



February 3, 2011

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

Re: **Definition of the Term “Fiduciary”**

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for comments on the proposed regulation, Definition of the Term Fiduciary, issued by the Department of Labor (“Department” or “DOL”) on October 22, 2010. We appreciate the extension of the comment period granted by the Department to allow for further consideration of the proposed rules. Given the scope of the proposal, the extended comment period allowed us to garner additional comments and thoughts from our membership.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

The proposed regulation is intended to modify and supersede an existing regulation on the application of the definition of the term fiduciary under the Employee Retirement Income Security Act of 1974 (“ERISA”) with respect to a person who gives investment advice to an employee benefit plan or to plan participants. With respect to investment advisers, Section 3(21)(A) of ERISA provides that a person is a fiduciary with respect to a plan to the extent he or she renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so. Under the current regulation, a person is deemed to provide investment advice if he or she:

- i. renders advice on the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property,
- ii. on a regular basis,

- iii. pursuant to a mutual agreement, arrangement or understanding between the person and the plan or a plan fiduciary that,
- iv. this advice will serve as a primary basis for investment decisions with respect to plan assets, and that
- v. this advice will be individualized based on the particular needs of the plan.<sup>1</sup>

This is known as the “five part test.” In order to be deemed a fiduciary by reason of providing investment advice, a person must meet each part of this test. In the preamble to the proposed regulation, EBSA states concern over having to “focus on establishing each of the elements of the 5-part test rather than on the precise misconduct at issue in particular cases.”<sup>2</sup> As such, the DOL has issued the proposed rule to address concerns about when investment advisers are determined to be fiduciaries.

## INTRODUCTION

We support the efforts of the DOL in updating the regulations on the definition of a fiduciary to reflect modern realities. As noted in the background section of the proposed rule, there have been significant changes in both the design of private retirement plans and the investment options and services provided for these plans. Although these changes have created increasingly complex investment schemes and financial arrangements, the determination of fiduciary status has not changed. Plan sponsors have continued to maintain their fiduciary duties throughout this time by engaging qualified plan professionals to guide them through myriad complexities. We believe that some changes are in order, principally to update the definition of a fiduciary to clarify that certain investment professionals upon whom plan sponsors rely for investment advice will be fiduciaries under the plan. This revision of the fiduciary definition in no way decreases or eliminates the duties of the plan sponsor as a fiduciary. Rather, it provides additional protection and assurances to the plan sponsor that plan professionals who provide investment advice will be held to the same fiduciary standard as the plan sponsor.

While we support this effort overall, there are certain areas where we believe that further discussion or clarification is needed. The proposed regulation is a significant change from what has been the status quo for over 35 years. Consequently, more time is needed in certain areas to determine the best way to proceed. The preamble to the proposed regulation states that “[a]s a consequence of the current regulation, the Department’s investigations of investment advisers must focus on establishing each of the elements of the 5-part test rather than on the precise misconduct at issue in particular cases.”<sup>3</sup> We agree that the investigations should focus on the misconduct at issue and not focus on marking off a checklist. In this same vein, we believe that the revision of the fiduciary definition should not be freely interpreted to include every act related to a retirement plan. Rather, a balance needs to be struck that protects plans and their participants while allowing for the free flow of information and services in the market.

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<sup>1</sup> ERISA Reg. section 2510.3-21(c).

<sup>2</sup> 75 Fed. Reg. 65265 (Oct. 22, 2010).

<sup>3</sup> 75 Fed. Reg. 65265. (Oct. 22, 2010).

## COMMENTS

**We Strongly Urge the DOL to Coordinate with the Securities and Exchange Commission.** As stated in the proposal, the regulations defining a fiduciary have not been updated since they were originally issued in 1975. The preamble notes significant changes relating to retirement plans since 1975. One such change is the overlap of issues between the DOL and the Securities and Exchange Commission (“SEC”) in the area of retirement plans. This overlap of issues has been further expanded by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) which shares many of the same goals as the DOL – protection of investors and enhanced oversight. For this reason, we urge the agencies to work together to create a coordinated fiduciary standard.

For example, section (c)(1)(ii)(C) of the proposed rule covers persons who are investment advisers as defined in the Investment Advisers Act of 1940. The DOL notes in the preamble that this reference to the Investment Advisers Act definition also includes the various exclusions from that definition. However, an entity that is exempt under the Investment Advisers Act may still be a fiduciary under one of the other alternative definitions in the proposed regulation. As another example, there is concern about the treatment of Swap Dealers and Major Swap Participants as defined in Dodd-Frank. Under the proposed rule, it is possible that these entities would be considered fiduciaries for purposes of ERISA. Thus, again, there is the possibility for conflicting rules between agencies.

