

Submitted via: Regulations.gov

July 20, 2015

Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice - Document Number: 2015-08831

Dear Sir or Madam:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the U.S. Department of Labor’s (DOL) proposed regulation defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) which includes adding brokers and advisers providing advice to individual retirement accounts to the definition. CUNA represents America’s credit unions and their more than 100 million members.

CUNA supports the goal of this rule to protect investors and encourage all advisors to act in the investor’s best interest. Credit unions exist to serve their members, and inherent in the credit union movement is acting in a member’s best interest. Credit unions offering investment services to their members aim to help American families of all means receive information about saving for retirement and planning for their future. While many large investment firms seek high net-worth clients, credit unions seek to provide services to their members in all financial situations and make it easier for these individuals to map out financial plans.

We agree with the DOL that credit union members, and all consumers, deserve the best possible service when seeking information about retirement plans or Individual Retirement Account (IRA) distributions. However, it is important to have rules that encourage and promote retirement savings – rather than potentially chill the ability of credit unions, or other financial institutions, to provide these products and services. CUNA believes that it is necessary for the DOL to analyze how it can more narrowly tailor the definition of “investment advice” to assure that credit union employees, who are only tangentially involved in providing investment services, are not included in the rule. Furthermore, CUNA urges the DOL to further consider how the barriers created by creating strict rules in this area could negatively impact consumers access to retirement and other investment services, particularly for lower net-worth credit union members who may have fewer opportunities to participate in retirement and savings plans.

Credit Unions Provide Retirement Products & Services to Their Members

Under the proposed rule, a person receiving compensation for advice that is individualized or specifically directed at a particular plan sponsor, plan participant, or IRA owner for consideration in making retirement investment decisions would be considered a fiduciary, unless they meet one of the specified carve-outs.

For a majority of credit unions offering brokerage services, compliance with this DOL proposal will not sit at the credit union level because many credit unions offering these services have arrangements with third party brokers that clearly outline the duties and responsibilities of each party in the arrangement. The third party offering retirement or IRA services in most situations will be responsible for their own compliance with applicable laws and compliance standards, and is usually selling their products directly to members. Usually, credit union employees who interface between credit union members and the third party are only involved in the dealings in a minor way.

Additionally, the proposal is not intended to implicate someone as a fiduciary if they merely provide participants with information about a retirement plan or IRA distribution options.

Nevertheless, credit unions are required to conduct due diligence to ensure any third party arrangement and practice has proper controls in place and there is a reasonable belief that practices are compliant. Another potential compliance consideration for credit unions is that the definition of “education” and the “education carve-out” are overly broad in the rule, and as written, do not provide credit unions full assurances that they are not included.

Furthermore, the DOL enforcement mechanism of class action litigation could sweep in credit unions, as sponsors of these brokers-dealers, when plaintiffs bring an action against multiple parties. Unfortunately, any class action defense generates additional costs that are borne by the members of their credit union. This will cause credit unions to have to consider whether it is in the best interest of the credit union and its members to engage in a broker-dealer relationship.

Additionally, under other less common circumstances, CUNA is also concerned that credit unions could be directly swept into this rule. For example, it is possible that this could occur in some situations where credit unions share employees with a broker dealer. A letter issued by the National Credit Union Administration (NCUA) in 2010 provides some guidance about this type of arrangement stating,

“No employee of a federal credit union may provide investment advice that would subject the employee or credit union to federal or state securities laws. A federal credit union, however, may offer investment advice services to its members by establishing a shared employee arrangement with a third party registered investment adviser. The dual employee may provide investment advice on behalf of the third party, but not the credit union. A federal credit union may also act as a finder to introduce or otherwise bring

together an outside vendor of investment adviser services to its members or wholly or partly own a CUSO that provides investment adviser services.”¹

In the case of dual employees, it becomes less clear that the credit union employee is exempt from consideration as a fiduciary.

Overly Prescriptive Requirements Surrounding Compensation Would Be Burdensome for Credit Unions

The DOL’s proposal includes anyone who recommends specific investments and receives a fee as a fiduciary. However, there is a proposed exemption, “the Best Interest Contract Exemption,” (BICE) that would provide conditional relief for common compensation, such as commissions and revenue sharing, that an adviser and the adviser's employing firm might receive in connection with investment advice to retail retirement investors. The exemption requires the firm and the adviser to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, adopt policies and procedures reasonably designed to minimize the harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice.

