



AMERICAN RETIREMENT ASSOCIATION

| Working for America's Retirement

August 7, 2018

The Hon. Preston Rutledge
Assistant Secretary for Employee Benefits
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Ste S-2524
Washington DC 20210

Re: Requested Clarification to Field Assistance Bulletin 2018-02 Regarding Participant Rollover Recommendations by Fiduciary Investment Advisers to Plans

Assistant Secretary Rutledge:

The American Retirement Association (“ARA”) is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America’s private retirement system, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”), the ASPPA College of Pension Actuaries (“ACOPA”), and the Plan Sponsor Council of America (“PSCA”). ARA’s members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has more than 20,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA’s members are diverse but united in their common dedication to the success of America’s private retirement system.

We very much appreciated the Department’s issuance of Field Assistance Bulletin 2018-02 (the “FAB”) on May 7, 2018. The enforcement policy it adopts is necessary to assist plan sponsors, plan participants and plan service providers in responding to the changing regulatory environment resulting from the 5th Circuit Court of Appeals ruling vacating the 2016 fiduciary regulation.¹ The Department’s timely action in this regard has reduced potential problems

¹ *Chamber of Commerce of the U.S.A., et al. v. U.S. Dep’t of Labor, et al.*, No. 17-10238, slip op. 46 (5th Cir. Mar. 15, 2018).

resulting from good faith compliance with the 2016 rule and the regulatory uncertainties resulting from the return to the 1975 fiduciary regulation.

We are writing to request clarification of the application of the FAB with respect to one of these regulatory uncertainties—rollover advice to plan participants in plans to which the adviser is currently a fiduciary investment adviser. This uncertainty results from the reversion to the 1975 regulation and pre-2016 DOL Advisory Opinions that may be applicable. Clarification will be in the best interest of plan participants who may otherwise not have full access to professional fiduciary retirement advisers, but who likely will be actively solicited by non-fiduciary salespersons.

- **The Intersection of FAB 2018-02 and AO 2005-23A**

ARA and NAPA represent thousands of dedicated fiduciary plan advisers. These advisers specialize in providing fiduciary advice and participant education to retirement plans, building long-term relationships with their plan clients. In the course of these relationships, participants nearing retirement often seek personal advice regarding retirement planning from these advisers, including whether to “roll over” assets from their 401(k) or similar retirement plans into IRAs.

Under the 2016 regulation, it was clear that essentially all recommendations to distribute or transfer assets from an ERISA plan were fiduciary advice, and that compliance with the conditions of the Best Interest Contract Exemption (“BIC Exemption”) would exempt any prohibited transactions that might be related to such a recommendation. As the 1975 regulation again applies, it appears that many rollover recommendations may no longer be fiduciary recommendations (for example, because such recommendations may be “one-time” advice that are not “regularly” provided for purposes of the 1975 regulation).

The Department previously issued guidance in Advisory Opinion 2005-23A (“AO 2005-23A”) indicating that most rollover recommendations are not fiduciary advice under the 1975 regulation, writing “It is the view of the Department that merely advising a plan participant to take an otherwise permissible plan distribution, even when that advice is combined with a recommendation as to how the distribution should be invested, does not constitute ‘investment advice’ within the meaning of the regulation (29 CFR § 2510-3.21(c)).”

The AO went on to note, however, that when:

“...someone *who is already a plan fiduciary* responds to participant questions concerning the advisability of taking a distribution or the investment of amounts withdrawn from the plan, that fiduciary is exercising discretionary authority respecting management of the plan and must act prudently and solely in the interest of the participant. Moreover, if, for example, a fiduciary *exercises control* over plan assets to cause the participant to take a distribution and then to invest the proceeds in an IRA account managed by the fiduciary, the fiduciary *may be* using plan assets in his or her own interest, in violation of ERISA section 406(b)(1). [emphasis added]”

If this AO guidance is applicable, it suggests that fiduciary investment advisers to plans—advisers that already act in the best interest of participants, and that have long-term relationships with their plan clients—are ERISA fiduciaries when providing rollover recommendations to participants in those plans but are in a legal “grey area” in which a prohibited transaction may or may not apply.² By contrast, unrelated persons selling financial products in rollover transactions to those same participants are not ERISA fiduciaries and are not subject to the prohibited transaction rules.