Different sets of rules and requirements applicable to the same assets will lead to additional costs and complexities for the underlying participants and account holders. This issue is further complicated to the extent that an individual may have several accounts at the same financial institution, some of which may be only subject to the SEC rules, and others of which may be subject to the new ERISA requirements as well as the SEC rules. Inconsistent rules will be confusing to investors and problematic for service providers to implement. Without coordination between the agencies, plan sponsors and plan professionals will spend significant resources unnecessarily trying to comply with two different sets of rules that are trying to reach the same goal. This situation could result in participants and beneficiaries not receiving the necessary tools and assistance necessary to achieve a financially sound retirement at a time when this is critically important, or only receiving such investment support at an additional cost.

**Removal of the “Regular Basis” and “Primary Basis” Requirements for Investment Advice May be Overly Broad.** Section (c)(1)(ii)(D) of the proposed regulation collapses the current five-part test into one requirement. In doing so, the proposed rule eliminates two very significant requirements – the “regular basis” requirement and the “primary basis” requirement. The DOL proposes to remove these requirements to eliminate “difficult factual issues” and to clarify when fiduciary status applies.<sup>4</sup> Inherent in the explanation is that plan sponsors often rely upon all advice given to them by plan professionals and the attachment of fiduciary status should not rest upon numerical calculations of how many times advice is given or how much it was relied upon. The Chamber completely agrees with this position.

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<sup>4</sup> 75 Fed. Reg. 65267 (Oct. 22, 2010).

At the same time, we are concerned that completely eliminating these conditions could discourage service providers from effectively communicating with clients for fear of unintentionally providing investment advice. Some members have expressed concern that eliminating these requirements could reduce the number of investment advisers in the industry, either because the barrier for entry will be too high or it will be too risky for some people to stay in the field. We can all agree that having more quality advisers is better for plan sponsors and plan participants in that competition among advisers helps to lower the costs of investing for plan participants and improves the quality of the advice being provided to plan sponsors.

In addition, the DOL's stated concern over not being able to bring an action for fiduciary breach is somewhat alleviated by the comprehensive changes being proposed. Under the current regime, every part of the five-part test must be met. In the proposal, however, only one of four conditions needs to be met. Even without eliminating the regular basis and primary basis requirement, this change would significantly expand the definition of a fiduciary. While the previous requirements may have set the bar too high, we believe that the proposed standard may be overly broad. Consequently, we believe that further discussion of this requirement is warranted.

**Making Appraisals and Fairness Opinions Investment Advice is an Expansion of the Statute.** In Advisory Opinion 76-65A, the DOL found that the valuation of employer securities did not constitute investment advice. In that opinion, the DOL relied on the fact that the appraisal “would not involve an opinion as to the relative merits of purchasing the particular employer securities in question as opposed to other securities.” This reasoning is consistent with a plain reading of Section 3(21)(A) of ERISA which states that a person is a fiduciary if he or she is providing investment advice and not simply information. In the preamble to the proposed rule, however, the DOL states that it is superseding its conclusion in Advisory Opinion 76-65A but gives no reason for doing so, other than enforcement concerns.<sup>5</sup> We do not believe that the inclusion of appraisals and fairness opinions as investment advice is compatible with the statutory language of ERISA section 3(21)(A). Therefore, appraisals and fairness opinions should not be considered investment advice under the final regulation.

**The Proposal May Unintentionally Harm Employee Stock Ownership Plans.** Treating appraisals and fairness opinions as investment advice will be particularly damaging to Employee Stock Ownership Plans (ESOPs). If appraisers were to be considered fiduciaries as contemplated under the proposed DOL rule, appraisal costs would increase dramatically due to the increased potential for liability. In addition, some appraisal companies would abandon the business to avoid the potential liability. Lessened competition among appraisal companies would further increase costs. Moreover, higher costs could result in fewer ESOPs being created, especially among small companies as they would be cost prohibitive.

We do not believe that bringing appraisals and fairness opinions under the definition of investment advice is an appropriate solution to the enforcement challenges the DOL faces. However, we are equally concerned that a plan fiduciary may be reasonably relying upon faulty valuations without any recourse. We believe that there are alternatives such as increasing penalties or requiring credentialing for appraisal companies that would better address these

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<sup>5</sup> 75 Fed. Reg. 65265 (Oct. 22, 2010).

concern and still protect plan participants. Consequently, we recommend that the DOL consider alternative approaches.

