⁷ <https://www.sba.gov/sites/default/files/sbfaq.pdf>



March 16, 2017

Edward Hugler
Acting Secretary of Labor
c/o Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Comments regarding the examination of the Fiduciary Duty Rule described in the President's Memorandum of February 3, 2017, RIN 1210-AB79 (82 *Fed. Reg* 12319)

Dear Mr. Acting Secretary:

The National Federation of Independent Business (NFIB) submits these comments for the record to the U.S. Department of Labor regarding the examination of the Fiduciary Duty Rule (the Rule) described in the President's Memorandum of February 3, 2017 (Memorandum).¹ These comments are submitted in response to the notice of proposed rulemaking regarding the "Definition of the Term 'Fiduciary;' Conflict of Interest Rule—Retirement Investment Advice," published in the March 2, 2017, edition of the *Federal Register* (NPRM of March 2, 2017).

NFIB is the nation's leading small business advocacy association, representing small and independent businesses in Washington, DC, and all 50 state capitals. A nonprofit, nonpartisan organization founded in 1943, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The membership of NFIB includes small and independent businesses in the financial services industry directly affected by the Rule, as well as small and independent businesses in virtually every industry sector likely to be indirectly affected by the Rule in its expected effect of limiting their ability to offer retirement benefits to employees.

Following the Memorandum that directed the Secretary of Labor to "examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of

¹ [82 Fed. Reg. 9675](#)

Americans to gain access to retirement information and financial advice,” the Department of Labor should find in the affirmative and rescind the rule. As explained below, the Department of Labor should make this finding because of the Rule’s direct and indirect impacts on small and independent businesses.

This comment letter addresses the examination prescribed in the Memorandum. In an earlier comment letter on this notice of proposed rulemaking, NFIB strongly supported the Department of Labor’s proposed delay of the applicability date by 60 days, and supported a longer delay if necessary to conduct a thorough review of the Rule’s impact on retirement information and financial advice.²

President’s Memorandum of February 3, 2017

As mentioned above, the Memorandum directed the Secretary of Labor to review the Rule and determine if it may adversely impact access to retirement information and financial advice. Specifically, the Memorandum issued the following direction:

(a) You are directed to examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, you shall prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule, which shall consider, among other things, the following:

(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and

(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

(b) If you make an affirmative determination as to any of the considerations identified in subsection (a)—or if you conclude for any other reason after appropriate review that the Fiduciary Duty Rule is inconsistent with the priority identified earlier in this memorandum—then you shall publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law.

² [NFIB Comments on the Proposed Delay of the Applicability Date of the Fiduciary Duty Rule](#). Filed March 3, 2017.

Fiduciary Duty Rule

The Department of Labor published the Rule on April 8, 2016.³ The Rule broadened what is considered investment advice, which triggers fiduciary status. Under fiduciary status, an institution or individual that dispenses investment advice for a fee or other compensation is prohibited from transactions that may increase his or her compensation based on the investments made by the investor.

The Rule broadens the definition of investment advice by replacing the five-part test in place since 1975 with a description of the types of communications that make up investment advice. Under the five-part test:

“for advice to constitute ‘investment advice,’ an adviser who is not a fiduciary under another provision of the statute must (1) render advice as to the value of securities or other property, or make 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 agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan or IRA.”⁴

Under the Rule, a communication is considered investment advice if it makes a recommendation to a plan, plan fiduciary, plan participant or beneficiary, Individual Retirement Account (IRA), or IRA owner for compensation concerning the acquisition holding, disposing, or exchange of securities or investment property, or concerning how much property should be invested after a rollover or distribution from a plan or IRA, or the management of securities or other investment property including investment policies or strategies, portfolio composition, the selection of investment advisors, and whether and how to take a transfer, distribution, or rollover from a plan or IRA; and the person providing the advice either acknowledges his or her fiduciary status, gives the advice pursuant to an agreement that the advice is individualized for the recipient or directs the advice to a specific investor concerning a particular investment or management decision.⁵

