



Office of Regulations and Interpretations, Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655, U.S. Department of Labor
200 Constitution Ave. NW
Washington, D.C. 20210

Re: RIN 1210-AB32 Conflict of Interest Rule

Dear Sir or Madam:

Empower Retirement appreciated the opportunity to appear at the public hearing on the definition of the term *fiduciary*. As we indicated in both our comment letter and our testimony, we have a number of concerns. Following our testimony, the Department of Labor (DOL) requested that we provide examples to clarify two of our concerns: the definition of *recommendation* and the inclusion of the term “specifically directed to” in the proposed rule.

Section 2510.3-21(a)(1)(i) of the proposal includes this language in the definition of *advice*: “A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA.” The term *recommendation* is further defined in Section 2510.3-21(f)(1) as, “A communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.”

As was noted in the preamble to the proposal, and during the hearing, the DOL drew upon the Financial Industry Regulatory Authority’s standard of when guidance should be considered a *recommendation*. While this definition may be appropriate for broker-dealers, we believe it is too broad when applied to the wide range of parties that interact with participants, particularly call center representatives, on a daily basis.

Example: A plan participant contacts a call center representative and requests information regarding money held in a prior employer’s 401(k) plan. The participant wishes to move the balance out of that plan, so she requests information regarding her options. The call center

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representative informs her that she may have the option of leaving her balance in the prior plan. The participant indicates that she does not wish to leave her money with her previous employer. The representative informs her that she can also roll her balance into an IRA or roll it into her new employer's plan. In describing the advantages and disadvantages of the different options, the representative informs the participant that money rolled into the new plan will have the advantage of fiduciary oversight and that she may have access to funds with lower expense ratios, including target date funds and managed accounts, in her new employer's plan. The representative also tells her about the potential access to a broader array of funds available in a retail IRA. Based on the discussion, the participant weighs her alternatives and decides to roll her balance to her new employer's plan.

Our concern is that such a transaction may be viewed as a *suggestion* to take a particular course of action that could result in a prohibited transaction. This is particularly true given that advice is no longer required to be given pursuant to a mutual agreement between the parties and no requirement that there be a reasonable expectation — based on the facts and circumstances — that advice is being offered in a fiduciary capacity. In the example above, the participant sold assets in her prior plan and purchased assets in her current plan. If this is deemed a *recommendation*, then a prohibited transaction has occurred.

While the DOL may believe that this transaction is covered in the education carve-out, we fear that inclusion of the term *suggestion* inserts an ambiguity into the proposed rule that may be interpreted differently by others. For these reasons, we believe the proposal could be clarified by specifying that a recommendation must be a call to action to take or refrain from taking a course of action, a much higher and clearer standard than a mere *suggestion*. Indeed, a call to action was how several representatives of the DOL described the term *recommendation* during the hearings. We also believe informative and essential conversations between participants and call center representatives, or other customer service representatives, will be inhibited by the proposal if it does not contain a requirement that there be a reasonable expectation of a fiduciary relationship.

In Section 2510.3-21(a)(2)(ii) *advice* is deemed to include rendering “advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.”

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We are concerned with the inclusion of the phrase “or that such advice is specifically directed to” may inadvertently capture routine communications sent to a plan’s entire participant base or subsets thereof. When the proposed rule is read in its totality, including defining a recommendation as a mere suggestion, this raises another ambiguity.

Example: Within the same plan, a participant who is 90% invested in employer stock may receive a flier detailing the benefits of diversification and the risks associated with individual securities, while another participant who has reached retirement age may receive a flier detailing distribution strategies. Similarly, participants using our website are prompted with the identification of a Next Best Step to help them reach their retirement income goals — which may include a suggestion to change their asset allocation.

There is clearly no expectation of a fiduciary relationship in these communications, but, under the proposal, sending these materials could potentially create fiduciary status. Once again, the DOL may view these routine types of communications as covered under the education carve-out, but the uncertainty may cause providers to re-examine their communication offerings and potentially eliminate valuable information that help participants. We would recommend eliminating the “specifically directed to” language and have the standard be whether the advice was individualized to the recipient.

Example: A call center representative responds to a call from a participant asking for help with investing. The call center representative describes the different levels of help available. The participant responds and says that he is not interested in paying for a managed account service but that he is not an active investor. The call center representative explains how target date funds work, and the participant asks which fund is appropriate based on his expected retirement date. The call center representative identifies the plan’s designated investment alternative that is targeted to that date.

In this situation, there would be a heightened concern about fiduciary status because a specific fund is mentioned. The alternative would be for the call center representative to try to guide the participant to the fund through a more convoluted communication with more potential for misunderstanding. This problem would be resolved by adding an “expectation of fiduciary status” component to the proposal.

As was mentioned during our testimony, Empower receives more than 4 million calls a year for an average of 16,000 calls each business day. Shortly after the DOL’s public hearing, we

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experienced a period of market volatility. During this time, we saw a significant increase in the number of calls received. In the week of August 24, more than 94,000 calls were received, an increase of 18%. It should be noted, however, that 28% of those calls were received on Monday, August 24, the day that the Dow saw a 1,000-point drop at the opening. This represents a 66% increase over daily averages. Calls with investment related questions increased by 57%.

We raise this to underscore the importance of our call center having the ability to communicate with participants without the concern that they may inadvertently provide fiduciary advice. Providing participants with day-to-day information regarding how their plans operates and what their options are is obviously important, but being able to calm and reassure participants during times of extreme market turmoil is invaluable. Call center representatives are, in many cases, the first sources that participants turn to when trying to understand the impact a market downturn might have on their retirement savings, and making certain that we have clear, unambiguous guidelines is crucial in delivering the assistance participants need and deserve.

Once again, we appreciated the chance to share our concerns and thoughts, and we would welcome the opportunity to continue the dialogue.

Sincerely,

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