**The Recommendation to Take a Distribution Should be Considered Investment Advice.**

We believe that a decision to take a distribution from a qualified retirement plan can be just as important to a participant's retirement security as the decision on how to invest those assets. Plan sponsors spend significant resources helping workers to save and accumulate retirement assets. They are acutely aware that these resources are wasted without spending equally significant resources on investment and financial education concerning distributions – both on when they can be taken and the types of distributions available. Unfortunately, however, plan sponsors report that many employees continue to be targeted by unscrupulous individuals providing imprudent distribution advice. Even if a participant does not follow the subsequent investment advice of such an individual, the initial decision to take a distribution, based on the advice of another, can result in the dissipation of retirement savings.

Consequently, we recommend that the DOL reconsider its position in Advisory Opinion 2005-23A that a recommendation to take a distribution, even when combined with a recommendation as to how the distribution should be invested, does not constitute investment advice. Moreover, we recommend that the DOL specifically state that a recommendation to take a distribution, even without a recommendation as to how the distribution should be invested, constitutes investment advice.

However, we do not believe that providing educational tools and services and other general information to plan participants regarding possible distribution options and in investing or allocating funds withdrawn from plans should be considered investment advice. Participants need help with retirement decisions and are asking for assistance. We do not want to prevent plan sponsors or service providers from meeting this need. As long as information on distributions does not include a clear recommendation to seek the distribution, it should not constitute advice under the proposed rule.

**The Final Rule Should Continue to Preserve the Status of Investment Education Under Interpretive Bulletin 96-1.** The Chamber commends the DOL for preserving the status of Interpretive Bulletin 96-1, relating to participant investment education, in the proposed rule.<sup>6</sup> The Bulletin states that the provision of investment-related educational material does not constitute investment advice. In the course of the DOL's joint inquiry with the Department of the Treasury on Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, the agencies requested comments regarding the provision of information to help participants make choices regarding the management and spend down of retirement benefits. The Chamber specifically commented on the importance of providing information and educational materials to help participants and beneficiaries make more informed decisions regarding their retirement distributions. Therefore, we support the DOL for preserving the status of Interpretive Bulletin 96-1 and encourage the DOL to consider adding a fifth paragraph (d) to the Bulletin stating that the provision of educational information to participants and beneficiaries about distribution options, including general discussions of the advantages and disadvantages of seeking a

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<sup>6</sup> Proposed Rule section 2510.3-21(c)(2)(ii)(A).

distribution and managing retirement assets outside the plan, does not constitute investment advice.

**The Final Rule Should Clarify the Marketing Exception.** Section (c)(2)(ii)(B) of the proposed rule states that certain marketing materials provided to a plan fiduciary in connection with its consideration of plan investment alternatives does not constitute investment advice if certain disclosures are made. Moreover, section (c)(2)(ii)(C) goes on to state that general financial information and data to assist a plan fiduciary's selection or monitoring of such securities or property, if certain disclosures are made, does not constitute investment advice. The Chamber strongly supports these exemptions.

However, it is not clear that the proposed rule sufficiently covers all materials that may be made available to plan sponsors. It is common for a fund investment manager to provide economic market analyses and forecasts to plan fiduciaries. For example, discussions of the recent worldwide debt crisis and its effect on capital markets, or reports about emerging markets such as China or Brazil, might be included in these reports. Another common topic of analysis is the Washington political environment and its potential impact on industries and markets. These reports and analyses may very well influence a plan fiduciary's decision about the selection and monitoring of plan investments. However, we do not believe that the DOL meant for these materials to be considered investment advice. As such, we ask that the final rule clarify this interpretation by specifying that the provision of this sort of general information and any other information described in section (c)(2)(ii)(C) does not constitute the provision of advice regardless of whether it is provided in conjunction with a fund platform arrangement described in section (c)(2)(ii)(B).

**The Final Rule Should Clarify that Advice about Investments May Not be "Investment Advice" Under the Statute.** Plan sponsors often engage other plan professionals to provide advice relating to investments that is not investment advice as it is meant under the statute. For example, lawyers advise plan sponsors on the legality of investments or help negotiate investment terms. Similarly, actuaries often address investment issues in rendering actuarial advice. Consequently, the final regulation should include an appropriate exception so that lawyers, actuaries, etc. are not considered to be providing investment advice in these situations. We recommend including substantially the same exemption as that set forth in section 202(a)(11)(b) of the Investment Advisers Act, which exempts the following from investment adviser status: "any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession." However, we urge that the DOL also add "actuaries, recordkeepers, and third party administrators" to this list.

