



July 21, 2015

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210–AB32 – “Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice” and associated proposed exemptions

These comments are submitted for the record to the Employee Benefits Security Administration (EBSA) on behalf of the National Federation of Independent Business (NFIB) in response to the notice of proposed rulemaking for the “Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice” and associated proposed exemptions (proposed rules) published in the April 20, 2015 edition of the *Federal Register*.

NFIB is the nation’s leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

NFIB believes that these proposals are likely to have a substantial impact on small businesses. We are concerned that the changes to the definition of fiduciary could substantially transform the way in which financial service providers deliver services to small businesses and their employees. This could result in providers no longer being able to offer these services to small businesses in an affordable manner. Consequently, it is the employees of these small businesses – the very individuals these rules purport to benefit – that stand to lose access to retirement benefits. In addition, if small businesses cannot offer retirement benefits they will be less competitive with larger businesses, thus hurting innovation and job opportunities for everyone.

Why small businesses need access to affordable retirement plans

NFIB believes that simplification of the regulations and reduction in the costs associated with retirement plans are important to American small business. For small businesses, employee benefit decisions are based on two principles: 1) what can the business afford, and 2) what do the employees want. The point is simple: employee benefits are not free.

If the business can afford the expense of a retirement plan, small business owners have a variety of reasons to offer one. These reasons include: providing their employees with an opportunity to save for retirement, attracting quality employees, instilling worker loyalty and encouragement to stay with the business, rewarding successful employees, and taking advantage of the tax deductions retirement plans offer.

For a small business owner considering whether to offer a retirement plan, the primary threshold that must be crossed is whether or not the business can afford the administrative costs of the plan. And for small businesses, the administrative and start-up costs of a retirement plan are disproportionately higher than they are for larger businesses.

A 2005 study from the U.S. Small Business Administration's Office of Advocacy (Office of Advocacy) found that the administrative cost per participant in retirement plans increased considerably for smaller businesses when compared to their larger counterparts¹. For example, for companies with more than 500 employees that offered defined contribution plans, the administrative cost of offering a retirement plan ranged from approximately \$30 to \$50 per participant. However, for companies with fewer than 50 employees, the administrative costs ranged from \$106 to \$439. As the study notes:

“There appears to be a rough minimum of administrative costs for [retirement] plans. The average total payment of administrative costs is nearly the same for companies with five and fewer employees as it is for companies with 6-10 employees and is only slightly higher for companies with up to 50 employees.”

These higher relative administrative costs are a significant contributing factor in fewer small businesses offering retirement plans. According to the most recent data available from the NFIB Research Foundation, 27 percent of small businesses offer retirement plans². This is consistent with the offer rate identified by the Office of Advocacy³. In contrast, for larger firms, only 26 percent of workers do *not* report having a retirement plan available to them⁴.

For small employers seeking to attract talented employees to work at their companies, this inherent disparity places small business owners at a competitive disadvantage relative to their larger competitors. Historically, Congress sought to address these disparities in part by creating the Simplified Employee Pension Individual Retirement Accounts (SEP IRAs) and Savings Incentive Match Plan for Employees (SIMPLE) IRAs. NFIB supported the creation of these types of retirement plans because they offer a simpler and more affordable alternative to other retirement plans, such as 401(k) plans, which require additional administrative requirements and regulatory complexity.

These plans are popular with small businesses that offer retirement benefits. Subsequent questions from the NFIB Research Foundation survey found that 40 percent of those with plans offered 401(k) plans, while 41 percent offered either a SIMPLE or SEP IRA (30 percent and 11 percent, respectively).

With about as many small businesses offering SIMPLE or SEP IRAs as 401(k) plans, any changes to the regulatory code that make SIMPLE or SEP IRAs more difficult and costly to offer makes it increasingly likely that these small businesses will drop retirement benefits altogether – thus making it more difficult for employees to save for retirement and more difficult for small businesses to attract the skilled, talented employees they need to grow.

Small business owners wear many hats at their business. According to an *NFIB National Small Business Poll on Business Structure*, 87.5 percent of all small employers do not have at least one employee (excluding the owner) whose only job is personnel or human resources⁵, and according to an *NFIB National Small Business Poll on Time Allocation*, 68 percent do not employ a chief financial officer, or the equivalent, someone largely responsible for handling the firm's budget and/or books⁶. A small business owner's time is his or her most valuable resource, and every additional hour that a

small business owner has to spend complying with new benefit regulations is one hour less that they have to spend on growing their business.

NFIB believes the proposed rules will add cost and burden to these plans, for the reasons set forth below.

Proposed rules will limit the ability of small businesses to offer retirement plans

The EBSA's goal with the proposed rules is laudable. The agency seeks to reduce conflicts of interest for financial service providers that lead them to offer products with higher fees that may not be the best fit for the client. As part of this effort, the proposed rules include a revised definition of "fiduciary" status, which triggers certain prohibited transactions. In addition, the proposed rules expand fiduciary status regarding numerous products beyond traditional 401(k) plans. According to the *Federal Register* notice, "[i]f adopted, the proposal would treat persons who provide investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA and the Code in a wider array of advice relationships than the existing ERISA and Code regulations, which would be replaced."

While 401(k) plans are the most popular among small businesses that offer retirement plans, many more find them too expensive and burdensome to offer. Therefore, SIMPLE and SEP IRAs present a more affordable and easier alternative. It is critical that EBSA preserves the viability of these lower cost options. However, this expansive proposal will likely lead to SIMPLE and SEP IRAs being more costly to offer, either in terms of the owner spending more money on setting up the benefit, or in the amount of time a small business owner will spend on setting up the benefit. It is likely that a small business chose to offer a retirement plan because of the lower effort levels required to provide SIMPLE and SEP IRAs. Making these plans more costly to offer will lead to small businesses dropping plans altogether, rather than continuing to use IRAs or converting to 401(k) plans.