In addition to a broader definition, the Rule, for the first time, expands coverage beyond plans covered by the Employee Retirement Income Security Act (ERISA) to non-ERISA

³ [81 Fed. Reg. 20946](#). The Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1002(21)) and the Internal Revenue Code (IRC) (26 U.S.C. 4975(e)(3)) define the term “fiduciary” with respect to an employee benefit plan to include a person who “. . . 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” On April 8, 2016, the U.S. Department of Labor’s Employee Benefits Security Administration published the final Fiduciary Rule construing the ERISA/IRC definition.

⁴ [80 Fed. Reg. 21933](#)

⁵ Ash, Greg. [Who’s a Fiduciary Now?](#) pp. 7-8. SpencerFane LLC. 2016.

plans like IRAs. The cumulative effect of these changes is to increase the number of investment advice fiduciaries substantially.

Investment advice fiduciaries can only engage in otherwise prohibited transactions through the use of prohibited transaction exemptions. The Department of Labor introduced two new exemptions and amended many existing exemptions at the same time it issued the Rule. Of the new exemptions, the most notable for small businesses is the Best Interest Contract (BIC) Exemption. The BIC Exemption “allows entities such as registered investment advisers, broker-dealers and insurance companies, and their agents and representatives, that are ERISA or (Internal Revenue) Code fiduciaries by reason of the provision of investment advice, to receive compensation that may otherwise give rise to prohibited transactions as a result of their advice to plan participants and beneficiaries.”⁶

As the name implies, to take advantage of the BIC Exemption, the financial institution and its advisors enter into a contract with the investor. This contract must acknowledge that the institution is a fiduciary, explain the institution’s policies and procedures “reasonably designed to mitigate any harmful impact of conflicts of interest,”⁷ and impose conduct standards that Congress chose not to impose outside ERISA, for the investor in court against the institution, among other requirements.

The Rule became effective on June 7, 2016. The Rule and associated exemptions are due to become applicable on April 10, 2017, notwithstanding the current proposed rule to delay these dates at least 60 days. While the standards of the BIC Exemption apply on April 10, 2017, the contract provision of the BIC Exemption does not apply until January 1, 2018.

Impact of the Rule on Small and Independent Businesses

NFIB believes the Rule, if allowed to proceed as finalized, will have a substantial impact on small and independent businesses. In comments filed for the record in response to the notice of proposed rulemaking published in the *Federal Register* on April 20, 2015,⁸ NFIB expressed concern about the impact of the rule on small businesses seeking to offer retirement benefits to employees, as well as those in the financial services industry.⁹

A January 2016 survey conducted by the NFIB Research Foundation found 38 percent of small employers with 250 employees or fewer offer retirement benefits to their

⁶ [81 Fed. Reg. 21002](#)

⁷ *Ibid.*

⁸ [80 Fed. Reg. 27928](#)

⁹ [Docket ID: EBSA-2010-0050-0830](#)

employees.¹⁰ NFIB remains concerned that the Rule could substantially transform the way in which financial service providers deliver services to small businesses and their employees. This could result in providers no longer being able to offer these services to small businesses in an affordable manner. It is the employees of these small businesses – the very individuals the Rule purports to benefit – that stand to lose access to retirement benefits. The inability of small businesses to offer retirement benefits to employees will make them less competitive with larger businesses – hurting innovation and job opportunities for everyone.

Further, the Department of Labor underestimated the impact of the Rule on small and independent businesses by insufficiently fulfilling its obligations under the Regulatory Flexibility Act (RFA). The RFA requires agencies to consider the impact of their regulatory proposals on small entities, to analyze effective alternatives that minimize small entity impacts, and to make their analyses available for public comment. It is the role of the U.S. Small Business Administration's Office of Advocacy to advance the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. The Office of Advocacy is the government's expert on the RFA. In this role, the Office of Advocacy comments to federal agencies regarding the impact of proposed regulations on small business and provides feedback on agency analyses of the regulatory impact.