**The Final Rule Should Clarify that Certain Employees of Plan Sponsors are Not Fiduciaries.** Similar to the plan professionals listed in the paragraph above, there are often employees of the plan sponsor who provide advice relating to investments that is not investment advice. For example, an employee of a plan sponsor may receive a salary for doing research on various investment options for a defined benefit pension plan and making recommendations to a committee that is identified in the plan documents as a named fiduciary for investing plan assets. This employee who does the legwork does not have discretionary authority to make decisions

about the plan investments – the discretionary authority rests with the committee. Therefore, the employee should not be a fiduciary in this example.

**Further Consideration Should be Given to the Application of the Rules to Broker-Dealers.**

Most broker-dealers are not, in their ordinary capacity, investment advice fiduciaries. Instead, they implement securities sales and purchases for plans and, most often, are compensated on a commission basis for such service. While some broker-dealers affirmatively elect fiduciary status through a written agreement with client plans, the relationship between plans and broker-dealers does not normally contemplate fiduciary responsibility. The proposed rule includes “an investment adviser within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940” as a fiduciary.<sup>7</sup> Section 202(a)(11) of the Investment Advisers Act specifically excludes broker-dealers from the definition of investment adviser. Nonetheless, under ERISA, a broker-dealer may still be found to render investment advice – and therefore be a fiduciary – under one of the other tests in the proposed rule. There is concern that the “purchase and sale” exception in the proposed rule does not align with the nature of services provide by broker dealers in the ordinary course of business, and is too narrow to provide broker-dealers with the comfort necessary to continue to operate in the retirement plan market under the new multi-factor test. In addition, as you are aware, the SEC is currently reconsidering the application of the fiduciary standard of care to broker-dealers under the Investment Advisers Act. For these reasons, we believe that further discussion is needed concerning broker-dealers and that the DOL should coordinate with the SEC in determining the application of fiduciary status to broker-dealers.<sup>8</sup>

**Individual Retirement Accounts Should be Excluded From the Regulation At This Time.**

There is significant concern that the proposed regulation will have a negative impact on the individual retirement account (“IRA”) market. As you are aware, IRAs are the primary retirement savings vehicle for people without an employer-provided plan. As such, there should be deliberate and careful consideration of the impact of this and any other proposed rule to avoid the unintended consequence of substantially reducing the options available to middle-income consumers for investment advice and services.

Furthermore, IRAs differ from ERISA-covered plans in significant respects and, therefore, it is reasonable to consider them separately when determining the application of fiduciary duties. IRAs are not subject to Title I of ERISA so this would be imposing a new regime over them. Moreover, providers of IRAs are currently regulated by the SEC. In light of the evolving standard of care under Dodd-Frank and the impact to millions of IRA account holders if a broadened ERISA fiduciary standard were to be imposed, we recommend that IRAs be excluded from the regulation at this time and considered separately at a later date. Moreover, we believe that further consultation between the DOL and the SEC of this issue is needed before adopting conflicting regulatory schemes that may jeopardize the investment savings of millions of investors.

**The Effective Date Should Be Extended to 12 Months Following the Date of Publication of the Final Rule.** The preamble states that the regulation is intended to take effect 180 days after publication of the final rule in the Federal Register. As we have commented above, the proposed regulation would make substantial changes to existing law. It will take time for service providers

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<sup>7</sup> Proposed Rule section 2510.3-21(c)(1)(ii)(C).

<sup>8</sup> Please refer to our discussion on coordination generally with the SEC above.

who are not fiduciaries under current law but would become fiduciaries under the final regulation to change their business models, policies, and practices to deal with the final regulation. We do not believe that 180 days will provide adequate time for them to complete this process and may result in significant service disruption to plan sponsors. Therefore, we recommend that the DOL extend the effective date of the final rule to 12 months following the date that it is published in the Federal Register.

### CONCLUSION

Again, we support the efforts of the DOL in updating the definition of a fiduciary to address the significant changes that have occurred over the last 30 years. This effort is important not only to the plan sponsors but also the retirement security of the workers for which they provide retirement benefits. Because significant changes will have far-ranging consequences, likely including unintended adverse consequences, we believe that further discussion of certain areas identified in the letter is needed. We encourage the DOL to bring all interested parties together to find the best resolution for all.

We appreciate your consideration of these comments and look forward to further discussions on these critical issues.

Sincerely,



Randel K. Johnson  
Senior Vice President  
Labor, Immigration & Employee  
Benefits  
U.S. Chamber of Commerce



Aliya Wong  
Executive Director, Retirement Policy  
Labor, Immigration, & Employee  
Benefits  
U.S. Chamber of Commerce