



AMERICAN BENEFITS

COUNCIL

April 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 - Comments on Issues Raised in Presidential Memorandum dated February 3, 2017 and in Preamble to Proposed Delay of Fiduciary Rule

Dear Sir or Madam:

On behalf of the American Benefits Council (the "Council"), I am writing regarding the effects of the new definition of a fiduciary and the related modifications of the prohibited transaction exemption regime (collectively referred to as the "Fiduciary Rule"), as requested in the preamble to the proposed delay of the Fiduciary Rule. The Council appreciates the opportunity to comment and to share input we have received from plan sponsors.

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

Fiduciary Rule, that have clearly emerged as implementation planning began and that would have adverse effects if not addressed.

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 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 sponsor members need full resolution of the uncertainty before the Rule becomes applicable. The approach outlined in the final delay unfortunately does not resolve the uncertainty because it provides for the definition of a fiduciary to take effect before the Presidentially-directed review takes place. In addition, in the event of further changes to the Rule pursuant to the review directed by the President, plan sponsors will need sufficient time to prepare for such changes.

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. The Council understands, and agrees with, 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 plan sponsors, we heard a consistent concern that the new rules were in conflict with, and would unintentionally undermine, the common direction in which employers are moving, and the pressing needs of participants in terms of facilitating employee engagement. We believe public policy must be very cautious about adding cost and potential liability for employers at a time when plan sponsors are trying to efficiently use internal and outside resources to enhance financial education and encourage more effective consumerism.

The Council's strategic policy 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, in conjunction with appropriate participant protections. This recommendation reflects our view of the importance of a balanced regulatory approach that supports the valued interaction among plan participants, plan sponsors, and service providers without unnecessary complexity or risk of liability to sponsors.

CERTAIN PLAN SPONSOR ISSUES FOR CONSIDERATION

The following issues –were among those addressed in more detail in the Council's previous comment letters on the proposed Fiduciary Rule. The following are the types of issues requiring review.

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 Plan sponsors are concerned because the lack of clarity means that the only way to clearly avoid fiduciary status and potential liability for the employee, and therefore the employer, is for the employer to prohibit employees from discussing many plan-related issues. Such a prohibition would be 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 could 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.

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)” would unfortunately preclude service provider employees from encouraging the plan sponsor’s employees to contribute more to the plan. Q&A-10 makes it clear that only employers, not service providers, can provide that encouragement without becoming a fiduciary. If service providers provide such encouragement, they would be fiduciaries and would be committing a prohibited transaction.

For employers that outsource plan functions – which is the overwhelming majority of employers – this prohibition would have the effect of reducing savings and would frustrate plan sponsors’ objective to help their employees. This needs to be changed. 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

Increasingly, retirement plans are becoming a source of higher costs and potential legal liability for plan sponsors. Plan sponsors need certainty and clarity in the rules governing their plans, and rulemaking should seek to mitigate new sources of liability and cost. Plan sponsors need to be able to retain plan services and to choose between fiduciary and non-fiduciary services, based on the services involved and the ongoing role of the employer. We respectfully urge the Department to keep these concerns in mind when examining the issues underlying the Fiduciary Rule. We thank you for your consideration of our views.

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley".

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