ERIC

The ERISA Industry Committee

Driven By and For Large Employers

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August 16, 2017

Submitted via the Federal eRulemaking Portal and
via Email (EBSA.FiduciaryRuleExamination@dol.gov)

Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington DC 20210

RE: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210-AB82, Docket ID Number: EBSA-2017-0004)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request by the Department of Labor ("DOL") for information regarding the Fiduciary Rule (the "Rule") and related prohibited transaction exemptions, published in the Federal Register on July 6, 2017. We write to call attention to the substantial uncertainty that the Rule has created for fiduciaries of employer-sponsored retirement plans[1] with respect to their responsibility to monitor their service providers' compliance with the Rule. If not addressed, this uncertainty may put employer-sponsored retirement plan fiduciaries in the untenable — and we believe unintended — position of having a duty to monitor their service provider's compliance with the Rule without clear guidance as to the steps they need to take to satisfy this new obligation. We respectfully request that the DOL address this uncertainty by clarifying the reasonable steps plan sponsors and fiduciaries can take to meet these fiduciary monitoring obligations.

[1] When we refer to "fiduciaries" of employer-sponsored retirement plans in this letter, we are referring to the plans' named fiduciaries and the plan sponsor's other employees who generally are responsible for administering the benefits and managing the assets under these plans. We are not referring to the third-party service providers who are generally retained to provide services to the plans such as recordkeeping and staffing call centers.

ERIC's Interest in Reducing Burdens the Rule Places on Plan Sponsors & Fiduciaries

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families.

ERIC has a strong interest in removing unnecessary regulatory hurdles so that the resources that employers set aside to provide retirement benefits to their employees can be used as efficiently and effectively as possible. Unfortunately, uncertainty as to plan fiduciaries' obligations to monitor service providers' adherence to the Rule has caused some plan fiduciaries to consider directing substantial resources toward compliance costs rather than toward providing benefits — an outcome that we strongly suspect is not consistent with the DOL's intention in implementing the Rule. Clear guidance on how plan fiduciaries can satisfy this duty to monitor will allow them to channel the appropriate resources needed, and not more, toward this monitoring obligation.

Uncertainty for Employer Plan Fiduciaries as a Result of the Rule

ERIC appreciates the DOL's prior efforts to minimize the Rule's regulatory burdens on employers who sponsor retirement plans and their fiduciaries. Among other things, ERIC appreciates changes reflected in the final Rule to make it easier for employer-sponsored plan participants to receive meaningful investment education and DOL statements that absent extraordinary circumstances, neither plan sponsors nor their employees will be investment advice fiduciaries under the Rule.

Nevertheless, a substantial burden on plan fiduciaries, in the form of uncertain monitoring obligations, remains in place. In its preamble to the final Rule, the DOL states that it does not believe that the Rule will significantly expand plan fiduciaries' preexisting fiduciary monitoring obligations. Unfortunately, this statement does not accurately reflect employers' experience with the Rule since it has been enacted.

In one of the most significant departures from previous DOL guidance, recommendations on distributions, including rollovers from a plan into an IRA or transfers to another plan, can constitute fiduciary investment advice under the Rule. This means that a broad array of communications between plan participants and service provider employees that were not subject to the fiduciary standard under prior guidance may now constitute fiduciary advice. As a result, plan fiduciaries face new monitoring obligations and the attendant risk of being subjected to co-fiduciary liability with respect to their service providers' recommendations.

Compounding these challenges, employer plan fiduciaries must navigate these new monitoring obligations without the benefit of DOL guidance.[2] In the absence of such guidance to date, plan

[2] The August 2017 DOL FAQ on ERISA § 408(b)(2) disclosures presents an additional monitoring challenge for employer plan fiduciaries. This FAQ exempts certain service providers from the 408(b)(2) requirement that they expressly disclose their fiduciary status during a transition period that may last until July 1, 2019 — thus, shifting the burden to plan fiduciaries to determine if their service providers are providing fiduciary investment advice under the Rule. While most service

fiduciaries may reasonably feel compelled to take unwarranted and costly measures to oversee service provider rollover recommendations. For example, plan fiduciaries would have to resort to extraordinary measures to review the communications that constitute rollover recommendations. Such recommendations commonly take place in the context of multiple one-on-one meetings and/or phone calls between participants and service provider employees — and not the employees of the plan sponsor. Accordingly, plan fiduciaries have no readily available means for reviewing the contents of such conversations — and if compelled to conduct such a review, would be limited to taking the unrealistic steps of reviewing recordings or transcripts of such conversations (assuming it even is possible to obtain such recordings or transcripts).[3]

