

DEPARTMENT OF LABOR

Employee Benefits Security Administration

RIN 1210-AB82

Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Request for Information.

SUMMARY: The Employee Benefits Security Administration of the U.S. Department of Labor (the Department) is publishing this Request for Information in connection with its examination of the final rule defining who is a “fiduciary” of an employee benefit plan for purposes of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code, as a result of giving investment advice for a fee or other compensation with respect to assets of a plan or IRA (Fiduciary Rule or Rule). The examination also includes the new and amended administrative class exemptions from the prohibited transaction provisions of ERISA and the Code that were published in conjunction with the Rule (collectively, the Prohibited Transaction Exemptions or PTEs). This Request for Information specifically seeks public input that could form the basis of new exemptions or changes/revisions to the rule and PTEs, and input regarding the advisability of extending the January 1, 2018, applicability date of certain provisions in the Best Interest Contract 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.

DATES: Comments in response to question 1 (relating to extending the January 1, 2018, applicability date of certain provisions) should be submitted to the Department on or before [INSERT DATE THAT IS 15 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL

REGISTER]. Comments in response to all other questions should be submitted to the Department on or before [INSERT DATE THAT IS 30 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Department requests that comments be received within these timeframes to ensure their consideration.

ADDRESSES: All written comments should be sent to the Office of Exemption Determinations by any of the following methods, identified by RIN 1210-AB82:

- Federal eRulemaking Portal: <http://www.regulations.gov> at Docket ID number: EBSA-2017-0004. Follow the instructions for submitting comments.
- Email to: EBSA.FiduciaryRuleExamination@dol.gov.
- Mail: Office of Exemption Determinations, EBSA, (Attention: D-11933), U.S. Department of Labor, 200 Constitution Avenue, NW, Suite 400, Washington DC 20210.
- Hand Delivery/Courier: OED, EBSA (Attention: D-11933), US Department of Labor, 122 C St., NW, Suite 400, Washington, DC 20001.

Comments will be available for public inspection in the Public Disclosure Room, EBSA, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW, Washington, DC 20210.

Comments will also be available online at www.regulations.gov, at Docket ID number: EBSA-2017-0004 and www.dol.gov/ebsa, at no charge. Do not include personally identifiable information or confidential business information that you do not want publicly disclosed.

Comments online can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, telephone (202) 693-8824, Office of Exemption Determinations, Employee Benefits Security Administration.

SUPPLEMENTARY INFORMATION:

On April 8, 2016, the Department published the Fiduciary Rule, which defines who is a

“fiduciary” of an employee benefit plan under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), as a result of giving investment advice to a plan or its participants or beneficiaries. The Fiduciary Rule also applies to the definition of a “fiduciary” of a plan (including an individual retirement account (IRA)) under section 4975(e)(3)(B) of the Internal Revenue Code of 1986 (Code).

On the same date, the Department published two new administrative class exemptions from the prohibited transaction provisions of ERISA (29 U.S.C. 1106) and the Code (26 U.S.C. 4975(c)(1)): the Best Interest Contract Exemption (BIC Exemption) and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption), as well as amendments to previously granted exemptions. Among other conditions, the PTEs are generally conditioned on adherence to certain Impartial Conduct Standards: providing advice in retirement investors’ best interest; charging no more than reasonable compensation; and avoiding misleading statements (Impartial Conduct Standards).

The Fiduciary Rule and PTEs had an original applicability date of April 10, 2017. By Memorandum dated February 3, 2017, the President directed the Department to prepare an updated analysis of the likely impact of the Fiduciary Rule on access to retirement information and financial advice. The President’s Memorandum was published in the Federal Register on February 7, 2017. 82 FR 9675 (Feb. 7, 2017).

