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January 20, 2011

Via Electronic Mail to e-ORI@dol.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5655
Washington, DC 20210

Re: Definition of Fiduciary Proposed Rule

Dear Ladies and Gentlemen:

As with any mandate, the law of unintended consequences that invariably follows is sometimes worse than the original problem. If the goal is to promote accountability and curb conflicts of interest (both notable pursuits), an expanded and crystal clear set of rules is one way to go. In an ideal world, the better solution is to let the marketplace work by having ERISA plan decision-makers buy goods and services from only those organizations that demonstrate best practices. However, given the reality that new rules are inevitable, it is important to understand that additional headaches may arise if too much is left to subjective interpretation or thought to be expensive to implement.

Overly strict rules will likely discourage some otherwise knowledgeable and experienced professionals from working with ERISA clients. A contracted vendor pool means less competition and higher costs. Small to mid-size plans may forego using outsiders who would now charge higher fees at the same time that these companies do not have monies for a dedicated full-time staff and yet need help from third party experts in order to thoroughly vet competing products and strategies. Following the passage of the Sarbanes-Oxley Act of 2002, more than a few capable individuals turned down opportunities to sit on boards because the personal and professional liability was deemed too high and the incremental expected reward was deemed too low. Consider what happened with the implementation of FAS 133. While intending to encourage visibility about how companies were using derivatives, and thereby protect shareholders, the complexity and costs of compliance had a downside. Some businesses ceased using derivatives to hedge altogether and were therefore exposed to more risk than before.

Importantly, as far as I can tell, the proposed expanded definition of fiduciary does little to promote transparency about who makes decisions on behalf of ERISA plans and how those decisions are made. As I wrote several years ago, searching for information about who controls billions of retirement scheme dollars is like searching for hidden treasure. Investors and plan participants want and deserve to know who is in charge and what experience and knowledge qualifies them to work on behalf of plan participants. It would likewise be helpful to know how these individuals were selected to serve, how their performance as a fiduciary is reviewed on a regular basis and by whom, how much time they devote to plan stewardship and what the process entails for selecting new fiduciaries. Other than the names of a few persons listed on Form 5500s and/or provided by a handful of companies that identify investment committee members, the public is left to trust that qualified persons are making good decisions. Pension-related footnotes to annual reports provide scant information about procedural prudence. This is troubling since retirement plan problems, when they exist, have the potential to create havoc for investors and beneficiaries alike if left unchecked. Also, it would be great to reward those individuals and organizations who go out of their way to exercise care and loyalty.

I applaud the U.S. Department of Labor for taking steps to improve accountability and look forward to clarification. My hope is that more will be done to improve transparency about who serves as a fiduciary, why they are qualified to serve and how they are doing in their job over time.

Sincerely,

Dr. Susan Mangiero, CFA, FRM

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