Credit union employees generally do not receive referral compensation for products, so they will not likely be involved in preparing and executing the contracts involved in the BICE exemption. However, the rule in its current form provides a lack of clarity surrounding how the BICE will work in application at financial institutions. For example, under the BICE, a financial institution is defined as an entity that retains an advisor who is an independent contractor, agent or registered representative. Financial institutions such as credit unions do not provide investment advice directly to investors; and as such, they would not be fiduciaries under the proposed regulatory definition. However, although not fiduciaries, financial institutions must agree to be a fiduciary in order for the advisor to qualify for the BIC exemption. This dichotomy again creates problematic ambiguity for financial institutions.

A CUNA member also expressed concern about whether a credit union that has a sponsor that sells insurance and investment products through various subsidiaries, including the credit union’s broker dealer, could be swept into the rule. In a situation such as this, a credit union may receive referrals for various credit union products, such as the credit union’s IRA products, and would have to make a clear distinction that employees are not compensated for these referrals to avoid being considered an ERISA fiduciary.

Sellers Exemption

The DOL has proposed a “seller’s carve-out” to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm’s length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted advisor. Under this carve-out, the DOL requested comment on the “sellers” exemption for plans with 100 or more plan participants and whether other conditions would be more appropriate proxies. Since some credit unions serve as

¹ National Credit Union Administration Letter to Federal Credit Unions, “Sales of Nondeposit Investments” Letter No.:10-FCU-03, available at <http://www.ncua.gov/Resources/Pages/LFCU2010-03.aspx> (December 2010).

small plan sponsors, these small plan fiduciaries need to obtain essential information on important decisions they make regarding their investments from a number of sellers. To the extent that multiple sellers are in the market, encouraging multiple “pitches” from a spectrum of competitors, where the sellers activity does not cross the line into fiduciary status, would seem to be advantageous in the decision making process and promote multiple offers in a competitive marketplace. Given that credit unions are highly regulated financial entities with a board of directors, we believe that it would be appropriate to recognize all financially regulated entities as one criterion for a seller’s carve-out. For example, we believe that the number of plan participants could be lower to recognize the structure of a credit union and its role as a heavily regulated financial entity.

Regulatory Overlap Would Eliminate Products for Credit Union Members

The onerous and complex nature of the proposed rule, and the potential regulatory overlap, could have the unintended consequence of chilling options for members of credit unions seeking investment products. Federally chartered credits unions are supervised by the NCUA, and also the Consumer Financial Protection Bureau if they have \$10 billion or more in assets, and state-charted credit unions are regulated at the state level. Furthermore, the Financial Industry Regulatory Authority and U.S. Securities and Exchange Commission already require specific licenses and compliance with certain laws for registered brokers, insurance agents, and investment advisors in credit unions. Any additional oversight in this area is unnecessarily duplicative and could be burdensome to credit unions who are already facing a multitude of regulatory hurdles. An unintended expansion of what is considered investment advice or fear of qualifying as an ERISA fiduciary could cause credit unions to avoid offering investment services to their members.

The compliance burdens for those who will qualify as ERISA fiduciaries are great, and small or medium size credit unions could be hesitant to engage in any activity that may sweep them into this expansive proposed rule. The responsibilities associated with being an ERISA fiduciary would require expensive and time-consuming compliance training for credit unions.

Conclusion

We believe it is important that credit unions are able to offer a full range of products and services to their members including products to help families save for retirement and other purposes. Any ambiguity and uncertainty in this area could cause financial institutions to exit or not join this market. Again, we urge the DOL to reconsider its overly broad proposed definition of “investment advice.” This would assure that ultimately consumers and credit union members are not negatively impacted, and that they can continue to receive information about their options for retirement and savings.

The reduction of any unnecessary regulatory hurdles, either intended or unintended, is important for the livelihood of credit unions. Thank you for the opportunity to comment on this proposal. If you have any questions concerning our letter, please feel free to contact me.

Sincerely,

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