On March 2, 2017, the Department published a notice proposing a 60-day delay of the applicability date of the Rule and PTEs. It also sought public comments on the questions raised

in the Presidential Memorandum, and generally on questions of law and policy concerning the Fiduciary Rule and PTEs.¹

On April 7, 2017, the Department promulgated a final rule extending the applicability date of the Fiduciary Rule by 60 days from April 10, 2017, to June 9, 2017.² It also extended from April 10 to June 9, the applicability dates of the BIC Exemption and Principal Transactions Exemption, and required investment advice fiduciaries relying on these exemptions to adhere only to the Impartial Conduct Standards as conditions of those exemptions during a transition period from June 9, 2017, through January 1, 2018.³ In this manner, the Department established a phased implementation period from June 9, 2017, until January 1, 2018, during which time the Fiduciary Rule will be applicable, and these new exemptions will be available subject to the Impartial Conduct Standards only. The final rule further delayed the applicability of amendments to an existing exemption, Prohibited Transaction Exemption 84-24, until January 1, 2018, other than the Impartial Conduct Standards, which will become applicable on June 9, 2017. Finally, the final rule extended for 60 days, until June 9, 2017, the applicability dates of amendments to other previously granted exemptions.⁴

On May 22, 2017, the Department issued a temporary enforcement policy covering the transition period between June 9, 2017, and January 1, 2018, during which the Department will not pursue claims against investment advice fiduciaries who are working diligently and in good faith to comply with their fiduciary duties and to meet the conditions of the PTEs, or otherwise treat those investment advice fiduciaries as being in violation of their fiduciary duties and not

¹ 82 Fed. Reg. 12319.

² 82 Fed. Reg. 16902.

³ *Id.*

⁴ *Id.*

compliant with the PTEs.⁵ The Treasury Department and IRS confirmed a similar enforcement policy covering excise taxes and related reporting obligations with respect to transactions covered by the Department's enforcement policy.⁶ The Department also published on May 22 a set of FAQs to provide additional information on the transition period from June 9, 2017, to January 1, 2018.⁷ The Department noted in both the temporary enforcement policy and FAQs that it intended to issue a Request for Information (RFI) for additional public input on specific ideas for possible new exemptions or regulatory changes based on recent public comments and market developments.

REQUEST FOR INFORMATION

The Department is in the process of reviewing and analyzing comments received in response to its March 2, 2017, request for comments on issues raised in the Presidential Memorandum. While the Department conducts its ongoing review, it is also interested in receiving additional input from the public about possible additional exemption approaches or changes to the Fiduciary Rule, as well as regarding the advisability of extending the January 1, 2018, applicability date of certain provisions in the Best Interest Contract 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.

Public input on the Fiduciary Duty Rule and PTEs has suggested that it may be possible in some instances to build upon recent innovations in the financial services industry to create new and more streamlined exemptions and compliance mechanisms. For example, one recent

⁵ Available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02>.

⁶ *Id.*

⁷ Available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period.pdf>.

innovation is the possible development of mutual fund “clean shares.”⁸ Many firms appear to be considering the use of such “clean shares” as a long-term solution to the problem of mitigating conflicts of interest with respect to mutual funds. Commenters noted, however, that funds will need more time to develop clean shares than contemplated by the current January 1, 2018, deadlines.

Commenters also described innovations in other parts of the retirement investment industry, such as insurance companies’ potential development of fee-based annuities in response to the Fiduciary Rule. Firms are also developing new technology, and advisory and data services to help Financial Institutions satisfy the supervisory requirements of the PTEs. The Department welcomes information on these developments and their relevance to the rule, the PTEs’ terms and compliance timelines.

The Department is particularly interested in public input on whether it would be appropriate to adopt an additional more streamlined exemption or other rule change for advisers committed to taking new approaches like those outlined above based on the potential for reducing conflicts of interest and increasing transparency. If commenters believe more time would be necessary to build the necessary distribution and compliance structures for such innovations, the Department is interested in information related to the amount of time expected to be required.

And, the Department seeks comment generally on a delay in the January 1, 2018, applicability date of the provisions in the BIC Exemption, Principal Transactions Exemption and

⁸ As described in a 2017 SEC staff interpretive letter, clean shares are a class of shares of a mutual fund without any front-end load, deferred sales charge, or other asset-based fee for sales or distributions. See Capital Group, SEC Staff Letter (Jan. 11, 2017), www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm.

amendments to PTE 84-24 while it evaluates the rule generally and the responses to issues identified in this Request for Information.