Under the RFA, an agency is required to examine whether its proposed rule will have a significant economic impact on a substantial number of small entities. If the agency determines that its proposed rule will have such an impact, it is required to prepare an initial regulatory flexibility analysis (IRFA). The IRFA must meet several requirements spelled out by section 603 of the RFA, including what small businesses are expected to be directly impacted, the major cost factors, and consideration of all significant regulatory alternatives.¹¹ The RFA requires agencies to publish the IRFA, or a summary, in the *Federal Register* at the same time it publishes the proposed rulemaking.

In its public comment letter to the Department of Labor of July 17, 2015, the Office of Advocacy wrote that it had found the IRFA for the Rule deficient. The Office of Advocacy found the IRFA deficient because “the public has not been adequately informed about the possible impact of the proposal on small entities, and (DOL) has not effectively weighed less burdensome significant alternatives to the proposed rule that would meet the (DOL)'s objectives.”¹²

¹⁰ Wade, Holly S., Chow, Michael J. [Employee Compensation and Small Business](#). NFIB Research Foundation. January 2016.

¹¹ [The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act](#). pp. 9-13. U.S. Small Business Administration Office of Advocacy. October 2010.

¹² [Docket ID: EBSA-2010-0050-0608](#)

The failure of the Department of Labor to address these concerns in the final version of the Rule illustrates the need for it to be rescinded in accordance with the Memorandum.

Responses to the Review Considerations in the President's Memorandum

The following section further explains NFIB's concerns about the Rule in the context of the three considerations for analysis under subsection (a) in the Memorandum and the NPRM of March 2, 2017.

Presidential Consideration 1: Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice.

The Rule is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice. Accordingly, the Department of Labor should find in the affirmative on this consideration of review.

The Rule, as explained above, prohibits certain transactions that could increase the compensation of a financial advisor or creates several new obligations that financial advisors must meet in order to continue offering services. These new requirements increase costs to advisors. In turn, the costs likely will be passed along to investors and raise the cost of accessing retirement investment planning. Even worse, these requirements make it more likely that financial advisors will abandon servicing small accounts altogether.

According to the *2016 Global Survey of Financial Advisors* published by Natixis Global Asset Management, more than three-quarters of advisors surveyed believe increased regulations could lead to higher costs for their clients.¹³ The Rule is specifically mentioned as being one of the primary drivers of increased regulatory costs. More alarming to small businesses, 38 percent of respondents said they were likely to "disengage from smaller clients." Because retirement plans sponsored by small businesses often pale in comparison to larger corporate retirement plans in terms of assets invested, small businesses face a greater likelihood of being dropped by their financial advisors. The costs to the advisor, in part due to the Rule, may become too great to justify continued servicing of smaller plans.

The new regulatory costs associated with the Rule will disproportionately impact small and independent businesses in the financial services industry. Research indicates that federal regulation of all types disproportionately affect small businesses. As one

¹³ [2016 Global Survey of Financial Advisors](#). Natixis Global Asset Management. 2016.

example, a 2014 study by two Lafayette College professors found that businesses with 50 or fewer employees spend 30 percent more per employee, per year, complying with federal rules.¹⁴ This finding reflects a trend from similar surveys performed for the U.S. Small Business Administration's Office of Advocacy in 1995, 2001, 2005, and 2010.¹⁵

As noted in our comment letter of March 3, 2017, supporting a 60-day delay in the applicability date of the Rule, small and independent businesses lack the resources to easily absorb the regulatory costs associated with the Rule. This fact increases the likelihood that small and independent businesses in the financial services industry will lose competitiveness with larger counterparts. A decreased ability to compete will lead to fewer small businesses in the industry. Consequently, retirement investors will have less access to the services listed in the Memorandum and the NPRM of March 2, 2017.

