



AMERICAN BENEFITS
COUNCIL

August 7, 2017

Filed electronically

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:

The American Benefits Council (the “Council”) is submitting this letter to provide “input that could form the basis of new exemptions or changes/revisions to the [fiduciary] rule and PTEs.” We are making this submission pursuant to the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (“RFI”) published in the Federal Register on July 6, 2017.

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.

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”).

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 common direction in which 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: Flexibility and the Future of Employee Benefits*, 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

The following issues – and many more – were addressed in more detail in our comment letters on the proposed Fiduciary Rule. It would be helpful if these types of issues were reviewed, as experience has demonstrated that they have become ongoing problems.

Status of plan sponsor employees

Under the Fiduciary Rule, although it is not entirely clear, it appears that plan sponsor employees, such as human resources employees, can become fiduciaries by responding to questions from plan participants regarding plan issues.¹ It appears that the only way to clearly avoid fiduciary status and potential liability for the employer or the employee is for the employer to prohibit the employees from discussing many plan-

¹ The Fiduciary Rule is clear that the plan sponsor itself does not become a fiduciary in this situation because it is not receiving compensation for responding to the questions. But in the case of a plan sponsor employee responding to questions, the exemption from fiduciary status is conditioned on, *inter alia*, the employee's "job responsibilities [not involving] the provision of investment advice or investment recommendations." So if the employee is authorized to respond to plan questions with "suggestions" (which is how the Rule defines a recommendation), the employee is not within the exemption.

related issues. Such a prohibition would work contrary to the goals of employee engagement noted above.

Plan sponsors need a clear safe harbor under which their employees, such as human resources employees, can provide helpful plan-related information to employees eligible to participate in the employer's plan without becoming a fiduciary and possibly incurring personal liability.

Status of call center employees

Under the Fiduciary Rule, call center personnel employed by the service provider hired by the plan sponsor 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 employees, such as human resources employees, and to their service provider regarding call center communications, and (2) these guidelines limit employee and 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 and unworkable burdens to monitor their employees and call centers on a constant basis. One possible route to addressing this problem is to conform the Fiduciary Rule to ERISA Section 404(c) and the Council would like to explore that possibility further with the Department.

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.

Q&As-9 and 10 of “Conflict of Interest FAQs (Part II – Rule)” have been widely interpreted to indicate that service providers who encourage employees to contribute more to the plan are fiduciaries. This comes in part from Q&A-10, which indicates that only employers can provide that encouragement without becoming a fiduciary, not service providers acting at the direction of the sponsor.

On the other hand, Q&A-2 of the August 2017 Conflict of Interest FAQs provides the opposite answer on whether service provider encouragement to contribute constitutes a fiduciary act. In light of this confusion, we strongly urge DOL to clarify this issue in the regulation to adopt the position set forth in the August 2017 FAQs.

For employers that outsource plan functions – which is the overwhelming majority of employers – a prohibition on service provider encouragement of contributions would have the effect of reducing savings and would frustrate plan sponsors’ objective to help their employees. This issue needs to be clarified. There is 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. As the litigation has become far more prevalent, plan sponsors need more certainty and more clarity in the rules than in the past, 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. It is important 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.

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