

R. Scott Henderson
Deputy General Counsel
Global Wealth & Investment Mgmt.

BY ELECTRONIC MAIL

February 3, 2010

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
e-ORI@dol.gov

Re: Definition of Fiduciary Proposed Rule

To Whom It May Concern:

Bank of America¹ (the “Firm”) respectfully submits these comments in response to the Department of Labor’s (the “Department”) proposed regulation regarding the definition of “investment advice” under Section 3(a)(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (“ERISA”). The proposed regulation (the “Proposal”) would expand the group of persons and entities considered to be an ERISA fiduciary.

Bank of America appreciates the Department’s efforts to reduce conflicts of interest and self-dealing in connection with investment advice. We agree with the Department that employee benefit plans and their participants deserve, and should have available, high-quality investment advice that is in their best interest.² Furthermore, we share the Department’s view that a person should be considered a fiduciary in each and every instance in which he represents or acknowledges that he is acting as a fiduciary. However, we also strongly believe that employee benefits plans and their participants should be free to enter into arrangements with service

¹ Bank of America Corporation is one of the world’s largest financial institutions, serving its clients with a full range of banking, investing, asset management and other financial and risk management products and services. It is among the world’s leading wealth management companies. Bank of America Corporation stock (NYSE: BAC) is a component of the Dow Jones Industrial Average and is listed on the New York Stock Exchange.

² Bank of America has been a consistent advocate for a harmonized standard of care that would require financial professionals to act in a fiduciary capacity when providing investment advice to retail investors. *See, e.g.*, Bank of America comment letter to Elizabeth M. Murphy, Secretary, SEC (Aug. 30, 2010), available at www.sec.gov/comments/4-606/4606-2583.pdf.

providers without the undue restraints of the current *per se* elements of ERISA's prohibited transaction rules. Any risks associated with affording plan sponsors and participants additional latitude under the rules can be mitigated by additional disclosures.

Without significant changes in the Department's approach to the prohibited transaction rules, we are concerned that the Proposal will substantially limit investor choice, particularly in the individual market. Moreover, discrepancies between the Proposal and similar rulemakings under consideration by the U.S. Securities and Exchange Commission ("SEC") could create additional disadvantages for retirement plan investors. We therefore encourage the Department to adopt the Proposal only in conjunction with a grant of broad exemptive relief.

I. The proposed revisions to the definition of ERISA fiduciary could significantly reduce investor choice.

Bank of America provides a full array of services to retirement plans, and, in a number of programs, embraces its ERISA fiduciary status. In those cases, the Firm's clients seek, and we provide, advice rendered as an ERISA fiduciary and in compliance with ERISA. Many other clients, however, have elected programs that are less comprehensive. Often, these clients are individuals who utilize the Firm's broker-dealer platform for both retirement and non-retirement assets.³ We are concerned that the Proposal could create incentives for service providers to exit the business of providing services to the substantial group of clients who have chosen less comprehensive services, or, if they continue in the business, to raise the fees to those clients.⁴ This would be an unfortunate, and unintended, result; we are confident that the Department does not want to reduce the ability of individuals to obtain professional services in connection with the management of their retirement plan assets.

A. Retirement plan investors should be able to choose the services and fee structure they want.

As we have noted in other contexts, investors have long demanded and expected a range of choices regarding their financial services. One such choice that investors are accustomed to having is how to pay for investment advice and other services (*e.g.*, through commissions or through asset-based fees).⁵ We believe that for many clients, the traditional brokerage arrangement with commission-based compensation results in the level of service they desire with

³ Of the over 4 million clients we serve on the Firm's broker-dealer platform, over 2 million also have retirement accounts with us.

⁴ Thus, the Proposal could result in many retirement plan participants receiving no personalized investment advice whatsoever. We note that the Department's efforts to enable plan sponsors to facilitate the provision of investment education and advice may not reach the many retirees who are no longer connected to the workforce but who hold assets in individual retirement accounts ("IRAs").

