



August 1, 2017

The Honorable R. Alexander Acosta  
Secretary of Labor  
c/o Office of Exemption Determinations  
Employee Benefit Security Administration  
Attention: D-11933  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Suite 400  
Washington DC 20210

RE: Second set of comments regarding the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions; RIN 1210-AB82; Docket ID: EBSA-2017-0004 ([82 Fed. Reg. 31278](#))

The National Federation of Independent Business (NFIB) submits these comments for the record to the Employee Benefit Security Administration (EBSA) regarding the “Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions” (RFI) published in the July 6, 2017, edition of the *Federal Register*.

NFIB is the nation’s leading small business advocacy association, representing small and independent businesses in Washington, DC, and all 50 state capitals. A nonprofit, nonpartisan organization founded in 1943, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. The membership of NFIB includes small and independent businesses directly impacted by the Fiduciary Rule.

EBSA published a final Fiduciary Rule on April 8, 2016.<sup>1</sup> The final rule established an applicability date for the definition of fiduciary and prohibited transaction exemptions of April 10, 2017. On April 7, 2017, EBSA published a subsequent final rule delaying the applicability date for certain parts of the 2016 final rule, including the definition of fiduciary, until June 9, 2017.<sup>2</sup> In the same notice, EBSA delayed the applicability date

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<sup>1</sup> [81 Fed. Reg. 20946](#).

<sup>2</sup> [82 Fed. Reg. 16902](#).

for the prohibited transactions exemptions (PTEs), including the Best Interest Contract exemption, until January 1, 2018.

The RFI seeks comments on two aspects of the Fiduciary Rule. The first aspect is regarding “the advisability of extending the January 1, 2018, applicability date of certain provisions in the Best Interest Contract (BIC) Exemption, the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and Prohibited Transaction Exemption 84-24.” The second aspect is regarding “public input that could form the basis of new exemptions or changes/revisions to the rule and PTEs.”

NFIB submitted a first set of comments, on the first aspect regarding the advisability of a further delay, on July 6, 2017. This second set of comments addresses the second aspect with responses to specific questions making recommendations to improve parts of the Fiduciary Rule.

### General Recommendation

The RFI is part of a review directed by the President’s Memorandum of February 3, 2017 (Memorandum).<sup>3</sup> The Memorandum set three specific criteria that EBSA should review to determine if the 2016 final rule aligns with the Administration’s goals outlined in the same document. These criteria are:

*(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans’ access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;*

*(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and*

*(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.*

EBSA acknowledged the impact of this rule on advisers and consumers in delaying the applicability date of the 2016 final rule until June 9, 2017, and by delaying the

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<sup>3</sup> [82 Fed. Reg. 9675.](#)

applicability date of the PTEs until at least January 1, 2018. Accordingly, NFIB recommends that EBSA rescind all parts of the rule that are not yet applicable. The outstanding requirements will impose disproportionate burdens on small financial advisers that have limited resources to invest in compliance. Consequently, small and independent businesses that want to offer retirement benefits to their employees will face fewer affordable options in their community.

NFIB expressed several concerns about the Fiduciary Rule in its responses to the NPRM for the 2016 final rule<sup>4</sup> and the NPRM of March 2, 2017.<sup>5</sup> Those responses are attached to these comments as part of NFIB's submission for the record regarding the RFI.

### Responses to Specific Questions in the RFI

EBSA should rescind all parts of the rule that are not yet applicable, but in light of the possibility that EBSA might fail to do so, NFIB makes the following specific recommendations in response to questions 3, 4, 5, and 10 in the RFI.

*RFI Question 3. Do the Rule and PTEs appropriately balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?*

NFIB Response: The rule and PTEs do not appropriately balance the interests of consumers, nor do they effectively allow advisers to meet their needs. The 2016 final rule created a situation in which it is likely that some advisers would be unwilling or unable to serve small and independent businesses. The reduced choice and availability will hurt the competitiveness of these businesses to attract and retain talent. Further, it directly limits the ability of employees at small businesses to invest and save. These outcomes run counter to the criteria in the Memorandum that directed this review of the 2016 final rule by EBSA.

EBSA acknowledged the impact of this rule on advisers and consumers in delaying the applicability date of the 2016 final rule until June 9, 2017, and by delaying the applicability date of the PTEs until at least January 1, 2018. Therefore, EBSA should remain consistent with this acknowledgement and recognize that the rule and PTEs do not appropriately balance the interests of consumers, nor do they effectively allow

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<sup>4</sup> [80 Fed. Reg. 21928](#).

<sup>5</sup> [82 Fed. Reg. 12319](#).

advisers to meet their needs. EBSA should rescind all parts of the rule that are not yet applicable to address these harmful impacts.

*RFI Question 4. During the transition period from June 9, 2017, through January 1, 2018, Financial Institutions and Advisers who wish to utilize the BIC Exemption must adhere to the Impartial Conduct Standards only. Most of the questions in this RFI are intended to solicit comments on the additional exemption conditions that are currently scheduled to become applicable on January 1, 2018, such as the contract requirement for IRAs. To what extent do the incremental costs of the additional exemption conditions exceed the associated benefits and what are those costs and benefits? Are there better alternative approaches? What are the additional costs and benefits associated with such alternative approaches?*

NFIB Response: The incremental costs of the additional exemption conditions represent a substantial portion of the increased burden on advisers in the 2016 final rule. The most onerous aspect of the 2016 final rule, which is likely to have the most harmful impact on small advisers and small businesses, is the language in the BIC exemption that renders it ineligible for use if the contract contains “a provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution,” or “[a]greements to arbitrate or mediate individual claims in venues that are distant or that otherwise unreasonably limit the ability of the Retirement Investors to assert the claims safeguarded by this exemption.”

NFIB recommends that EBSA rescind the requirements of the BIC exemption that are not yet applicable. Such action would continue to protect investors because advisers must continue to adhere to the Impartial Conduct Standards, but would limit the risk of litigation that makes it too risky or expensive for advisers to serve the small business market based on the amount of assets they and their employees hold.

*RFI Question 5. What is the likely impact on Advisers’ and firms’ compliance incentives if the Department eliminated or substantially altered the contract requirement for IRAs? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the contract requirement and, if so, how?*

NFIB Response: As stated in the response to question four, NFIB recommends that EBSA eliminate the contract requirement, leaving advisers to adhere to the Impartial

Conduct Standards. These standards are sufficient to hold advisers to act in the best interest of their clients without the stifling consequences of increased litigation risk.

*RFI Question 10. Could the Department base a streamlined exemption on a model set of policies and procedures, including policies and procedures suggested by firms to the Department? Are there ways to structure such a streamlined exemption that would encourage firms to provide input regarding the design of such a model set of policies and procedures? How likely would individual firms be to submit model policies and procedures suggestions to the Department? How could the Department ensure compliance with approved model policies and procedures?*

NFIB Response: Instead of adopting such a potentially confusing and inflexible exemption, EBSA should rescind all parts of the rule that are not yet applicable.

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EBSA acknowledged the harmful impact of the 2016 final rule by initiating the RFI. Accordingly, NFIB recommends that EBSA rescind all parts of the rule that are not yet applicable. Those outstanding requirements will disproportionately burden small financial advisers due to their complexity, and small and independent businesses that want to offer retirement benefits to their employees. Nothing in these comments should be construed to indicate support for provisions of the Fiduciary Rule that have taken effect.

NFIB appreciates the opportunity to submit comments to EBSA regarding the Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions.

Sincerely,



Daniel Bosch  
Senior Manager, Regulatory Policy