



February 3, 2011

**VIA ELECTRONIC MAIL – [e-ORI@dol.gov](mailto:e-ORI@dol.gov)**

Office of Regulations and Interpretations  
Employment Benefits Security Administration  
Attn: Definition of Proposed Fiduciary Rule  
Room N-5655  
United States Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

**Re:** Definition of Fiduciary Proposed Rule, RIN 1210-AB32

Ladies and Gentlemen:

The Council of Insurance Agents & Brokers (the “Council”) appreciates this opportunity to comment on the Department’s proposal to revise the definition of fiduciary under Section 3(21) of the Employee Retirement Income Security Act (ERISA).<sup>1</sup> The Council is a trade association representing the nation’s leading commercial insurance agencies and brokerage firms, which specialize in a wide range of insurance products and risk management services for business, industry, government, and the public. Operating both nationally and internationally, Council members conduct business in more than 3,000 locations, employ more than 120,000 people, and annually place more than 80 percent – well over \$200 billion – of all U.S. insurance products and services protecting business, industry, government and the public at-large. Council members also place the majority of U.S. employee benefit insurance products and provide a range of insurance-related consulting and administrative services.

One of the key roles our members play is in assisting tens of thousands of employer-based health and welfare insurance plans and voluntary benefit programs of all sizes, covering millions of American workers, to obtain the health and welfare benefits coverages they and their employees need and want at a cost they both can afford.

Accordingly, we are concerned about the scope of the definition of fiduciary in the proposed rule, and whether the definition could be interpreted to impose fiduciary status on any insurance agent or broker who provides assistance to group health plans without regard to nature of the services involved. Such an interpretation would be inconsistent with the definition of fiduciary under ERISA Section 3(21),<sup>2</sup> and it is unclear whether the Department intended such a result. Therefore, we seek clarification of the scope of the proposed definition.

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<sup>1</sup> Proposed Rule, Definition of the Term “Fiduciary,” 75 Fed. Reg. 65263 (Oct. 22, 2010) (hereafter “Request for Comments”).

<sup>2</sup> The definition of fiduciary in ERISA Section 3(21)(A) requires that an entity have either discretionary authority or control over a plan’s assets or management, render investment advice for a fee, or have discretionary

The proposed rule, which addresses the specific context of providing investment advice for a fee under ERISA Section 3(21)(A)(ii), employs undefined terminology that ultimately makes the scope of fiduciary status unclear. The preamble of the proposed rule references the Department's desire to "protect the beneficiaries of pension plans and individual retirement accounts by more broadly defining the circumstances under which a person is considered to be a 'fiduciary' by reason of giving investment advice."<sup>3</sup> However, the text of the proposed rule would apply to service providers assisting "employee benefit plans," which includes health and welfare plans as well as pension plans. Such service providers are deemed to render "investment advice" that would make them fiduciaries if they make "recommendations as to the advisability of investing in, purchasing, holding, or selling securities *or other property*," or if they provide "advice or make[] recommendations as to the management of securities *or other property*."<sup>4</sup>

Since the term "other property" is neither defined in the regulation nor explained in the preamble, the Council is concerned that the proposed regulation could be read to impose fiduciary status on a service provider assisting a health and welfare plan, such as a group medical insurance plan, by making recommendations as to the advisability of purchasing a health insurance policy, for example.<sup>5</sup> Given that the relevant statutory language focuses on rendering "investment advice," recommendations or advice not associated with investments – and a health policy is not an investment vehicle – should not be covered by the rule. It is not clear whether the Department intended for "investment advice" to be interpreted so broadly as to encompass the typical situation involving an insurance agent or broker merely advising a group health plan about health insurance coverage. We believe the proposed regulation should be clarified to avoid this anomalous result by defining "other property" to specify that it does not refer to property purchased for non-investment purposes, such as medical insurance or other health and welfare insurance products.

The Council appreciates this opportunity to comment on the Department's proposed rule defining fiduciary in the context of rendering investment advice. We urge the Department to define the term "other property" in the rule to make clear that the rule does not make insurance producers or other service providers fiduciaries merely because they have provided advice or recommendations regarding property not purchased for investment purposes, such as health and welfare benefits insurance. The Council stands ready to provide you with any additional information or assistance that may be helpful.

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authority or responsibility for administration of the plan. Insurance agents and brokers acting as intermediaries for welfare plans typically do not satisfy any of these tests.

<sup>3</sup> *Id.* at 65263.

<sup>4</sup> *See* proposed rule subsections (c)(1)(i)(A)(2) & (3) (emphasis added).

<sup>5</sup> It should be kept in mind that while insurance agents and brokers are typically not ERISA fiduciaries with respect to health plans, the relationship between agents and brokers and their health plan clients is governed by a well-developed body of state law, which makes clear that the contract between the parties dictates the scope of the obligations owed.

Respectfully submitted,

A handwritten signature in black ink that reads "Ken A. Crerar". The signature is written in a cursive style with a large, sweeping initial "K".

Ken A. Crerar  
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