Additionally, the proposed rules would make these IRAs more costly for financial professionals to provide for small businesses and increases the likelihood that these providers avoid the small business market. The proposed rules would effectively prohibit providers from offering products to small businesses on which they earn variable compensation or sell products with which they have an affiliation, which is common in the SIMPLE and SEP IRA markets. In addition, even offering a small business a general list of investment products available would be considered by EBSA to be beyond basic information and instead treated as a sales pitch, which would be considered a prohibited activity.

Financial service providers may get around some of these prohibitions with the proposed "best interest contract exemption." However, there are two problems with this proposal. First, it is not clear if this exemption actually applies to SIMPLE and SEP IRAs, or if they only apply to individual IRAs. Second, the requirements of the exemption still impose considerable costs on the broker, which acts as a disincentive for brokers to offer services to small businesses. Accordingly, we have heard from large and small providers alike, including NFIB members, that the exemption is generally unworkable.

This situation is made worse by the "carve out" available to those selling plans to businesses with 100 or more participants. Providers are not prohibited from offering products to these larger plans. The reason is because EBSA believes that larger plans have more sophisticated benefits personnel and can therefore distinguish between general information and a sales pitch. Because smaller plans

cannot make that distinction – in EBSA’s opinion – small businesses cannot benefit from the exemption. This makes it all the more likely providers will not bother to offer services to small businesses.

In addition to the challenges the proposed rules present to SIMPLE and SEP IRAs, 401(k) plans will also be affected because of the expansion of activities that will now be considered fiduciary in nature, and accordingly, prohibited if fees are paid to providers based on which products are purchased. In the preponderance of cases, the amount of money made by the provider varies depending on what options a small business owner chooses.

Under the proposed rules, if a provider were contacted by a small business owner about potentially setting up a 401(k) or IRA plan for employees, that provider would not even be able to identify a list of a dozen or so investment options that are typical for the industry that small business is in. This is because the proposed rules treat this activity as actual investment advice rather than education.

The circumstance presented above leaves the small business owner in an unpleasant situation. He or she must choose one of two bad options. The first is that the owner would have to select the investment options him or herself. Not only is the owner likely not expert enough to do this well, but by doing so he or she takes on additional liability. ERISA holds fiduciaries to an expert standard, and if he or she is not an expert, then he or she must seek help from one. This leads to the second poor option, which is to search for and retain a qualified independent third party expert to do the selection for a fee.

Neither of these options would be viable for many small businesses. Therefore, the proposed rules would make it exceedingly likely that numerous small companies would forego offering a retirement plan altogether, rather than subject their business to the expensive, complicated, and stressful elements of offering a retirement plan.

The EBSA should not be taking action that reduces the number of small businesses that will be able to offer retirement benefits. According to the Office of Advocacy, small businesses employ about half of all of U.S. private sector employees⁷. Restricting the ability of these employers to offer a plan to employees would mean large numbers of employees would no longer have access to a retirement plan at work.

Proposed rules are an example of the need for small business regulatory reform

NFIB believes that these proposed rules demonstrate the need to reform the Regulatory Flexibility Act and its amending laws. Currently, agencies are required to perform an initial regulatory flexibility analysis prior to proposing a rule that will have a significant economic impact on a substantial number of small entities. While these analyses are helpful for agencies to realize the cost and impact a proposed rule will have on small business, agencies would get additional benefit from convening a Small Business Advocacy Review panel for rules of significant impact. These panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. NFIB believes all agencies – in particular the entire Department of Labor – would achieve better regulatory outcomes if required to go through such a procedure.

In this case, EBSA would have benefitted from asking small businesses that offer, or would like to offer, retirement plans how these proposed rules would impact their ability to do so. Perhaps if this was the case, the agency would have crafted proposed rules that better achieve the agency's goal of protecting investors – rather than create regulatory hurdles that will likely reduce the number of small business employees that have access to a retirement plan.

Conclusion

NFIB believes that these proposals are likely to have a substantial impact on small businesses. We are concerned that the changes to the definition of fiduciary could substantially transform the way in which financial service providers deliver services to small businesses and their employees. The result is likely to be that these advisors and providers are no longer able to offer these services to small businesses in an affordable manner. Consequently, it is the employees of these small businesses – the very individuals these rules purport to benefit – that stand to lose access to retirement benefits. In addition, if small businesses cannot offer retirement benefits they will be less competitive with larger businesses, thus hurting innovation and job opportunities for everyone.

NFIB appreciates the opportunity to comment on the proposed rules. Should EBSA require additional information, please contact NFIB's senior manager of regulatory policy, Dan Bosch, at 202-314-2052; or senior manager of legislative affairs, Matt Turkstra, at 202-314-2034.

Sincerely,



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NFIB

¹ Joel Popkin and Company. *Cost of Employee Benefits in Small and Large Businesses*. 2005. SBA Office of Advocacy.

² Dennis, William J., Jr. *NFIB National Small Business Poll: Payroll*. 2006. NFIB Research Foundation.

³ Kobe, Kathryn. *Small Business Retirement Plan Availability and Worker Participation*. 2009. SBA Office of Advocacy.

⁴ *Ibid.*

⁵ Dennis, William J., Jr. *NFIB National Small Business Poll: Business Structure*. 2004. NFIB Research Foundation.

⁶ Dennis, William J., Jr. *NFIB National Small Business Poll: Time Allocation*. 2012. NFIB Research Foundation.

⁷ <https://www.sba.gov/sites/default/files/sbfaq.pdf>