



AMERICAN BENEFITS
COUNCIL

March 16, 2017

Submitted via regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB79 – Proposed Rule; Extension of Applicability Date

Dear Sir or Madam:

On behalf of the American Benefits Council (the “Council”), I am writing regarding the proposal to delay the new definition of a fiduciary and the related modifications of the prohibited transaction exemption regime (collectively referred to as the “Fiduciary Rule”).

The American Benefits Council (the “Council”) is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council’s members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council’s membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans covering millions of Americans.

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

As a plan sponsor organization, we believe we can best contribute to the overall dialogue by focusing on the issues for large plan sponsors and their participants. In that regard, there were a number of issues for plan sponsors that were not addressed in the Fiduciary Rule. We support the proposed temporary delay because it would give

everyone the opportunity to take a fresh look at what was not addressed, including issues that have been determined to be critical for plan sponsors since the Rule's release.

It is also our understanding that because of the upcoming review of the Fiduciary Rule, there is significant uncertainty regarding the status of the Rule and corresponding delays in determining compliance plans including documentation with service providers, communication with participants, and changes in service models (given the possibility of such compliance plans being modified or unwound in light of the DOL's ongoing review). Our plan sponsors need resolution of the uncertainty before the Rule becomes applicable. For this reason also, we support the proposed delay. The fiduciary definition rule was a massive DOL regulatory project that included multiple proposed regulations that involved multiple agency personnel; the process for reviewing and revising it to make it workable will take time.

RECOMMENDED FRAMEWORK FOR REVIEW OF PLAN SPONSOR ISSUES

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

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

CERTAIN PLAN SPONSOR ISSUES FOR CONSIDERATION DURING THE DELAY

The following issues – and many more -- were addressed in more detail in our comment letters on the proposed Fiduciary Rule. It is these types of issues that need to be reviewed during a period of delay.

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-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 plan sponsor's service provider can easily become fiduciaries through casual "suggestions" and information provided to plan participants. And by reason of their being employed by the plan service provider, this fiduciary advice can easily be a prohibited transaction, triggering liability for the call center employee, the service provider, and the plan sponsor (e.g., co-fiduciary liability for failing to monitor the call center). Again, this will discourage employee engagement, and place very intense monitoring burdens on plan sponsors.

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

Plan Sponsor Protection From Liability

If (1) plan sponsors provide clear administrable guidelines to their 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 burdens to monitor their employees and call centers on a constant basis.

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.

The Need for Certainty and Clarity

Unfortunately, retirement plans are becoming a source of increasing costs and potential liability for plan sponsors. Plan sponsors need certainty and clarity in the rules, and they do not need new sources of liability and cost. Moreover, they need to be able to retain plan services and to be able to choose between fiduciary and non-fiduciary services, based on the services involved and the ongoing role of the employer. During a period of delay, it is critical that the issues underlying the Fiduciary Rule be reexamined with these concerns in mind. We thank you for your consideration of our views.

Sincerely,

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

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