



Christine L. Owens
Executive Director

July 21, 2017

www.nelp.org

NELP National Office
75 Maiden Lane
Suite 601
New York, NY 10038
212-285-3025 tel
212-285-3044 fax

Washington DC Office
2040 S Street NW
Washington, DC 20009
202-683-4873 tel
202-234-8584 fax

California Office
405 14th Street
Suite 401
Oakland, CA 94612
510-663-5700 tel
510-663-2028 fax

Washington State Office
317 17th Avenue South
Seattle, WA 98144
206-324-4000 tel

Office of Exemption Determinations
EBSA (Attention D-11933)
U.S. Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

Re: EBSA-2017-0004

To Whom It May Concern:

The National Employment Law Project (“NELP”) submits these comments in response to the Department of Labor’s (the “Department”) July 6, 2017, request for information (the “RFI”) on the advisability of extending the applicability date of certain conditions for several recently-created or -amended administrative class exemptions from the prohibited-transaction provisions of ERISA and the Internal Revenue Code (collectively, the “Conditions”). The purpose of the Conditions is to protect retirement savers from risks associated with the prohibited transactions. Some of the Conditions are applicable now, but the Department delayed the applicability of others until January 1, 2018.¹ Still other Conditions were originally set to apply on January 1, 2018.²

NELP is a non-profit research and policy organization that for more than 45 years has advocated for the employment and labor rights of low-wage workers. Because these workers need the protections afforded by the full set of the Conditions as soon as possible, NELP strongly opposes further delay of the application of any of the Conditions. NELP also disagrees with the Department’s decision to even *consider* an additional delay in the applicability date of the Conditions.

On March 2, 2017, the Department a proposed rule to extend the applicability date of all aspects of the Fiduciary Rule, including the Conditions.³ It also asked for substantive comments on changes in the marketplace that could be considered as part of the Department’s reevaluation of the Rule, including the Conditions. In April, 2017, after receiving nearly 200,000 comments on the issue of extension and carefully weighing the costs and benefits of delaying the applicability dates of all aspects of the Rule, the Department concluded that the applicability date for certain Conditions should be postponed to or, in other cases, remain January 1, 2018.⁴ The Department delayed all provisions of the Rule until at least June 9, 2017, because of the uncertainty it had created by proposing to delay the Rule in first place. While the RFI seeks additional

¹ See EBSA; Extension of Applicability Date, 82 Fed. Reg. 16902 (Apr. 7, 2017).

² See, e.g., EBSA; Adoption of Class Exemption, 81 Fed. Reg. 21002, 21070 (Apr. 8, 2016).

³ See EBSA; Proposed Rule, Extension of Applicability Date, 82 Fed. Reg. 12319 (Mar. 2, 2017).

⁴ See Extension of Applicability Date, 82 Fed Reg. at 16907.

comments about certain aspects of the Conditions, nothing prevented the Department from including these questions in the March proposed rule and they do not justify a further delay in application date. In the absence of any evidence of changed circumstances outside of the Department's control, the Department's effort to reconsider its April delay decision represents a wasteful misuse of taxpayer funds and an unnecessary burden on stakeholders.

The Conditions Provide Indispensable Protection to Retirement Savers

Congress prohibited the "prohibited transactions" for a reason. The conflicts of interest inherent to them are inconsistent with the duty of loyalty an investment-adviser fiduciary is required to exercise toward clients. Exemptions to these prohibitions should be only available subject to enforceable conditions that investment-adviser fiduciaries take steps to mitigate these conflicts and, in fact, provide unbiased financial advice. The Department provided these protections in its 2016 rulemaking to create new, and amend existing, administrative class exemptions. For instance, use of the Best Interest Contract Exemption (the "BICE") is supposed to be conditioned on an investment-adviser fiduciary's adherence to impartial conduct standards ("ICSs"), backed by representations and warranties incorporated into a written contract.⁵ The ICSs are effective only to the extent they can be enforced, and so the Conditions requiring financial institutions to contractually bind themselves to the satisfaction of ICSs are of vital importance. Yet, today, the BICE is available without compliance with the representation-and-warranty Conditions.⁶ Similarly, those Conditions requiring disclosures about risks related to prohibited transactions are not yet applicable.⁷ If investment-adviser fiduciaries are going to use an exemption to engage in otherwise prohibited transactions, their clients need the full panoply of protections provided by the Conditions to guard against conflicted advice. This includes especially the ability to enforce the ICSs. The Department should make all of the Conditions applicable as soon as possible, which as of now is January 1, 2018.

