



February 3, 2011

Division of Regulations  
Employee Benefits Security Administration  
200 Constitution Avenue NW  
FP Building, Room N-5655  
Washington, DC 20210

Submitted to: e-ORI@dol.gov

Re: **Definition of Fiduciary Proposed Rule**

Ladies and Gentlemen:

AARP appreciates the opportunity to comment on the Department of Labor's (Department) request for comments on the proposed amendment to 29 CFR § 2510.3-21(c), the regulation interpreting ERISA § 3(21)(A)(ii), to establish additional circumstances where investment advice providers are subject to ERISA's fiduciary responsibilities. AARP supports the Department's review of this regulation given that the current manner in which employee benefits are provided is significantly different from the situation in 1975; indeed, the retirement benefits industry has changed dramatically with the shift from defined benefit plans to defined contribution plans. Consequently, AARP believes that a revision of this regulation to reflect the practices in the current market place is needed to better protect the interests of plans and their participants and beneficiaries.

AARP is the largest nonprofit, nonpartisan organization representing the interests of Americans age 50 and older and their families. Nearly half of our members are employed, full or part-time, with many of those employers providing retirement plans. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift away from defined pension plans to defined contribution plans has placed significant responsibility on individuals to make appropriate investment choices so that they have adequate income to fund their retirement years.

In order to help individuals make appropriate investment decisions, AARP shares the goal of increasing access to investment advice for individual account plan

participants. To that end, we have consistently asserted that such advice must be subject to the Employee Retirement Income Security Act's (ERISA) fiduciary rules, based on sound investment principles and protected from conflicts of interest. The recent financial turmoil and scandals underscore the imperative that such advice is independent and non-conflicted, and the standards governing industry practices involved in rendering investment advice are fair, clear and easy to understand.

AARP submits the following specific comments on the proposed regulations:

- I. **Description of What Constitutes Investment Advice:** AARP favors the Department's inclusion of appraisals and fairness opinions concerning the value of securities or other property as the type of activities that constitute investment advice. Moreover, AARP supports the inclusion of advice related to the management of securities or other property, such as recommendations as to the exercise of rights appurtenant to shares of stock (*i.e.*, proxy voting) and the selection of persons to manage plan investments. It appears to AARP that such appurtenant rights are no less property interests than are the underlying property to which they are appurtenant, and it would undermine protection of all such property to exclude any aspect of the property.

AARP believes that the added benefits to plan fiduciaries, participants and beneficiaries of broadening the scope of activities under the definition of investment advice are substantial. At the same time, AARP believes, and it has yet to be demonstrated otherwise, that incremental burdens, economic or other, of including all such activities are relatively minor. Finally, AARP believes that the Department's inclusion of plan participants and beneficiaries within the protective arch of the proposed regulation squarely hits the mark, inasmuch as the explicit purpose of ERISA is to protect participants and beneficiaries. See Title I – Protection of Employee Benefit Rights and ERISA § 2.

- II. **Recommendations Related to Taking a Plan Distribution:** The Department has requested comment on whether and to what extent the final regulation should define the provision of investment advice to encompass recommendations related to taking a plan distribution. AARP believes that it is essential for the proposed regulation to include investment adviser activities that touch the distribution of assets from all forms of employer-sponsored retirement plans. In this regard, AARP

points to the fact that the distribution stage and process is critical in the cycle of plan participant events in that decisions made with respect to the timing and manner of plan distributions will often determine the efficacy of a working lifetime of retirement savings. In short, a plan participant is in an extremely critical position at distribution decision-making time regarding how to take distributions from his or her retirement plan. Decisions made at that time are often effectively irreversible, at least in a practical sense, on account of the fact that tax consequences and transaction costs generally make it impractical even to consider backing up the distribution election. Thus, it is essential for the participant to have the protection of ERISA's fiduciary duty cloak attaching to the investment adviser who undertakes to guide a participant at election time.

**III. Frequency or Regularity of Investment Advice:** AARP applauds the proposed rule insofar as it does not require investment advice to be rendered with any particular frequency or regularity in order to subject the adviser to ERISA's fiduciary standards. AARP believes this approach comports with ERISA's overall aim to protect plans and particularly plan participants, and that any consideration, not to mention emphasis, on frequency or regularity in this arena would severely depart from the statute's prescribed standard of conduct applicable to those upon whom plans and participants rely in order to formulate and implement investment decisions. AARP believes that this issue goes to one of the primary reasons ERISA was enacted, and that the stakes are too high for any rule to compromise the point. To carry the point to its appropriate logical extension, the proposed rule rightly omits any requirement that the parties have a mutual understanding that the advice will serve as a primary basis for plan (or participant) investment decisions. Rather, the proposed rule essentially embeds an irrebuttable presumption that fiduciary status attaches to a financial adviser with respect to whom it is understood by the parties that the adviser's advice will be considered in connection with making a decision related to plan assets. AARP endorses this allocation of rights and responsibilities as between adviser and plan/participant.

