



**VIA E-MAIL: E-ORI@DOL.GOV**

February 2, 2011

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

**Re: Definition of Fiduciary Proposed Rule 29 C.F.R. § 2510.3-21(c) (RIN 1210-AB32)**

Ladies and Gentlemen:

This letter is submitted by the Society of Human Resources Management ("SHRM") in response to the request for comments by the Employee Benefits Security Administration ("EBSA") on its proposal to revise 29 C.F.R. § 2510.3-21(c) by expanding the definition of "fiduciary" who renders "investment advice".

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. Many of our members perform in-house fiduciary functions relating to their employers' sponsored pension plans.

### **INTRODUCTION**

We appreciate the Department of Labor's efforts to update the regulations on the definition of a fiduciary that provides investment advice with respect to plan monies or other assets. We wholeheartedly agree that significant changes have occurred in the last 35 years (when the current rule was first promulgated) in the financial industry servicing the retirement plan community that justify the revocation of the current five-part test used to determine whether a person is a fiduciary by reason of rendering investment advice. Plan sponsors should be able to rely on persons holding themselves out as investment experts and those experts providing

investment advice for a fee should be fiduciaries under ERISA, even though the advice may not be given on a "regular basis" or may not serve as the "primary basis" for investment decisions. SHRM's specific comments follow.

## **COMMENTS**

### **(1) PROFESSIONALS WHO PROVIDE APPRAISALS AND FAIRNESS OPINIONS REGARDING THE VALUE OF SECURITIES OR OTHER PROPERTIES SHOULD NOT BE DEEMED FIDUCIARIES UNDER ERISA.**

In explaining its proposal to include the provision of appraisals and fairness opinions as investment advice, DOL noted that a common problem encountered in the recent ESOP National Enforcement Project was faulty valuations of employer securities prepared by professional appraisers and relied on by plan fiduciaries. DOL stated that imposing fiduciary status and the concomitant ERISA fiduciary duties on persons providing appraisals and fairness opinions will better align the duties of the persons who provide such opinions with those of fiduciaries who rely upon them.

SHRM believes that this approach will be detrimental to the plan sponsor community. The imposition of ERISA fiduciary duties on appraisers, financial experts and other professionals who render fairness opinions will assuredly drive up the costs of experts and reduce the number of experts who will agree to provide services to these plans and their fiduciaries. Plan sponsors already incur substantial expenses and expend time and effort in administering their employee benefit plans and assuring compliance with laws governing the plans. Adding to this expense will only cause employers to drop their retirement plans or discourage the establishment of such plans.

Moreover, by making an appraiser or other expert an ERISA fiduciary, it would change the current framework of the federal common law governing ERISA fiduciary duties. Under the current legal regime, an appraisal or fairness opinion is usually obtained by the plan fiduciaries to assist them in making decisions regarding the value of employer securities and other assets which may be held in a plan. The plan fiduciary has the primary obligation to reasonably investigate the merits of any particular transaction and if the plan fiduciary lacks the expertise to make a determination, he/she is obligated to obtain the assistance of an expert. However, even where an expert is retained to provide assistance to the plan fiduciary, the plan fiduciary must still exercise his/her own independent judgment regarding the issue at hand. The plan fiduciary cannot rely solely on expert advice. Rather, the plan fiduciary must evaluate the expert's report, ask questions that a sophisticated investor would ask, assess the responses, and ultimately make the judgment whether or not to rely on the valuation.

Under the proposed regulation, the plan fiduciary would not be retaining the expert to provide advice to him/her, but rather would be hiring a fiduciary to render a decision on behalf of the plan. If the expert fiduciary provides a determination as to the value of assets or the fairness of a transaction, the plan fiduciary would be foolish not to rely on the fiduciary expert advice or report.

Nothing in the ERISA statute requires a wholesale revision of the law as developed by the federal courts. What standards will apply to the expert fiduciaries? If an expert does not fulfill his/her

professional standard, will the plan fiduciary be precluded from suing him/her under state law? Will professional malpractice/negligence actions all be governed by ERISA and triable only in federal courts without a jury?