This Aspect of the Request for Information is Redundant

As the Department knows, on March 2, 2017, it published a proposed rule to extend the applicability date of all aspects of the Fiduciary Rule, including the Conditions.⁸ The Department requested comments on "the proposal to extend the applicability dates for 60 days,"⁹ and specifically sought comment on "costs and benefit considerations [it] should ... consider if the applicability date is further delayed, for 6 months, a year, or more?,"¹⁰ as well the effect of the anticipated applicability date on investors and the financial services industry.¹¹ By the close of the comment period, a mere two weeks later, the Department had received by its own count 193,000 comments.¹² Of these, fully 178,000 – or

⁵ See, e.g., Adoption of Class Exemption, 81 Fed. Reg. at 21075-83.

⁶ Extension of Applicability Date, 82 Fed. Reg. at 16907

⁷ *Id.*

⁸ See Proposed Rule, Extension of Applicability Date, 82 Fed. Reg. at 12319.

⁹ *Id.*

¹⁰ *Id.* at 12324.

¹¹ *Id.* at 12319-20.

¹² Extension of Applicability Date, 82 Fed. Reg. at 16903.

92 percent – of them “oppose[d] any delay whatsoever.”¹³ The Department nevertheless engaged in a robust cost-benefit analysis and concluded that, while the ICSs would become applicable in June 2017, “other conditions in these PTEs [the administrative class exemptions], such as requirements to make specific written disclosures and representations of fiduciary compliance in investor communications, are not required until January 1, 2018.”¹⁴ Key to this decision was the Department’s conclusion that “a longer delay likely would result in too little additional cost saving to justify the additional investor losses, which could be quite large.”¹⁵

Having engaged in this analysis and reached a reasoned conclusion, the Department cannot now reverse course without evidence of changed circumstances outside of its control.¹⁶ To NELP’s knowledge, there is none. Nothing in the RFI suggests that, in the three months since the publication of the final rule delaying the applicability date of key Conditions, the protection provided by the Conditions is less important. Nor does the RFI support the notion that the investor losses caused by a further delay in the Conditions’ application would be suddenly justified by increased compliance-cost saving. Without first establishing such a foundation, this aspect of the RFI is purely redundant to the Department’s request for comments on the extension of applicability dates in the March 2 proposed rule. It is – essentially – a fishing expedition, by which the Department tests randomly whether some new piece of evidence, not revealed in the first 198,000 comments, will improbably surface that could justify a further delay in the applicability date.

This is not an efficient way to administer the Nation’s laws. It represents a waste of precious departmental resources and imposes an unnecessary burden on stakeholders, who having already submitted nearly 180,000 comments opposing delay in the Fiduciary Rule’s applicability dates, must now answer the bell once more. It also creates greater uncertainty for the full range of stakeholders and threatens further damage to the purpose of the Fiduciary Rule – to ensure that individuals have full and unbiased access to the information they need to invest their resources to build financial security for themselves and their families.

For these reasons, NELP strongly opposes further delay in the application of any of the Conditions.

Sincerely,



Christine L. Owens
Executive Director

¹³ *Id.*

¹⁴ *Id.* at 16907.

¹⁵ *Id.* at 16912.

¹⁶ *See* 5 U.S.C. § 706(2)(A).