Presidential Consideration 2: Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.

The anticipated applicability of the Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees. Accordingly, the Department of Labor should find in the affirmative on this consideration of review.

Since finalization of the Rule, information continues to emerge illustrating that companies are making changes that will limit the options of small businesses wanting to offer retirement benefits to their employees.

Merrill Lynch announced in October 2016 that to comply with the Rule, it would no longer provide advice from advisors on new, commission-based IRAs beginning on the applicability date, April 10, 2017.¹⁶ Instead, new customers would either pay a level fee – which for infrequent traders can be more expensive than commission based models – or utilize the firm's "roboadvisory product." The same article cited sources familiar with Merrill Lynch's decision explaining that the firm chose not to use the BIC Exemption for these accounts because "the documentation requirements were still labor-intensive and presented a litigation risk."

Edward Jones announced in August 2016 that it would stop offering mutual funds and exchange traded funds to commission-based accounts.¹⁷ The article covering the

¹⁴ Crain, W. Mark, and Crain, Nicole V. [The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business](#). National Association of Manufacturers. 2014.

¹⁵ *Ibid.* p. 5. (See note 6).

¹⁶ Wursthorn, Michael. [Merrill Lynch to End Commission-Based Options for Retirement Savers](#). Wall Street Journal. October 6, 2016.

¹⁷ Wursthorn, Michael. [Watch Out, Retirement Savers, Your Choices Are Poised to Shrink](#). Wall Street Journal. August 18, 2016.

announcement explained the ramifications: “many will have to weigh whether they want to remain in a commission-based account without access to mutual funds and exchange-traded funds or move to an individual retirement account that charges a fee based on a percentage of invested assets. The fee-based option could be more costly for some investors, such as those who don’t trade much.”

LPL Financial announced in August 2016 that it was implementing a fee-based compensation structure on common products like mutual funds and annuities.¹⁸ In November 2016, when explaining a further transition into fee-based products by eliminating more commission-based products, the company’s chief executive said “[t]he world is going to get more narrow, meaning there is going to be a smaller set of products that one can support.”¹⁹

The product-offering decisions above demonstrate the reduction of investment options for retirement investors, and the disruptions taking place in the financial services industry as a direct result of the Rule.

Presidential Consideration 3: Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

The Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services. Accordingly, the Department of Labor should find in the affirmative on this consideration of review. It should be noted that the Fiduciary Rule already has generated a substantial amount of litigation, even before the Rule becomes applicable.²⁰

¹⁸ Kelly, Bruce. [DOL fiduciary rule sparks LPL to standardize fees on mutual funds: CEO](#). Investment News. August 24, 2016.

¹⁹ Britton, Diana. [LPL Makes More Changes to Prepare for DOL Rule](#). WealthManagement.com. November 3, 2016. LPL Financial Holdings, Inc. describes itself as follows: “We are a leader in the retail financial advice market, the nation’s largest independent broker-dealer (based on total revenues, Financial Planning magazine June 1996-2016), a top custodian for registered investment advisors (‘RIAs’), and a leading independent consultant to retirement plans. We provide an integrated platform of brokerage and investment advisory services to more than 14,000 independent financial advisors (our ‘advisors’), including financial advisors at more than 700 financial institutions across the country, enabling them to provide their retail investors (‘clients’) with objective financial advice through a lower conflict model. We also support approximately 4,000 financial advisors who are affiliated and licensed with insurance companies that use our customized clearing, advisory platforms, and technology solutions.” *Annual Report* (SEC Form 10-K), filed February 24, 2017, Item 1 (General Corporate Overview). LPL Financial has stated that “because qualified retirement accounts and IRAs make up a significant portion of our business, we expect that implementation of the DOL Rule and related exemptions will negatively impact our results, including the impact of increased expenditures related to legal, compliance, information technology and other costs” and that “these changes have also affected (and will likely continue to affect) the products and services we provide to accounts and the compensation that we and our advisors receive in connection with such products and services.” *Id.*, Item 1A (Risks Related to Our Regulatory Environment).

