

February 3, 2011

**Filed Electronically**

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

Re: Proposed Definition of the Term “Fiduciary”

Ladies and Gentlemen:

We appreciate the opportunity to comment of the Department’s proposal of October 22, 2010, to redefine the circumstances in which a person is considered an investment advice fiduciary under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and section 4975 of the Internal Revenue Code of 1986, as amended (“Code”).

Our comments are provided on behalf of certain of the firm’s clients that are broker-dealers and advisers providing advisory, brokerage and related services, including through sponsoring advisory wrap programs and other platforms established with a view to providing support to third-party advisers.

Our clients share the Department’s sense of the import of this proposal. The existing definition of investment advice fiduciary in Reg. §2510.3-21(c) has informed 35 years of practice for the financial services industry. Plans and service providers alike have come to rely on that definition in providing for the retirement security of millions of participants and beneficiaries. Many of the essential services plans receive from financial services firms were adapted to and depend on this definition.

In proposing to redefine “investment advice fiduciary,” the Department is disturbing a central concept around which investment services for ERISA plans have been constructed. The fundamental and, in many cases, unique services performed by financial services firms for retirement plans have been acknowledged under ERISA literally since the enactment of the statute. Starting with PTE 75-1 through the Pension Protection Act, the Department and

Congress have, in a series of conscious and measured steps, developed an effective and largely workable regulatory structure for these services. As it must, this structure recognizes that financial services firms often, and perhaps even usually, are acting as service providers but not fiduciaries within the meaning of ERISA:

- There are entirely legitimate business reasons for financial services firms to limit their activities for plans to nonfiduciary services; the incremental risks and costs of acting as an ERISA fiduciary is for many firms beyond the prudent reach of their resources.
- Even more fundamentally, financial services firms are selling firms. They bring to market investment products and services for which they are typically and legally compensated on a commission basis. Under ERISA, this fundamental business model (which long predates the 1974 enactment of that statute) is entirely permissible for service providers but, as the Department reads Title I, not allowable for fiduciaries.

As a consequence, the regulatory structure carefully constructed by the Department makes provision for the many instances in which financial services firms limit their activities to nonfiduciary services (e.g., the exemptions in PTE 75-1 for principal and agency transactions) and the more limited instances in which financial services firms take on the function of investment advice fiduciary (e.g., PTE 84-24 and PTE 86-128).

The Department's efforts in this regard have been a success. The necessary services provided by financial services firms have largely remained available to ERISA plans on a mutually viable basis because the existing regulation provides a mechanism for firms and plans to distinguish between nonfiduciary and fiduciary services on a reasonably predictable basis. As a result, the reported instances in which financial services firms or their representatives have, within this regulatory structure, contravened the interests of plans in a manner proscribed by ERISA have been remarkably few.

The proposed redefinition of investment advice fiduciary has the potential to upend the Department's important work and disrupt the necessary investment services on which plans depend, to the detriment of their participants and beneficiaries. This starts with the proposed substitution of the new multi-part test (subsection (c)(1)(ii)(D) of the proposal) for the existing five-part test. The multi-part test does not offer a reliable means for informed parties to structure an investment service as a nonfiduciary service; in fact, it appears to be the Department's intention to preclude such structuring, at least pursuant to the multi-part test. Under the proposal, it even seems possible that the occasional recommendation to a plan of an investment by a registered representative or insurance agent, or of an investment adviser by a solicitor – understood to date to be selling activity rather than ERISA fiduciary activity in the ordinary course – may suffice to confer fiduciary status. The exceptions to investment advice fiduciary status could provide a solution but, in relevant part, as proposed they are crafted in such narrow terms that they will have little practical import. Thus, the Department's carefully balanced work of 35 years to assure that essential investment services remain available to plans is put at risk,

apparently as an unintended consequence of the proposal and certainly without explicit discussion in the preamble.

Our clients are greatly concerned – certainly in light of their own business interests, but also in the interest of the proper functioning of the financial services on which plans and their participants depend – that any redefinition adopted by the Department be limited to its intended and justified objectives and minimize unintended consequences. If the Department proceeds with the sweeping approach of the proposed regulation, rather than deal more directly with the specific cases it has identified as warranting a change in status under ERISA §3(21), we respectfully submit that the Department should:

1. Review in advance the effect of the redefinition on the existing regulatory structure and, if indicated, amend existing exemptions simultaneously with the effective date of any final regulation. It would be a counterproductive result if a proposal intended to advance the interests of plan participants and beneficiaries unintentionally had the perverse effect of even temporarily denying them access to the mutual funds, other securities, insurance products and investment services to which they are accustomed and on which their retirement security depends. Any such risk to the retirement system generally, and to the credibility of the ERISA regulatory regime, is both unacceptable and unnecessary. As part of its consideration of any final regulation, the Department should test the consequences of whatever fiduciary redefinition it ultimately develops under the complex of statutory and class exemptions that currently accommodate investment services. To the extent the redefinition works an unwarranted change in outcome under one or more of those exemptions, the Department should propose and adopt a solution for that dislocation, and should conform the effective date of the redefinition to the effective date of those solutions.

