

July 21, 2015

Submitted Electronically – e-ORI@dol.gov and e-OED@dol.gov

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

**Re: Definition of the Term “Fiduciary” (RIN 1210-AB32);
Best Interest Contract Exemption (ZRIN 1210-ZA25)**

To Whom It May Concern:

As representatives of small businesses that sponsor retirement plans or offer retirement products, we appreciate the opportunity to comment on the regulatory proposal issued by the U.S. Department of Labor’s (“DOL”) on April 20, 2015 expanding the definition of fiduciary investment advice. While we understand the intent behind the proposed regulation (the “Proposal”) redefining the term “fiduciary” with respect to the provision of investment advice, we are very concerned about the negative practical impact the Proposal will have on small business retirement savings.

INTRODUCTION

Small businesses make up 99% of all U.S. employers, and account for 63% of new private sector jobs, as well as almost half of all private sector employment and output.¹ Like their large employer counterparts, small business entrepreneurs and the millions of workers they employ need retirement savings opportunities. Over half of small businesses with less than 100 employees offer retirement plans.² In addition to

¹ See U.S. Small Business Administration – Office of Advocacy, Frequently Asked Questions, March 2014, available at https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf.

² Bureau of Labor Statistics, Retirement benefits: Access, participation, and take-up rates -Table 2. Retirement benefits: Access, participation, and take-up rates,1 civilian workers,2 National Compensation Survey, March 2014, <http://www.bls.gov/ncs/ebs/benefits/2014/ownership/civilian/table02a.htm>.

traditional pension plans and 401(k) plans, small employers also use simplified investment vehicles such as Simplified Employee Pension (“SEP”) IRAs and Savings Incentive Match Plan for Employees (“SIMPLE”) IRAs. SEP IRAs and SIMPLE IRAs are easy and inexpensive to set up, and do not impose ongoing administrative or reporting requirements on employers, allowing their focus to remain on growing their businesses. However, there are many small businesses that may not be able to offer retirement plans due to a lack of resources. Our primary concern with the Proposal is that the negative consequences of the rule would discourage retirement savings in small businesses rather than providing incentives and resources that are very much needed.

COMMENTS

As with large plans, there are a number of areas in the proposal that impact small business retirement plans either directly or indirectly. In particular, there are two major areas where the Proposal is particularly detrimental to small business retirement plans – the exclusion of small businesses from the Seller’s Carve-out and the BIC Exemption. Moreover, the Education Carve-Out, which replaces IB 96-1, makes it difficult for plan participants and investors to receive necessary assistance in choosing the right investments for their retirement savings. These issues are described in detail below.

The Seller’s Carve-Out Should Include Small Plans, Participants and IRAs. Under the proposal, there is a carve-out for advisors that are selling or marketing materials (“Seller’s Carve-Out”). However, this carve-out does not apply to advisors of small business. The DOL seems to believe that small businesses are not as sophisticated as large businesses and, therefore, need additional protections. The validity of this rationale is based on faulty assumptions, and does not justify discriminatory treatment. There is simply no basis to assume that a fiduciary to a plan with 150 participants is financially sophisticated simply because the plan is a “large” plan. The plan fiduciary may well be a person or a committee of persons who run the company, and who are very experienced in running their businesses, but may not have a background in investment finance. By contrast, a small business with 50 participants might itself be a financial advisor. Size is unrelated to the financial knowledge of a plan fiduciary, especially at a threshold of 100 participants. There is no rational basis for eliminating choice for all participants and IRA owners while retaining it for large plans.

Moreover, there is no evidence presented that a high level of financial sophistication is needed to understand that a discussion is a sales discussion if it

follows a basic disclosure that an advisor is selling a proprietary financial product, that the advisor is paid to sell the product, and the advisor is not providing fiduciary advice. This disclosure, similar to that the Department requires in the large plan carve out, is readily understandable to any recipient. The assumption that small plans, participants and IRA owners cannot understand the difference between sales and advice does not match the real world experience of our members and their employees. The Department can protect participants, IRA owners and small plans with the same kind of disclosures that it requires of large plans under the large plan carve out, but without eliminating their right to choose the services and products that best fit their needs.

