COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

August 6, 2020

Submitted via the Federal eRulemaking Portal

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

RE: Notice of Proposed Class Exemption: Improving Investment Advice for Workers & Retirees (ZRIN 1210-ZA29, Docket ID Number: EBSA-2020-0003)

Ladies and Gentlemen:

Covington and Burling LLP ("Covington") is pleased to comment on the Notice of Proposed Class Exemption ("PTE"), Final Rule, and Technical Amendment concerning Fiduciary Investment Advice from the Department of Labor (the "Department"), published in the Federal Register on July 7, 2020 (collectively, the "Rule").[1] We write in our capacity as legal advisor to employer plan sponsors and fiduciaries to call attention and to suggest a relatively simple solution to the substantial uncertainty that the Rule would otherwise create for fiduciaries of employer-sponsored retirement plans.[2]

Specifically, the uncertainty relates to monitoring plan service providers' compliance with the PTE and with the Department's newly articulated position that communications concerning rollover distributions from employer-sponsored retirement plans often may constitute fiduciary investment advice. If not addressed, this uncertainty may put employer plan fiduciaries in the untenable—and we believe unintended—position of having a duty to monitor their service providers' compliance with the Rule, without clear guidance as to the steps they need to take to

---

[1] This letter responds to the Department's request, in its Notice of Proposed Class Exemption, for comment "on all aspects" of the portion of its proposal respecting rollovers, including the "the real-world experiences and concerns" of interested parties and "other actions the Department should take . . . that would promote prudent rollover advice without overlapping existing regulatory requirements."

[2] When we refer in this letter to "fiduciaries of employer-sponsored retirement plans" or "employer plan fiduciaries," we are referring to the plan's 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.

satisfy these new obligations. We respectfully request that the Department address this uncertainty by clarifying the reasonable steps employer plan fiduciaries can take to meet these monitoring obligations, and that the Department do so along the lines we propose at the end of this comment.

The Department's New Rollover Analysis Raises Uncertainty for Employer Plan Fiduciaries

The Department's newly articulated rollover analysis in the Rule creates uncertainty about how employer plan fiduciaries are to monitor their service providers' communications with participants regarding rollovers from the plan to a financial institution that is either affiliated, or has a financial arrangement, with the service provider. Historically, many service providers have taken the position that their rollover recommendations are not provided on a "regular basis" or pursuant to a "mutual agreement" and therefore do not constitute fiduciary investment advice under the Department's five-part test (the "Five-Part Test").[3] Likewise, the Department long ago concluded in the Deseret Letter[4] that advice to roll assets out of a retirement plan does not generally constitute fiduciary investment advice.

By contrast, the Rule provides that rollover recommendations often may constitute fiduciary investment advice. In the preamble to the PTE, the Department states that rollover advice from a service provider who "has been giving financial advice" or "will be regularly giving financial advice" constitutes advice "on a regular basis." Moreover, the Department states that "[w]ritten statements disclaiming a mutual understanding . . . are not determinative." Finally, the Department makes clear that it no longer intends to apply the analysis in the Deseret Letter.

Under the Department's newly articulated analysis, a broad array of communications between plan participants and service providers that were not subject to the fiduciary standard under prior guidance may now constitute fiduciary investment 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. As discussed below, distinct risks for employer plan fiduciaries arise depending on whether the service provider accepts, or does not accept, fiduciary responsibility for its rollover recommendations.

---

[3] 29 CFR 2510.3-21(c)(1), 40 FR 50843 (August 31, 1975). Under the Five-Part Test, for advice to constitute fiduciary investment advice, a financial institution or investment professional must (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding that (4) the advice will serve as the primary basis for investment decisions, and that (5) the advice will be individualized. A financial institution or investment professional that meets this Five-Part Test, and receives a fee or other compensation, direct or indirect, is an investment advice fiduciary. Consistent with a 2018 decision by the U.S. Court of Appeals for the Fifth Circuit, the Rule confirms that this 1975 regulation is operative and controlling.

[4] Advisory Opinion 2005-23A.