Potential Delay of January 1, 2018 Applicability Date

1. Would a delay in the January 1, 2018, applicability date of the provisions in the BIC Exemption, Principal Transactions Exemption and amendments to PTE 84-24 reduce burdens on financial services providers and benefit retirement investors by allowing for more efficient implementation responsive to recent market developments? Would such a delay carry any risk? Would a delay otherwise be advantageous to advisers or investors? What costs and benefits would be associated with such a delay?

General Questions

2. What has the regulated community done to comply with the Rule and PTEs to date, particularly including the period since the June 9, 2017, applicability date? Are there market innovations that the Department should be aware of beyond those discussed herein that should be considered in making changes to the Rule?

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?

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?

Contract Requirement in BIC and Principal Transaction Exemptions

The contract requirement in the BIC Exemption and Principal Transactions Exemption and resulting exposure to litigation creates an added motivation for Financial Institutions and Advisers to oversee and adhere to basic fiduciary standards, and provides that IRA owners have an additional means to enforce those protections. Throughout the fiduciary rulemaking, however, commenters have been divided on the contract requirement, with many expressing concern about potential negative implications for investor costs and access to advice. As noted above, the Department is interested in the possibility of regulatory changes that could alter or eliminate contractual and warranty requirements.

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?

6. What is the likely impact on Advisers' and firms' compliance incentives if the Department eliminated or substantially altered the warranty requirements? What should be changed? Does compliance with the Impartial Conduct Standards need to be otherwise incentivized in the absence of the warranty requirement and, if so, how?

Alternative Streamlined Exemption

As noted above, the Department is also interested in receiving additional input from the public on possible additional and more streamlined exemption approaches that would better

address marketplace innovations that may mitigate or even eliminate some kinds of potential advisory conflicts otherwise associated with recommendations of affected financial products innovations.

7. Would mutual fund clean shares allow distributing Financial Institutions to develop policies and procedures that avoid compensation incentives to recommend one mutual fund over another? If not, why? What legal or practical impediments do Financial Institutions face in adding clean shares to their product offerings? How long is it anticipated to take for mutual fund providers to develop clean shares and for distributing Financial Institutions to offer them, including the time required to develop policies and procedures that take clean shares into account? What are the costs associated with developing and distributing clean shares? Have Financial Institutions encountered any operational difficulties with respect to the distribution of clean shares to the extent they are available? Do commenters anticipate that some mutual fund providers will proceed with T-share offerings instead of, or in addition to, clean shares? If so, why?

8. How would advisers be compensated for selling fee-based annuities? Would all of the compensation come directly from the customer or would there also be payments from the insurance company? What regulatory filings are necessary for such annuities? Would payments vary depending on the characteristics of the annuity? How long is it anticipated to take for an insurance company to develop and offer a fee-based annuity? How would payments be structured? Would fee-based annuities differ from commission-based annuities in any way other than the compensation structure? How would the fees charged on these products compare to the fees charged on existing annuity products? Are there any other recent developments in the

design, marketing, or distribution of annuities that could facilitate compliance with the Impartial Conduct Standards?

9. Clean shares, T-shares, and fee-based annuities are all examples of market innovations that may mitigate or even eliminate some kinds of potential advisory conflicts otherwise associated with recommendations of affected financial products. These innovations might also increase transparency of advisory and other fees to retirement investors. Are there other innovations that hold similar potential to mitigate conflicts and increase transparency for consumers? Do these or other innovations create an opportunity for a more streamlined exemption? To what extent would the innovations address the same conflicts of interest as the Department's original rulemaking?

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?

Incorporation of Securities Regulation of Fiduciary Investment Advice

11. If the Securities and Exchange Commission or other regulators were to adopt updated standards of conduct applicable to the provision of investment advice to retail investors, could a streamlined exemption or other change be developed for advisers that comply with or are subject to those standards? To what extent does the existing regulatory regime for IRAs by the Securities and Exchange Commission, self-regulatory bodies (SROs) or other regulators provide

consumer protections that could be incorporated into the Department's exemptions or that could serve as a basis for additional relief from the prohibited transaction rules?