Similarly, employer plan fiduciaries may feel the need to use their limited resources to review documentation concerning service provider rollover recommendations to fulfill their monitoring obligations. The Rule and subsequent DOL guidance provide detailed documentation requirements that must be maintained by service providers to demonstrate why each rollover recommendation is in the best interest of the retirement investor. While employer plan fiduciaries' review of such rollover recommendation documentation will undoubtedly impose undue burdens on these fiduciaries, it is highly speculative, at best, as to how such review would further the goal of protecting plan participants. As noted above, rollover recommendations are often the product of detailed and extensive communications that take into account individuals' particular goals and circumstances. It is the service provider whose employees make the fiduciary recommendation to distribute plan assets (and not the plan's administrative fiduciaries) that is in the best position to certify that the recommendation is in the participant's best interest.

Clarification To Address Reasonable Steps to Fulfill Monitoring Obligations

The DOL should address the uncertainty and costs imposed on employer plan fiduciaries by clarifying what constitutes prudent measures for these plan fiduciaries to monitor their service providers' compliance with the Rule. Specifically, the DOL should make clear that one way in which employer plan fiduciaries' monitoring obligations can be satisfied with respect to any type of investment advice under the Rule is for their service providers to provide an annual certification that:

- The service provider has not provided any fiduciary investment advice to plan participants in the past year; or

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providers would have a contractual obligation (outside of their obligations under ERISA § 408(b)(2)) to plan fiduciaries to disclose their fiduciary status under the Rule, this FAQ highlights the difficulty plan fiduciaries face in assessing whether their service providers' communications might fall within the new definition of fiduciary investment advice.

[3] Although the above example is focused on rollover recommendations, plan fiduciaries face the same difficulty reviewing any other one-on-one communication between a service provider employee and a plan participant, in which it is theoretically possible for the service provider employee to provide fiduciary investment advice.

- The service provider has provided fiduciary investment advice in the past year and that such advice satisfies all relevant fiduciary obligations, including their obligation to provide investment advice that is in the best interest of participants. [4] If the service provider cannot certify that its investment advice satisfies the relevant fiduciary standards, the provider would need to submit a detailed explanation, including a description of corrective measures.

In addition, the certification would address whether the service provider intends to provide fiduciary investment advice in the coming year.

Plan sponsors and fiduciaries can solicit participant feedback in summary plan descriptions or other participant communications to monitor these certifications:

- If the service provider certifies that it does not intend to provide fiduciary investment recommendations in the coming year, participant communications can detail what constitutes a fiduciary investment recommendation under the Rule and ask that participants inform the plan fiduciary if the service provider attempts to make a fiduciary investment recommendation.

- If the service provider certifies that it intends to provide fiduciary investment advice in the coming year, participant communications can detail the fiduciary obligations arising from this advice, including the factors that should be considered in determining whether a recommendation to rollover assets from the employer's plan is in the participant's best interest. Participants can be asked to inform the plan fiduciary if they feel that service provider communications fail to meet these fiduciary obligations.

ERIC would be happy to work with the DOL to create model language to effectuate such disclosures.

In this manner, the clarification outlined in this section would significantly reduce uncertainty and unnecessary burdens imposed on plan sponsors and fiduciaries, while at the same time ensuring that participants receive investment advice that is in their best interests.

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[4]In the ordinary course, one would expect that a service provider to a plan would not provide fiduciary investment advice of any kind to plan participants without specific written authorization from the plan's fiduciaries, to the extent that the service provider is communicating with participants through official plan communication channels or based on information about participants the service provider has obtained in its capacity as service provider to the plan.

ERIC stands ready to work with the DOL to address the regulatory burden and uncertainty imposed on plan sponsors and fiduciaries as a result of the Rule. If you have any questions concerning our comments, or if ERIC can be of further assistance, please do not hesitate to contact Will Hansen at whansen@eric.org or (202) 627-1930.

Sincerely,

Will Hansen
Senior Vice President, Retirement Policy