²⁰ Chamber of Commerce of the United States, et al. v. Hugler, No 3:16-cv-1476-M, 2017 WL 514424 (N.D. Tex. February 8, 2017) (holding Fiduciary Rule lawful), appeal pending, No. 17-10238 (5th Cir., appeal filed March 1, 2017); National Association for Fixed Annuities v. Perez, Civ. A. No. 16-1035 (RDM), 2016 WL 6573480 (D.D.C. November 4, 2016) (holding Fiduciary Rule lawful), appeal pending, No. 16-5345 (D.C. Cir. appeal filed November 28, 2016); Market Synergy Group, Inc. v. U.S. Department of Labor, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kansas November 28, 2016) (denying preliminary injunction against Fiduciary Rule), *id.* 2017 WL 661592 (granting government motion for summary

The Rule includes a requirement in the BIC Exemption for a contract between the investor and the financial services institution that includes government-mandated conduct standards enforceable in court against the institution. The inclusion of this provision makes it more likely that litigation will increase. As noted previously, Merrill Lynch noted the anticipated increase in litigation risk as one reason why it was switching to level-fee IRA products.

Legal analysis of the Rule indicates that litigation is expected to increase.²¹ The expected increase in costs would add to the fees investors must pay, and add to the risks for small and independent financial advisors. As one lawyer explained, “whatever the cost, it will be passed onto the customer. That’s just how capitalism works. With any increased litigation risk, there is an increased litigation expense. And if you’re adding a big expense like that into the system, then it’s going to make it more expensive for customers to get the advice they need.”²²

The Department of Labor Should Rescind the Rule

Subsection (b) of the Memorandum directs the Department of Labor to publish for notice and comment a proposed rule rescinding or revising the Rule, as appropriate and as consistent with law, if the Department makes an affirmative determination as to any of the considerations identified in subsection (a), or if the Department concludes for any other reason after appropriate review that the Fiduciary Duty Rule is inconsistent with Administration priorities spelled out in the Memorandum.

The Department of Labor should find in the affirmative on all three considerations. Accordingly, the Department of Labor should publish for notice and comment a proposed rule rescinding the Rule. Based on the discussion above, the Rule will have clear negative impacts warranting rescission.

The Rule has harmed, or is likely to harm, small businesses and their employees – as retirement investors – by reducing access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice. The Rule has resulted in disruptions among small and independent businesses in the financial services industry as well as adversely affected small businesses and their employees as retirement investors. Finally, the Rule is likely to cause an increase in expected litigation, both among small businesses in the financial services industry, and for small businesses sponsoring retirement plans for their employees.

judgment)(February 17, 2017), appeal pending, No 17-3038 (Tenth Cir. appeal filed February 23, 2017); and Thrivent Financial for Lutherans v. Perez, No 16-CV-03289-SRN-HB (D. Minn. February 21, 2017) (denying government motion to stay proceedings pending presidentially-directed review).

²¹ [The US Department of Labor’s Final “Fiduciary” Rule Incorporates Concessions to Financial Service Industry but Still Poses Key Challenges](#). Pp. 17. Shearman & Sterling LLP. April 14, 2016.

²² Karmasek, Jessica. [Class actions will test DOL’s new fiduciary rule, attorney says](#). Legal News Line. May 2, 2016.

Conclusion

For the reasons set forth above, the NFIB urges the U.S. Department of Labor to publish promptly for notice and comment a proposed rule rescinding the Fiduciary Duty Rule. Thank you for the opportunity to comment of the Department's examination of the Rule described the President's Memorandum of February 3, 2017.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Bosch", written in a cursive style.

Daniel Bosch
Senior Manager, Regulatory Policy