The BIC Exemption will Increase the Cost of Providing Services to Small Businesses, if not Eliminating Access Completely. Because advisors to small businesses are not carved out of the fiduciary definition, they must change their fee arrangements, or qualify for a special rule called an “exemption” in order to provide services on the same terms as before. However, the new exemption proposed by DOL may not apply to small business plans. It does apply to individual owners of IRAs, but it is not clear whether this exemption is available for retirement plans – including SEP and SIMPLE IRAs - that are being offered by an employer. Further, even if it does apply, the new exemption – called the Best Interest Contract (“BIC”) Exemption – would itself substantially increase costs for advisors due to its many conditions and requirements.

The reason the DOL regulatory package causes such significant change is that a fiduciary investment advisor under ERISA generally has engaged in a prohibited transaction if the advisor recommends investments that either pay the advisor a different amount than other investments, or that are offered by affiliates (for example, the advisor is connected with the insurance company that offers the investment). There are certain exceptions to these rules, called “prohibited transaction exemptions”, but as DOL has proposed the new rules, the exemptions generally won’t help financial advisors who are working with small businesses to set up plans. Therefore, it may be illegal for those advisors to get commissions or to recommend certain investments.

This problem is highlighted in services for SEP and SIMPLE IRAs. One way advisors might try to comply is by charging a flat fee for their SEP or SIMPLE IRA services. However, many IRA vendors prefer not to charge a direct fee to account holders, and many account holders prefer not to pay flat fees, especially in small accounts where a flat fee may be a significant portion of the assets. Logically, a vendor must generate a certain amount of revenue from servicing a SEP IRA or SIMPLE IRA account to generate some profit from it, or it will not provide the service. If

advisors and vendors change to a flat fee model, they may actually charge more than before, to account for the risk and expense associated with changing their method of doing business. This potential loss of low-cost investment assistance was one of the reasons why the DOL's previous proposal to redefine fiduciary investment advice several years ago—a proposal that was ultimately withdrawn—raised objections from many within Congress.³ It is important to note, however, that some advisors may already be compensated in a manner consistent with the proposed DOL requirements, though this is less common in IRAs and small 401(k) plans.

The Education Carve-Out Unnecessarily Restricts Investment Assistance and Harms Small Business Retirement Plan Participants. While the Proposal expressly permits education to be provided to plans, participants, and IRAs, the redefinition of asset allocation models that reference the plan's investment options as fiduciary advice will significantly disrupt plan sponsor efforts to educate their plan participants and retirees about investment options. Many small businesses rely on trusted third parties to provide investment education to their employees. These efforts include providing asset allocation models that provide a recommendation on investments in various asset classes based on a plan participant's age, expected retirement and risk tolerance. However, under the Proposal, any party who provides specific investment options for each asset class would be deemed an ERISA fiduciary. This significant modification from current rules, which allow for such information on a non-fiduciary basis, would harm investors, and particularly small business plan participants that likely have access to fewer resources. By disallowing any party to make the link between asset classes and specific investment options, the Department of Labor is forcing plan participants into the tenuous position of figuring out how to invest their own retirement savings, which increases the risk of them making poor choices.

CONCLUSION

For the reasons stated above, we are very concerned that the Proposal will not achieve the Department's goals of better protecting workers and retirees, but will instead

³ See, e.g., Letter from members of the Congressional Black Caucus serving on the House Financial Services Committee to then-Acting Labor Secretary Seth Harris dated March 15, 2013, warning that the "if the re-proposal reflects the Department's initial fiduciary proposal it could disparately impact retirement savers and investment representatives in the African American community...We are particularly concerned about the effects these regulations will have on savers in [IRAs]. If brokers who serve these accounts are subject to ERISA's strict prohibitions on third-party compensation, they may choose to exit the market...[i]f that occurs, it could cause IRA services to be unattainable by many retirement savers in the African American community."

make it harder for small business employers and employees to access financial advice and increase retirement savings. We urge the DOL to make changes in the final rule that would undo the negative consequences mentioned above. Thank you for the opportunity to comment on this very significant rulemaking.

Sincerely,

Financial Services Institute

National Association of Insurance and Financial Advisors

Small Business & Entrepreneurship Council

Small Business Council of America

U.S. Chamber of Commerce