⁵ In fact, Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") provides that receipt of commission-based compensation will not by itself be a violation of any fiduciary standard of care to be made applicable to broker-dealers. *See also* Study on Investment Advisers and Broker-Dealers, Staff of the U.S. Securities and Exchange Commission (Jan. 2011) (the "SEC Study") (noting that the Staff's recommendations regarding a forthcoming SEC rulemaking under Section 913 are intended to assure that retail investors continue to have choice among compensation schemes).

low overall fees.⁶ The Proposal effectively would eliminate the ability of the individual retirement plan participant to elect a traditional commission-based brokerage relationship, which is the prevalent model in the self-directed account market.

The Proposal effectively would preclude financial services providers from charging variable rates or commissions in connection with the provision of services to retirement plan clients. This is because any advice rendered by an ERISA fiduciary that resulted in additional compensation to the fiduciary or its affiliates would raise prohibited transaction issues under ERISA Section 406(b), which are not completely or cost-effectively addressed by existing class exemptions. Thus, absent broad exemptive relief, we would expect that retirement plan investors currently participating in brokerage-based platforms will be required to pay an account-based fee, contrary to the investors' initial choice to utilize a commission-based structure. We note that there is a longstanding class exemption that permits a fiduciary to charge commissions for execution of agency transactions, and that exemption is available without conditions to individual retirement accounts.⁷ Bank of America urges the Department to recognize the value of a traditional brokerage arrangement, with commission-based compensation, and to revise the Proposal to preserve this alternative for all investors who direct investments in their own retirement accounts.

B. The Proposal disadvantages retirement plan investors.

We also are concerned that the Proposal may have the unintended effect of reducing, not enhancing, the provision of services to retirement plan accounts. In particular, a retirement plan investor may find himself or herself with fewer advisory options than exist with respect to non-retirement plan assets. As the Department is aware, the SEC generally allows financial services professionals to disclose information to investors in a manner that can be expected to adequately inform the investor of potential conflicts, without prohibiting such conflicts altogether. Unlike the approach that the SEC takes to conflict issues, ERISA fiduciaries are generally prohibited from even entering into relationships that pose conflicts in the context of retirement plan accounts or are required to neutralize any economic benefits.

We urge the Department to revisit the Proposal and consider the potential costs to retirement plan investors, given the bias of ERISA to all-in or account-based fees, and the potential for the investor to decide to "go it alone" rather than seek professional assistance at a higher cost.⁸ We also urge the Department to consider the potential for disparate pricing in the individual marketplace as between personal and retirement account assets, and likely confusion to the investor.

⁶ It is notable that, during the period that fee-based brokerage was available to clients, the industry was called to task for under-utilization of commission-based services and developed utilization reports to alert clients who would be better served by reverting to a traditional commission-based service.

⁷ See PTE 86-128.

⁸ We are aware that some Department personnel, at least historically, have stated a preference for fee leveling even if it results in higher effective fees to an account. That approach is contrary to the more recent focus on fees charged to a retirement account with the appreciation of the effect of compounding fees on retirement accumulation. With effective disclosure of the potential conflicts of interest, a plan investor can assess the most cost effective consumption of the advice they need.

C. *The Proposal will disrupt investments that are traded on a principal basis.*

Investors as a whole currently have access to a wide array of investment products, including products that are currently sold primarily or exclusively on a principal basis (e.g., firm-sponsored structured products). ERISA's prohibition on an ERISA fiduciary trading as principal with a plan, however, in many instances precludes access to such products. Bank of America is concerned that expanding the group of ERISA fiduciaries through the proposed definitional change would further limit investor access to products traditionally traded as principal.

Bank of America currently makes a wide range of different securities and investment products available to retirement plan clients participating in its brokerage platform. Many of these securities and investment products are sold by Bank of America primarily or exclusively as principal.⁹ Similarly, millions of clients of other financial services firms effect trades that their broker-dealer executes as principal. This well-established practice would be severely disrupted if broker-dealers were treated as ERISA fiduciaries, or even if there were substantial uncertainty about a broker-dealer's status as such.

Bank of America believes that the markets have changed dramatically since the enactment of ERISA and consideration of the principal trading rules embodied in the Department's principal trading exemption thirty-five years ago. For example, FINRA Rule 2124 (originally adopted in 2006 as NASD Rule 2441) requires brokers to provide disclosure and obtain consent from clients when executing riskless principal trades with a markup. In contrast, ERISA's absolute bar on principal trades by fiduciaries, even "riskless principal" trades, is unnecessary and will create substantial market disruption in the context of the Proposal.