SHRM does not believe the DOL's proposal will correct any problems with valuations. SHRM recommends instead that DOL enact regulations setting standards for valuations of employer stock and other plan assets and defining who should be allowed to prepare employer stock valuations.

**(2) INVESTMENT ADVICE SHOULD ENCOMPASS RECOMMENDATIONS TO PARTICIPANTS ON PLAN DISTRIBUTIONS, ESPECIALLY WHEN THE RECOMMENDATION IS COMBINED WITH A RECOMMENDATION WITH HOW THE DISTRIBUTION SHOULD BE INVESTED.**

In Advisory Opinion 2005-23A, the DOL indicated that an advisor recommending to a participant to take a distribution (even when combined with a recommendation on how to invest) is not "investment advice," since the distributed funds would not constitute plan assets. However, if such advice is provided by an individual who is already a plan fiduciary, then the fiduciary may be exercising discretionary authority respecting management of the plan or its assets. The DOL has asked whether the standards set forth in the Advisory Opinion should be changed. SHRM believes that these standards should be changed and urges the DOL to adopt a simple rule that says investment advice will include recommendations to a participant to take a distribution of plan assets. The participant who terminates his/her employment may have the choice to keep their account balances in the plan until retirement. Thus, advice to take a distribution (whether in-service or after termination) relates to how those monies should be invested. Moreover, advice or recommendations regarding where to invest those assets outside of the plan provided while those assets remain in the plan should likewise constitute investment advice. This recommended change of position is consistent with the statute as written to extend fiduciary status to persons providing advice for a fee "with respect to any monies or other property of such plan."

**(3) THE DOL SHOULD REQUIRE THAT A PERSON REPRESENTING A PURCHASER OR SELLER OF A SECURITY OR OTHER PROPERTY PROVIDE A WRITTEN STATEMENT THAT HE/SHE IS PROVIDING ADVICE IN ITS CAPACITY AS A PURCHASER OR SELLER WHOSE INTERESTS ARE ADVERSE AND IS NOT UNDERTAKING TO PROVIDE IMPARTIAL INVESTMENT ADVICE.**

In the proposed regulation at 29 C.F.R. § 2510.3-21(c)(2), there are several exceptions to the general definition of "investment advice." One such exception is in § 2510.3-21(c)(2)(i) which provides that a person shall not be considered to be providing "investment advice" if the person can demonstrate that the recipient reasonably should know, that the person is providing advice or making a recommendation in its capacity as a purchaser or seller of a security or property (whose interests are adverse to the plan and its participants and beneficiaries) and the person is not undertaking to provide impartial investment advice. This proposed rule focuses on the plan fiduciary's or the plan participant's or beneficiary's subjective knowledge and would operate as an affirmative defense.

SHRM believes that this exception should apply only when the person discloses in writing in a prominent fashion to the plan fiduciary or participant or beneficiary that he/she (i) is not an ERISA

fiduciary; (ii) is representing the purchaser or seller of a security or property whose interests are adverse to those of the plan and its participants and beneficiaries; and (iii) is not providing impartial investment advice. Many times, plan fiduciaries and participants and beneficiaries may unknowingly rely upon the advice of persons who have conflicts of interests. These conflicts may not be disclosed or, if disclosed, the disclosure is done in such a way as to obfuscate what the conflicts are and how these conflicts may impinge upon the advice. SHRM believes that a clear concise statement as enumerated above should provide clear warning to plan fiduciaries and participants and beneficiaries that the advisor's opinions should not be relied upon.

**CONCLUSION**

SHRM supports DOL's efforts in updating the definition of fiduciary providing investment advice. Most of the proposed changes will provide much needed assurances that advisers to plan fiduciaries and participants and beneficiaries will not be able to easily evade ERISA fiduciary status. However, there are some areas, as described above, that we believe warrant further consideration and need to be revised.

We appreciate the opportunity to comment on these important regulations. Should you have any questions or need additional information, please contact Nancy Hammer at (703) 535-6030.

Sincerely,



Nancy Hammer  
Society for Human Resource Management