- *Uncertain Standards for Monitoring Service Providers that Accept Fiduciary Responsibility for Rollover Recommendations*

It is unclear how employer plan fiduciaries should monitor service providers that take the position that rollover recommendations are subject to the fiduciary standard and avail themselves of the PTE. In the absence of Department guidance, plan fiduciaries may reasonably feel compelled to take unwarranted and costly measures to oversee these service provider rollover recommendations. For example, plan fiduciaries might 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 employees of the plan sponsor. Accordingly, many 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).[5]

Similarly, employer plan fiduciaries may feel the need to use their limited resources to review documentation concerning service provider rollover recommendations. The PTE provides 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 would undoubtedly impose significant burdens on these fiduciaries, it is highly speculative, at best, that 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—and not the employer plan fiduciary—who is in the best position to certify that the rollover recommendation is in the participant's best interest.

- *Untenable Obligations for Monitoring Service Providers that Disclaim Fiduciary Responsibility for Rollover Recommendations*

Other service providers may continue to take the position that some, or all, of their rollover recommendations are not subject to the fiduciary standard—potentially, in tension with the Department's newly stated position on the issue. Without any guidance to the contrary, and under the specter of co-fiduciary liability, plan fiduciaries may feel compelled to question, and potentially challenge, their service providers' legal positions as to whether particular communications concerning rollovers are subject to the fiduciary standard.

[5] 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.

This is not the proper role for an employer plan fiduciary. As the Department acknowledges in the preamble to the PTE, whether a rollover communication will constitute fiduciary investment advice depends on individual facts and circumstances. Accordingly, there may be reasonable disagreement as to whether a service provider acts in a fiduciary capacity in any particular instance. It would be inefficient to compel plan fiduciaries to investigate the facts and circumstances of individual rollover recommendations and, potentially, to second guess their service providers' legal position as to whether the communication constitutes fiduciary investment advice. Instead, the service providers, who actually provide the advice that may or may not be subject to fiduciary standards, should make their own determinations, and bear any attendant risk, alone.

Reasonable Steps to Fulfill Monitoring Obligations

Employer plan fiduciaries cannot reasonably be expected to scrutinize the legion of legal analyses that service providers necessarily will undertake as they work to comply with the PTE or that underlie a position that particular service provider communications do not constitute fiduciary investment advice. The Department should address the unnecessary uncertainty and costs that would otherwise be imposed on employer plan fiduciaries by stating that service providers are best positioned to ensure their own employees' compliance with the Rule.

This could be accomplished by making clear that one way for employer plan fiduciaries to satisfy their obligations under ERISA with respect to rollover communication activities by plan service providers is for their service providers to provide an annual certification to the plan that:

1. The service provider acknowledges that its rollover recommendations constitute fiduciary investment advice and that such advice satisfies all relevant obligations under the PTE, including the obligation to provide investment advice that is in the best interest of participants; or

2. The service provider acknowledges either that its rollover communications do not constitute fiduciary investment advice, or that it is not providing investment advice of any kind with respect to rollovers.

For the avoidance of doubt, nothing in these recommendations should prevent the plan from satisfying the applicable safe harbor in items 1 and/or 2, above, by (A) prohibiting the provision of rollover recommendations or advice altogether, (B) limiting the time, location, method, or circumstances in which the service provider may provide rollover recommendations or advice, or (C) prohibiting the provision of rollover recommendations or advice in the absence of a certification under item 1 above.

The recommendations outlined in this section would significantly reduce uncertainty and unnecessary burdens imposed on employer plans and plan fiduciaries, while at the same time supporting the Rule's features designed to ensure that advice concerning rollovers is in participants' best interests. Covington would be happy to work with the Department to create model language to effectuate these recommendations.

* * *

We appreciate the opportunity to submit this letter for your consideration, and we stand ready to work with the Department to address the regulatory burden and uncertainty that would otherwise be imposed on employer plan fiduciaries as a result of the Rule. We would welcome the opportunity to discuss the issues in this submission. If you have any questions concerning our comment, or if Covington can be of further assistance, please do not hesitate to contact Richard Shea at rshea@cov.com or (202) 662-5599, Jason Levy at jmlevy@cov.com or (202) 662-5287, or Jack Lund at jlund@cov.com or (202) 662-5082.

Sincerely,

Richard C. Shea

Richard Shea
Jason Levy
Jack Lund
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001