Full-service broker-dealers existed in 1975 and provided advice to their clients. A determination was made in connection with the adoption of ERISA to permit that business model to continue under the "mutual understanding" and "primary basis" tests. Had a different determination been made back then, a more robust agency trade market may have developed as the financial services sector expanded, but many corporate decisions have in fact been made in light of the resulting regulatory structure. Similarly, the Department has issued a string of interpretations and exemptions to make the system function. Bank of America does not dispute that the developments over the intervening years have revealed deficiencies in the system, but changing that system now would require many structural changes to the market that cannot be easily accomplished. The resulting harm to retirement account holders needs to be factored into any cost-benefit analysis in deciding whether to finalize the Proposal.

⁹ We have estimated that more than 4,000 investment products currently held in client accounts could be affected by restrictions on proprietary products and principal trades that would result from implementation of the Proposal. Those products are held in approximately 3 million retirement accounts on our broker-dealer platform.

D. *The “Selling Exception” does not adequately address the above concerns.*

The proposed exception for people acting as or on behalf of a seller or purchaser of securities or property does little to alleviate our concerns about the Proposal. While the circumstances in which such an exception would apply are unclear, it plainly would not be available to a broker acting as agent for a client. We do not agree that an exception from being deemed an ERISA fiduciary should be available only to persons with interests known to be adverse to the recipient of its advice.

II. *Bank of America believes it is imperative for the Department to coordinate with the SEC regarding the Proposal.*

Pursuant to the Dodd-Frank Act, the SEC recently conducted a study of the standards of care that apply to broker-dealers and investment advisers.¹⁰ Now that the study is complete, the statute authorizes the SEC to implement the Staff’s recommendations by proposing a rule or rules that would establish a uniform fiduciary standard for investment advisers and broker-dealers when providing personalized investment advice to retail investors. Given the likelihood of an SEC rulemaking regarding fiduciary duties, we believe it is imperative for the Department to closely coordinate with the SEC to ensure that any new rules or regulations on this topic are consistent.¹¹

III. *If it were to adopt a regulation pursuant to the Proposal, the Department should provide adequate time for financial services firms and their clients to deal with the significant implementation challenges.*

As noted above, Bank of America believes there are fundamental issues with the Proposal that should preclude any rulemaking without reconsideration and substantial revisions. However, in the event the Department were to proceed with a rulemaking pursuant to the Proposal, it should allow adequate time for orderly transition to the new regulatory structure. Financial services firms could be required to entirely rework their compensation structure, as well as build technological and other systems to satisfy new requirements. In addition, firms likely would need to revise policies and procedures and provide training to all employees with client-facing responsibilities.

¹⁰ See SEC Study; SEC Release No. 34-62577, IA-3058 (July 27, 2010) (seeking comment on a study mandated by Section 913 of the Dodd-Frank Act).

¹¹ The SEC Study explicitly acknowledges the Department’s Proposal. See SEC Study at notes 415 and 438.

IV. Conclusion

In summary, while the motives behind the Proposal are laudable, as a practical matter the Proposal could require a radical change to the business model of full-service financial services firms and very negatively affect the quality of products and services available to retirement plan clients. Bank of America fears that, if implemented as proposed, the Proposal would lead to the near elimination of personalized advice for participant-directed retirement accounts, and would make it quite difficult, if not impossible, to provide holistic services to those clients for whom they service both retirement and non-retirement assets. Retirement account holders also could lose access to highly desired investments that are sold almost exclusively on a principal basis by broker-dealers. Existing exemptive relief, even as applied to IRAs, does not adequately address the numerous prohibited transaction issues that would arise should millions of retirement accounts maintained as retail brokerage accounts be required to be operated as fiduciary accounts. Therefore, we encourage the Department to reconsider the breadth of the definition of ERISA fiduciary in the Proposal and/or provide broad exemptive relief that would permit the continued provision of full-service brokerage services in the participant-directed market.

If you have any questions, or if we can provide any further information, please contact me at 646-855-1180.

Sincerely,

A handwritten signature in black ink that reads "R. Scott Henderson". The signature is written in a cursive, slightly slanted style.

R. Scott Henderson