



Setting the global standard for investment professionals

2 February 2011

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

Re: Proposed Rule: Definition of the Term “Fiduciary” under ERISA

Dear Sirs and Madames:

CFA Institute, (“CFA Institute”)¹ appreciates the opportunity to submit the following comments regarding the U.S. Department of Labor’s Employee Benefits Security Administration (“EBSA”) proposal to expand who would be considered a “fiduciary” under the Employee Retirement Income Security Act (“ERISA”). CFA Institute represents the views of investment professionals before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity and accountability of global financial markets.

Executive Summary

While CFA Institute supports the goals of EBSA’s proposals and the need for market participants to act in the best interests of their clients, we do not support the proposal’s expansion of who is considered a fiduciary under ERISA and thereby expanding the Act’s enforcement procedures and criminal penalties beyond those who exercise discretionary authority or control over beneficiaries’ funds or serve as the primary fund adviser.

¹ CFA Institute is a global, not-for-profit professional association of nearly 101,000 investment analysts, advisers, portfolio managers, and other investment professionals in 139 countries, of whom nearly 90,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 137 member societies in 58 countries and territories.



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Discussion

CFA Institute strongly supports the goal of the EBSA, as stated in the proposal to protect participants and beneficiaries of retirement plans from conflicts of interest and self-dealing by those who provide investment services to them.

As evidenced by the strong *Code of Ethics* and *Standards of Professional Conduct* applicable to all its members, CFA Institute has long advocated that investment professionals practice the highest standards of ethics and professional conduct when engaging in services for their clients. All CFA Institute members must comply with a number standards when providing investment advice to clients, including the Standard III(A) – Loyalty, Prudence, and Care – which requires CFA members and candidates for the CFA designation to exercise a duty of loyalty to their clients, act with reasonable care, exercise prudent judgment, act for the benefits of clients and place their clients’ interests before their own. Further, CFA members are subject to additional standards that require them to exercise independence and objectivity, deal fairly with clients, exercise diligence, independence and thoroughness in making investment recommendations, and disclose conflicts of interest to their clients.

Proposal to Broaden Definition of Investment Adviser

As described in the rule proposal, there have been “significant changes in both the financial industry and the expectations of plan officials and participants who receive investment advice” since the DOL enacted the initial regulation defining the circumstances under which a person renders “investment advice.” The exponential growth of defined contribution and 401(k) plans as retirement vehicles has led to the enormous expansion of investment service providers that provide critical assistance to these plans and their beneficiaries. Many of these service providers currently do not qualify as fiduciaries under ERISA leaving their duties and responsibilities unclear with respect to that Act.

The proposed changes would broaden the definition of “investment adviser” to include market participants who previously provided investment services that were outside the jurisdiction of ERISA. The proposed changes would mean that more individuals—such as consultants, brokers, and appraisers who offer assistance or expertise on investment-related matters—could be subject to the “stringent duties on those who act as plan fiduciaries” and “become personally liable for losses sustained by a plan” as a result of violations of ERISA rules.

CFA Institute agrees with the EBSA that individuals who provide investment-related services can “significantly influence the decisions of plan fiduciaries, and have a considerable impact on plan investments.” Consultants who assist a plan choose an investment adviser, or with asset allocation or other types of consulting projects can be just as critical to the success of the pension plan as choosing particular investments. Having a correct and accurate assessment from an appraiser as to the value of the investment is the only way to make an informed investment decision with regard to that asset. When paying for investment advice, clients expect their advisers to provide that advice in the clients’ best interest whether that advice is offered as part of an on-going relationship or as part of an occasional or one-time relationship.



However, putting these providers on the same plane as those who exercise “discretionary authority or control with respect to management of the plan or management or disposition of its assets” in terms of responsibility or liability is inappropriate. Broadening the scope of who is considered to have “rendered investment advice” in a manner proposed by these rules will lead to an unbalanced level of responsibility, restrictions and liability relative to the significance of action.

Cost/Benefit Perspective

The strict 5-part test currently in place narrowly defines who “renders investment advice” under ERISA as those providing advice on a regular basis and on the understanding that it would serve as the primary basis for the plan’s investments. We believe this is appropriate when such stringent penalties and duties are imposed once the test is satisfied.

While the EBSA believes that the benefits of the proposal outweigh the costs, we cannot agree. The proposal, if adopted, would have significant impacts on a variety of different players and practices. We believe the proposed rules would potentially reduce the number of those interested in providing services to ERISA plans, reducing the amount of information and assistance available to retirement plans and increasing its cost. Assuming that service providers continue to offer services to ERISA plans, the cost of the additional compliance precautions and procedures, given the potential liability, will likely be passed on to the client and negatively impact the returns of participants in retirement funds whom the proposed rules are designed to protect.

CFA Institute certainly supports EBSA’s efforts to ensure that those providing investment-related services to ERISA pension plans do so in an ethical manner—in the best interest of the client, with independence and thoroughness, and disclosing all conflicts of interest. But we believe the DOL can accomplish this goal without imposing an onerous procedural burden and potential criminal liability on service providers and fomenting the widespread disruption to the relationships that will result from defining these more tangential service providers as “fiduciaries” under ERISA.

Since the onset of the financial crisis there has been much discussion and debate about the term “fiduciary”—who owes such a duty to whom and when. The investing public is rightly confused about when they can expect the professionals who provide investment services to act as fiduciaries. Proposals to define a uniform fiduciary duty for all who provide investment advice are aimed at simplifying this issue and protecting the investing public. By inappropriately characterizing parties who provide investment-related services as having the same duty, with the same consequences for failure to adhere to that duty, as those who have discretionary authority over the management of assets, or those who are the primary investment advisers to clients, the proposed rules will likely create more confusion than clarity on this critical topic.



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Conclusion

We are encouraged by EBSA's desire to broaden the protections offered to those with invested retirement assets. Protecting the interest of investors throughout the complex investment process is an admirable goal. However, CFA Institute does not support the expanded application of the term fiduciary across the spectrum of firms providing investment-related services. .

We appreciate the opportunity to respond to the EBSA's proposals to expand the definition of the term fiduciary under ERISA. Should you have any questions about our positions, please do not hesitate to contact Kurt N. Schacht, CFA at kurt.schacht@cfainstitute.org or 212.756.7728; or Jon Stokes at jon.stokes@cfainstitute.org or 434.951.5314.

Sincerely,

/s/ Kurt N. Schacht

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