

September 22, 2021

The Honorable Ali S. Khawar  
Acting Assistant Secretary  
Employee Benefits Security Administration  
200 Constitution Ave, NW  
Washington, DC 20210

Dear Acting Assistant Secretary Khawar:

The undersigned organizations appreciate that the Employee Benefits Security Administration (“EBSA”) has engaged in stakeholder outreach to ensure that guidance changes are made after consideration of broad-based input. We write today regarding the current temporary enforcement policy reflected in Field Assistance Bulletin (FAB) 2018–02, which is presently scheduled to expire on December 20, 2021.

As an initial matter, we call your attention to the [letter](#) submitted to EBSA on September 2, 2021, by the U.S. Chamber of Commerce. Our organizations fully support and agree with the comments and recommendations made in the Chamber’s letter, and consistent with that letter, we respectfully urge EBSA to extend the temporary enforcement policy as reflected in FAB 2018-02 by at least six to twelve months beyond December 20, 2021. EBSA and all stakeholders would benefit from such an extension, as it would allow firms to thoughtfully consider using Prohibited Transaction Exemption 2020-02 and implement it most effectively, while reducing consumer confusion and disruption that would follow from retaining the current date.

Moreover, we concur with and endorse the Chamber’s recommendation that, following expiration of the temporary enforcement policy (whether on December 20 as currently scheduled or following any extension), EBSA should “allow the current rules and PTEs to go into effect, allowing an appropriate period of review and evaluation, before considering further substantive changes.” Again here, we believe EBSA and all stakeholders would benefit from this recommendation, as it would provide an opportunity for all interested parties to observe and evaluate the real-world effectiveness of the current rules before deciding whether any additional changes are necessary.

If, however, EBSA chooses to proceed with further rulemaking as contemplated by its current regulatory agenda, we would respectfully urge EBSA to extend the temporary enforcement policy for a reasonable period of time following the completion of such rulemaking rather than for a fixed period of time.

Our recommendations are based on three main points. First, although some firms may be technically able to comply by December 20, it is important for financial institutions to be confident that their efforts preparing for implementation and compliance will be smooth and secure. This is achieved by having the time to refine and test their compliance tools and mechanisms. More time will allow firms to ensure that all the exemption’s participant protections are fully in place, without the types of errors and disruption that will confuse and frustrate retirement savers and their advisors.

Second, we are quite concerned that many small firms may have been less aware of the December 20 expiration of the temporary enforcement policy than larger firms. For the larger firms, this has been an ongoing effort that in many cases began months ago by devoting substantial resources toward compliance. Such resources are not readily available to small firms. The resource disadvantages small firms face may prohibit them from being able to comply on December 20, potentially leaving them with no choice but to reject fiduciary status. This could potentially create an unlevel playing field between retirement investors who utilize large firms versus small firms as their advisors.

Third, we continue to hear concerns from firms that are very hesitant to accept fiduciary status or firm up new procedures until they have an idea of how PTE 2020-02 and the other exemptions may be enhanced or modified, as reflected in the upcoming proposed guidance and further fiduciary rulemaking. The timing of any new proposals or guidance by EBSA creates significant uncertainty and challenges for industry. It means stakeholders are dealing with what might be described as a “moving target” which causes confusion and substantial cost to the extent compliance efforts implemented today may not be satisfactory and/or require reworking under any impending changes or new requirements.

The firms have worked extensively to comply with Regulation Best Interest and are working feverishly to comply with PTE 2020-02. In light of all the changes in this area during the last five years, some firms are hesitant to adopt material new changes that may need to be revisited again soon, based on new proposals that may be released around the same time that compliance is required with PTE 2020-02. Some firms may very reasonably hold off embracing the use of the PTE until they have an idea of what it will ultimately look like. This creates a situation where small firms are not embracing use of the PTE because of a lack of resources to comply by December 20 and other firms are not embracing use because of uncertainty around future rulemaking that creates a moving target for compliance. These factors also contribute to the unlevel playing field between firms that would result if the temporary enforcement policy is not extended beyond December 20, which we hope you will agree is in no one’s interest.

The foregoing issues are compounded by the burdens associated with efforts to ensure workforce safety in light of the new COVID variants and the attendant uncertainties. As you know, these burdens and uncertainties impact most employers, including the federal government.

For the above reasons, we respectfully urge EBSA to (a) extend the temporary enforcement policy under FAB 2018-02 for a reasonable period of time, and (b) pause its plans to propose further changes to the rules for investment advice fiduciaries until there is sufficient evidence that further changes are needed (or, in the alternative, to extend the temporary enforcement policy for a reasonable period of time beyond the completion of any such rulemaking rather than for a fixed period of time,). An extension of at least six to twelve months beyond December 20, 2021, would allow firms a meaningful opportunity to provide feedback during the impending notice and comment period. Consumers would, of course, continue to be protected by FAB 2018-02 for as long as the temporary nonenforcement policy remains in effect, including the requirement that fiduciaries work diligently and in good faith to comply with impartial conduct standards.

Thank you for your consideration of this request and please do not hesitate to reach out if we can provide additional information.

Sincerely,

American Securities Association (ASA)

Davis & Harman LLP<sup>1</sup>

Federation of Americans for Consumer Choice (FACC)

Finseca

Institute for Portfolio Alternatives (IPA)

Insured Retirement Institute (IRI)

Investment Company Institute (ICI)

National Association of Independent Life Brokerage Agencies (NAILBA)

National Association of Insurance and Financial Advisors (NAIFA)

Securities Industry and Financial Markets Association (SIFMA)

U.S. Chamber of Commerce

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<sup>1</sup> On behalf of a group of firm clients.