Our members have expressed to us the strong concern that this uncertainty regarding prohibited transactions may prevent some fiduciary advisers from providing recommendations to these plan participants. Indeed, this issue was a concern for our members prior to the adoption of the 2016 fiduciary rule, and we appreciated working with the Department to develop exemptions addressing some of these concerns through that regulatory process. We believe participants will be better served if the Department clarifies the application of the FAB enforcement policy to specifically address rollover recommendations made by advisers who are plan fiduciaries.

While the FAB generally states that the enforcement policy applies to “...investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards...,” we believe the uncertainty created by AO 2005-23A should be addressed by clarifying very specifically what best interest conduct is necessary for rollover recommendations by plan fiduciary advisers under the enforcement policy. Without such clear guidance, uncertainty will remain as to whether the FAB applies, and what steps are necessary to ensure compliance with its requirements.

- **Suggested Clarification Language**

Accordingly, we suggest that the Department issue either a new FAB or issue FAQs clarifying the current FAB. For your consideration, we have drafted suggested language below:

“On May 7, 2018, the Department issued Field Assistance Bulletin 2018-02 describing its enforcement policy addressing uncertainties resulting from the 5th Circuit Court of Appeals order vacating the fiduciary rule and its associated prohibited transaction exemptions. Because uncertainty about fiduciary obligations and the scope of exemptive relief could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions, the Department adopted an enforcement policy under which the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.

² While we believe that a non-discretionary recommendation by a fiduciary plan adviser to a participant regarding a rollover or other distribution is not “exercising control” over plan assets, the analysis in AO 2005-23A does not clearly state whether the Department views a prohibited transaction as having occurred only when discretion is exercised. Thus, there is ambiguity—a legal “grey area”—regarding when an exemption would be necessary.

Additional guidance regarding this enforcement policy has been requested by plan advisers who are ERISA fiduciaries to the plans they advise, and who also provide rollover or distribution recommendations to participants in those plans. Specifically, these advisers expressed concern that it is not clear whether such recommendations may involve a prohibited transaction, and requested clarification as to how the enforcement policy would apply to these recommendations to the extent a prohibited transaction may arise. Accordingly, the Department has developed the following FAQs to clarify these issues:

Q1. Could the enforcement policy adopted in FAB 2018-02 apply to a rollover or other distribution recommendation made by an investment adviser who is a fiduciary to the plan in which the participant receiving the recommendation participates?

A. Yes. While not all rollover or distribution recommendations are fiduciary advice under 29 CFR § 2510-3.21(c), to the extent such recommendations are fiduciary advice, and to the extent that a prohibited transaction may arise, a rollover or distribution recommendation to a plan participant by an adviser that is an ERISA fiduciary to that participant's plan is covered by the enforcement policy if its conditions are met.

Q2. What are the conditions that the fiduciary adviser in the example above must meet under the enforcement policy described in FAB 2018-02?

A. As relevant here, the enforcement policy requires adviser fiduciaries to work diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted by the BIC Exemption. The impartial conduct standards require that fiduciaries make no materially misleading statements, charge no more than reasonable compensation, and make a recommendation in the best interest of the recipient.

In the context of a rollover recommendation, a best interest recommendation should include consideration of a participant's individual needs and circumstances and the following factors:

- Alternatives to the rollover, including leaving the money in the plan, if permitted;
- Investments available in the plan and in the recommended IRA;
- Services available in the plan and in the recommended IRA, such as individualized investment advice;
- Distribution options available in the plan and in the recommended IRA;
- Investment-related fees and expenses; and
- Administrative fees and expenses

As the Department indicated in guidance related to the BIC Exemption, a fiduciary seeking to meet the best interest standard as set out in the BIC exemption would engage in a prudent analysis of these factors and considerations before recommending that an investor roll over plan assets to an IRA or other investment.”

- Conclusion

We appreciate your consideration of our request. By clarifying the FAB's applicability to an adviser who is a fiduciary to the plan from which the rollover comes, the Department can ensure that participants are able to receive fiduciary advice from trusted advisers. Absent this clarification, we are concerned that legal risk and uncertainty may cause many fiduciary advisers and their financial institutions to avoid such rollover recommendations, depriving participants of a valuable source of quality, professional investment advice.

We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/

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/s/

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