2. Expand the purchase or sale exception. Given the approach of the proposed regulation, it is essential that a distinction be made between nonfiduciary selling activity and fiduciary advice; that is a distinction recognized in long practice, accepted by the courts,<sup>1</sup> and necessary to the appropriate functioning of investment services for ERISA plans. The proposed “purchase or sale” limitation (subsection (c)(2)(i)) describes one such circumstance – that of a counterparty to an asset transaction that has the usual adverse interest to the plan and can appropriately state that it is not undertaking to provide impartial investment advice – but that is by no means the only circumstance where such an exception should be allowed. For example:

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<sup>1</sup> See, e.g., *Olson v. E.F. Hutton & Co.*, 957 F.2d 622 (8th Cir. 1992); *Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co.*, 884 F.2d 288 (7<sup>th</sup> Cir. 1989); *Ellis v. Rycenga Homes*, 484 F. Supp. 2d 694 (W.D. Mich. 2007); *Blevins Screw Products v. Prudential Bach Securities*, 835 F. Supp. 984 (W.D. Mich. 1993).

- Financial intermediaries act in a sales capacity in agency as well as principal transactions.
- For agency transactions, financial intermediaries do not have the adversity of interest typical of a counterparty.
- Financial intermediaries sell investment services (e.g., solicitations for investment advisers), as well as investment property.
- Significantly, financial intermediaries facilitating an investment transaction for a commission most often conceive of themselves as acting for the best interest of the client, and this regulation should do nothing to discourage that perspective even where the intermediary cannot serve as an ERISA fiduciary on the terms required by the Department.

To avoid disruption of the access of plans to essential investment services, the final regulation must provide an exception broad enough to encompass financial intermediaries acting in a sales rather than a fiduciary capacity in all these circumstances, in addition to the proposed counterparty exception. Moreover, these exceptions would function more effectively if they avoid the “swearing contest” created by the proposal and specify a straightforward and readily verifiable means for the parties to evidence that their relationship entails nonfiduciary selling activity rather than fiduciary advice.

3. Expand the exception for platform providers. The limitation of subsection (c)(2)(ii)(B) of the proposed rule – that the provision of a “platform” of investment options is not, in itself, investment advice – also is correct in principle but framed too narrowly. For example, registered investment advisers (“RIA”) may sponsor wrap fee programs, as defined by Rule 204-3(g)(4) of the Investment Advisers Act of 1940, which are often referred to as “platforms.” In some of these programs, the RIA only establishes the platform, providing organizational and/or administrative services to platform users (including, generally, other registered advisers who provide the advice), but not providing any investment advice in its role as a platform sponsor. In these circumstances, the “platform” limitation appears to offer the most reliable mechanism under the proposal to confirm that fiduciary status is not intended, but:

- The statement required by the proposed limitation that the RIA is not providing impartial advice is more confusing than helpful. In several respects, this formulation seems to impair the operation of the limitation as intended; and
- We cannot conceive of a reason why the result on this point should differ between defined benefit and individual account plans.

The final regulation should provide a broader exemption for platform providers that is available in respect of all ERISA plans and that more clearly works for the range of platform structures offered to plans.

4. Provide a separate definition for IRAs. The least functional aspect of the fiduciary structure enacted in ERISA is the application of Code §4975 to IRA service providers. IRAs are retail products, rather than workplace products. IRA owners choose their IRA and its investments from the universe of choices available in the market. For example, IRA owners can choose either commission-based products or advice-based accounts, and there are circumstances where the IRA owner's retirement income is maximized by one of those choices rather than the other. IRA owners are in privity with their IRA providers; if they have a complaint, they can either rollover to another IRA or pursue a legal remedy against the provider (other than under §4975, which provides no private right of action). Investment professionals work with their clients on IRAs in *pari passu* with other personal investments, and clients have an expectation that their investment professionals will integrate their IRAs into their overall portfolio asset allocation and investment selection. It makes no sense to IRA owners when otherwise permissible retail investments are available for their personal accounts but not for their IRAs by reason of §4975. And inferring from recent regulatory and enforcement activity, it appears that the Department and the Internal Revenue Service functionally concur. Whatever the merits of expanding the scope of investment advice fiduciary status for ERISA plans, those justifications do not extend to IRAs, and functionally constraining the availability of commission-based and certain other investment products does a disservice to IRA owners. At a minimum, the existing regulation should be retained for IRAs, and arguably fiduciary status should be limited to those investment professionals that accept that status in writing, which is substantially the outcome provided in practice by the existing regulation.

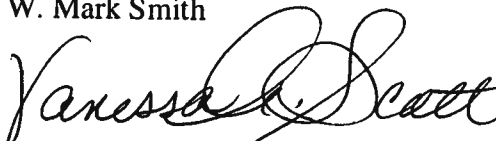
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We appreciate the opportunity to comment on the proposed regulation on behalf of our clients, and would be pleased to provide additional information or otherwise support the development of the final regulation.

Sincerely,



W. Mark Smith



Vanessa A. Scott