**IV. Proposed Limitations as to Fiduciary Designation:** AARP has significant concerns about the potential interpretation and breadth of the limitations set forth in § 2510.3-(21)(c)(2)(i) of the proposed rule. The general definitional provisions of the proposed rule, set out in § 2510.3-(21)(c)(1)(i) and (ii) are explicitly subject to the limitations set forth in §

2510.3-(21)(c)(2)(i). Specifically, the limitation removes from the definition of fiduciary persons who “can demonstrate that the recipient of advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.” In practical application, the limitation transfers to the adviser who would seek its benefit the burden of proving entitlement. AARP believes that, as written, the proposed limitation dilutes the value of the remainder of the proposed rule as well as the Pension Protection Act’s investment advice provisions.

**A. Per se Exclusion from Limitation of Individual Plan Participants:**

AARP believes that the limitations of proposed § 2510.3-(21)(c)(2)(i) should not be applicable in any case to advice rendered to individual plan participants. In other words, the rebuttable presumption of fiduciary status that appears to be the rule of the proposed regulation should be revisited and discarded as contrary to ERISA’s statutory safeguards expressed in the Pension Protection Act to protect against the rendering of conflicted investment advice to plan participants.<sup>1</sup> Thus, AARP believes that the Department would overstep its powers to include individual plan participants within the ERISA parties with respect to whom the exceptions to fiduciary status stated in proposed § 2510.3-(21)(c)(2)(i) may be asserted.

**B. Plan Protections from Limitations:** AARP believes that investment advisers to plans and plan fiduciaries should be required under any proposed limitation to overcome a rigorous presumption of fiduciary status in order to escape such status. Because the objective of ERISA and its interpretive regulations is to protect plan participants, rather than to promote the ease of vendors and service providers doing business with ERISA plans, AARP submits that the proposed limitation as to the fiduciary designation should be conditioned upon (1) satisfactory compliance by the adviser with a comprehensive disclosure regimen, (2) incorporating a statement of the conflict or conflicts inherent in the proposed relationship, (3) a full disclosure of all sources and amounts of fees or other compensation to inure to the

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<sup>1</sup> See ERISA § § 408(b)(14) and 408(g), setting forth rigorous standards for conflicted investment advisers.

investment adviser, and (4) a clear and unequivocal acknowledgement of the conflict by the small plan's fiduciary. Finally, the investment adviser who seeks the shelter of the limitation should have the obligation to maintain full and sufficient records documenting the applicability of the limitation for a suitable period following the rendering of the excepted investment adviser services.

- V. **Assisting Plan Fiduciary to Select and Monitor Investments:** In connection with § 2510.3-(21)(c)(2)(ii)(B) and (C), AARP understands that the Department seeks to relieve investment advisers from the burdens of fiduciary status in connection with the adviser's role in assisting a plan fiduciary to carry out its plan administration responsibilities to select and monitor plan investment options, and the adviser properly disclaims fiduciary status in connection with its activities. AARP believes, however, that the general language of the proposed rule paints with too broad a brush, and that it would be appropriate for the Department to revisit that aspect of the regulation with an eye toward recognizing the significance of the investment selection and monitoring process.

At least three circuit courts have held that in a section 404(c) plan a fiduciary's duty does not include the selection and monitoring of investment options. See, e.g., *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Langbecker v. Electronic Data Sys.*, 476 F.3d 299, 307 (5th Cir. 2007); *Jenkins v. Yaeger*, 444 F.3d 916 (7th Cir. 2006); accord, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 455 (3d Cir. 1996) (*in dicta*); contra, *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n. 3 (4th Cir. 2007). These decisions indicate that courts would permit fiduciaries to choose all underperforming funds as investment options without finding a violation of ERISA's prudence standards. We believe that in the preamble the Department should remind fiduciaries that consistent with its recent amendment to the interpretive regulations under section 404(c) the selection and monitoring of investment options are a fiduciary function. We reiterate this position here because the implications are obvious.

Division of Regulations

February 3, 2011

Page 6

AARP appreciates this opportunity to provide its views on the proposed amendment to the regulation related to the definition of a fiduciary in connection with investment advice providers to ERISA retirement plans. If you have any questions, please do not hesitate to contact Tom Nicholls at 202.434.3765 or Jay Sushelsky at 202.434.2151.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner  
Legislative Counsel & Legislative Policy Director

cc: Robert Doyle  
Director, Office of Regulations and Interpretations  
Jeffrey Turner  
Chief, Division of Regulations