Principal Transactions

The Principal Transaction Exemption provides relief only for certain investments (certain debt securities, CDs and unit investment trusts) to be sold by Advisers and Financial Institutions to plans and IRAs in principal transactions and riskless principal transactions, while the BIC Exemption provides additional relief for parties to engage in riskless principal transactions without any restrictions on the types of investments involved.

12. Are there ways in which the Principal Transactions Exemption could be revised or expanded to better serve investor interests and provide market flexibility? If so, how?

Disclosure requirements

13. Are there ways to simplify the BIC Exemption disclosures or to focus the investor's attention on a few key issues, subject to more complete disclosure upon request? For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm? The Department would welcome the submission of any model disclosures that could serve this purpose.

Contributions to Plans or IRAs

14. Should recommendations to make or increase contributions to a plan or IRA be expressly excluded from the definition of investment advice? Should there be an amendment to the Rule or streamlined exemption devoted to communications regarding contributions? If so, what conditions should apply to such an amendment or exemption?

Bank Deposits and Similar Investments

Some commenters have raised questions about the compliance burden under the Rule and PTEs on small community banks that currently do not exercise any fiduciary functions for customers when their employees discuss opening IRAs or investing their IRAs in bank deposit products such as CDs. Some have also raised questions about the need for a special rule for cash sweep services. Still others have said that health savings accounts (HSAs) merit a special exclusion or streamlined exemption because they tend to be invested in shorter-term deposit products to pay qualifying health expenses.

15. Should there be an amendment to the Rule or streamlined exemption for particular classes of investment transactions involving bank deposit products and HSAs? If so, what conditions should apply, and should the conditions differ from the BIC Exemption?

Grandfathering

Section VII of the BIC Exemption provides a grandfathering provision to facilitate ongoing advice with respect to investments that predated the Rule, and to enable advisers to continue to receive compensation for those investments. Some commenters thought this provision could be expanded in ways that would minimize potential disruptions associated with the transition to a fiduciary standard and facilitate ongoing advice for the benefit of investors.

16. To what extent are firms and advisers relying on the existing grandfather provision? How has the provision affected the availability of advice to investors? Are there changes to the provision that would enhance its ability to minimize undue disruption and facilitate valuable advice?

PTE 84-24

17. If the Department provided an exemption for insurance intermediaries to serve as Financial Institutions under the BIC Exemption, would this facilitate advice regarding all types

of annuities? Would it facilitate advice to expand the scope of PTE 84-24 to cover all types of annuities after the end of the transition period on January 1, 2018? What are the relative advantages and disadvantages of these two exemption approaches (i.e., expanding the definition of Financial Institution or expanding the types of annuities covered under PTE 84-24)? To what extent would the ongoing availability of PTE 84-24 for specified annuity products, such as fixed indexed annuities, give these products a competitive advantage vis-à-vis other products covered only by the BIC Exemption, such as mutual fund shares?

Communications with Independent Fiduciaries with Financial Expertise

The Fiduciary Rule contains a specific exclusion for communications with independent fiduciaries with financial expertise. Specifically, a party's communications with an independent fiduciary of a plan or IRA in an arm's length transaction are excepted from the Rule if certain disclosure requirements are met and the party reasonably believes that the independent fiduciary of the plan or IRA is a bank, insurance carrier, or registered broker-dealer or investment adviser, or any other independent fiduciary who manages or controls at least \$50 million. Some commenters have requested that the Department expand the scope of the exclusion.

18. To the extent changes would be helpful, what are the changes and what are the issues best addressed by changes to the Rule or by providing additional relief through a prohibited transaction exemption?

Signed at Washington, DC, this _____ day of June, 2017.

Timothy D. Hauser
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Employee Benefits Security Administration
U.S. Department of Labor
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