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Office of Regulations and Interpretations
Attn: Public Hearing on Definition of Fiduciary
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC, 20210

Subject: Public Hearing on Definition of Fiduciary

Greetings:

On behalf of the American Council of Life Insurers¹ (“ACLI”), we write to you today on the proposed rule promulgated under Section 3(21)(A)(ii) of the Employee Retirement Income Security Act (“ERISA”), which was published at 75 Fed. Reg. 65263 (October 22, 2010) (“Proposed Rule” or “Rule”) and to offer a response to questions raised at the March 1st hearing by DOL staff to our witness Thomas Roberts.

Clarification of Seller’s Limitation

In our February 3rd comment letter and in our testimony, we asked that the proposal be modified to provide examples of circumstances that would reasonably demonstrate that the recipient of information knows that a recommendation is being made by a “seller.” One example would be a representation that:

¹ The American Council of Life Insurers is a national trade organization with more than 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension, 401(k) and 403(b) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

The person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation in the event the plan, plan fiduciary or participant/individual selects the products and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected.

The proposed regulation provides that the seller's limitation is not applicable to a person "who represents or acknowledges that it is an ERISA Fiduciary." Our letter states that this constraint on the seller's limitation should only apply if the seller has represented or acknowledged in writing (electronic or otherwise) that it was a fiduciary.

During our testimony it was suggested that the seller's limitation might be protected by some form of disclosure stating that the seller was not an ERISA Fiduciary. Such a disclosure could be added to the representation (described above) that the "person is a seller"

In addition to examples, the rule could include one or more safe harbor model notices. For example:

I, (Name), am a representative of (Agency/Company). I would like to be of assistance to you. Before we proceed, I need to be clear with you that my firm and I may have a financial interest in the sale of any product or transaction that we might recommend to you. Our financial incentive to recommend a particular product or investment may vary by asset class, investment choices or product type, or according to the particular investments available within a given asset class or product type. My firm and I do not agree to act as your ERISA fiduciary investment advice provider. An ERISA fiduciary is not permitted to take its own financial interests into account when making a recommendation.

In certain circumstances, it may be appropriate to bifurcate this disclosure to make clear that, while the selling firm does not agree to serve as an ERISA fiduciary investment advice provider in connection with recommendations made by the particular representative making the disclosure, it may agree to serve as an ERISA fiduciary investment advice provider in connection with recommendations made outside of the scope of the relationship between the representative and the plan, plan fiduciary or participant/individual to whom the disclosure is made. In such cases, the disclosure should be revised to remove all references to the selling firm and add the following:

I also need to be clear with you that my firm may have a financial interest in the sale of any product or transaction that I might recommend to you and my firm does not agree to act as your ERISA fiduciary investment advisor in connection with any of my recommendations.

This type of representation would provide a clear indication to the plan, plan fiduciary or participant that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest.

As you are aware, regulatory efforts are underway by the Securities and Exchange Commission ("SEC") regarding the standard of care for broker-dealers and investment advisers that provide investment advice about securities to retail customers. Depending upon the SEC's actions, there may be a need to expand this "seller's" disclosure to describe the seller's status and obligations under federal securities law including whether the seller is a fiduciary under federal securities law.

Finally, the Department should clarify that, for purposes of the seller's limitation, the "recipient" of advice or recommendations may be the plan, the plan's sponsor or other plan fiduciary, plan participant, plan beneficiary or an individual (*in the case of an individual retirement arrangement*).

Proposed Rule and Exemptive Relief

In light of the substantive comment letters and testimony at the hearing, we expect that the Department will make a number of useful revisions to the Proposed Rule. With substantive revisions, the Department should provide the public with an opportunity to review and comment on the next iteration of the rule before a final rule is promulgated. The current Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply, by re-defining and substantially broadening the concept of rendering "investment advice for a fee" within the meaning of ERISA Section 3(21)(a)(ii).

At the hearing, we were asked about compensation disclosure and noted that the Prohibited Transaction Exemption 84-24 requires such disclosure. We note this exchange to emphasize the need for the Department to confirm the status of current exemptions and solicit public input on whether amendments are needed to existing exemptions and/or whether new exemptions are in order.

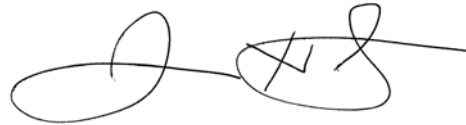
We ask that the Department issue a new proposal together with any proposed changes to or confirmations of exemptive relief. We believe it is important to review and comment on these together. We remain committed to offering comments that seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

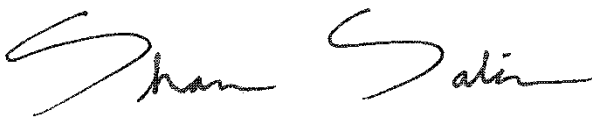
Sincerely yours,



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