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DELIVERED VIA E-MAIL TO e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefit Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of Fiduciary Proposed Rule, 29 CFR §2510.3-21(c)

To Whom It May Concern:

Fi360¹ appreciates the opportunity to provide additional comments on the proposal to broaden the definition of “fiduciary” under Section 3(21) of the Employee Retirement Income Security Act (“ERISA”) and the related regulation at 29 CFR §2510.3-21(c). We reiterate our support of the Department of Labor’s (the “Department”) efforts to provide greater protection for retirement plans and their participants and beneficiaries,² and seek to provide additional comments addressing specific issues raised prior to and during the Department’s hearings March 1 and 2, 2011.

During the comment period and testimony, several commenters noted their concern that costs will increase for plans and participants. However, while these commenters generally refer to “costs” and to several categories of costs (*e.g.*, compliance, retraining, fiduciary litigation), rarely

¹ Fi360 offers a full circle approach to investment fiduciary education, practice management, and support. Our mission is to promote a culture of fiduciary responsibility and improve the decision making processes of investment fiduciaries, including investment advisors, managers, and stewards. With legally substantiated Practices as our foundation, we offer training, tools, and resources in support of that mission. We also manage the Accredited Investment Fiduciary® (AIF®) and Accredited Investment Fiduciary Analyst™ (AIFA®) designation programs. AIF designees receive training that provides a unique comprehensive overview of fiduciary standards of excellence, asset allocation, preparation of investment policy statements, manager search and due diligence, performance measurement, and other related subjects. AIFA designee training builds on that foundation and prepares students to provide Fiduciary Assessments to institutions. At present, there are over 4,800 active AIF and AIFA designees.

² Fi360 submitted its original set of comments in support of the Department’s proposal on February 3, 2011, <http://www.dol.gov/ebsa/pdf/1210-AB32-151.pdf>.

do the commenters attempt to substantiate the basis for their analysis, summarily concluding that the costs will outweigh any potential benefit derived from the Department's proposal.³ In cases where summary data or assumptions of cost are provided, no corresponding raw data for these summaries and assumptions are provided.⁴ Although one large service provider quantified costs associated with compliance with other regulations during the March hearing, one isolated example from a particular provider is not necessarily demonstrative for an entire industry of various providers nor for this particular regulatory proposal, which differs in some respects from other recent regulatory changes.⁵

In addition, one commenter points to the SEC staff's study of broker-dealer and investment adviser obligations as a basis for identifying costs.⁶ This commenter, however, fails to recognize that SEC staff in most cases only stated that services offered "might" change and that costs "may" or "could" change as the result of a uniform fiduciary standard being implemented by the SEC.⁷ While the SEC and Department have asked for quantitative proof of costs, commenters failed to provide it during the SEC staff's study and the Department's comment period for the current proposal.⁸ Moreover, commenters have failed to distinguish between one-time costs and ongoing costs and how these expenditures will affect plans and participants. In addition, it is clear that certain commenters are most concerned about costs as they relate to IRAs, while others are focused more on costs related to plans, but at times these commenters failed to clearly distinguish between the two.

We would also note that while we believe thorough analysis of the costs and benefits associated with any regulatory proposal is essential, when dealing with fiduciary regulation and the protections it affords to investors, we believe that a broader analysis

³ See, e.g., U.S. Department of Labor Employee Benefits Security Administration Public Hearing, Definition of Fiduciary Investment Advice, 84-94, (Mar. 1, 2011) ("March 1 Definition of Fiduciary Hearing") (statement of Ken Bentsen, Executive Vice President for Public Policy and Advocacy, Securities Industry and Financial Markets Association ("SIFMA")), at <http://www.dol.gov/ebsa/pdf/1210-AB32-HearingTranscript1.pdf>.

⁴ See, e.g., March 1 Definition of Fiduciary Hearing, 196-197 (statement of Jim McCarthy, Managing Director, Morgan Stanley Smith Barney); Comment Letter from T. Timothy Ryan, Jr., President and CEO, SIFMA, Feb. 3, 2011 ("SIFMA Letter"), available at <http://www.dol.gov/ebsa/pdf/1210-AB32-HearingTranscript1.pdf> (citing study conducted by Oliver Wyman).

⁵ See March 1 Definition of Fiduciary Hearing at 218-222 (statement of Jim McCarthy, Managing Director, Morgan Stanley Smith Barney).

⁶ SIFMA Letter at 9, 15 n.23.

⁷ See Staff of the U.S. Securities and Exchange Commission, "Study on Investment Advisers and Broker-Dealers," 146-165, January 2011 ("SEC Fiduciary Study"), at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

⁸ See, e.g., SEC Fiduciary Study, at 144 ("Generally, commenters did not quantify particular costs or even give a range of costs that they would incur for the various potential outcomes.").

needs to include potential losses and benefits to plan participants and their beneficiaries under fiduciary principles. Stated another way, at what point should relationships based on fiduciary principles of care and loyalty be compromised or diminished in order to protect business interests over the interests of plans and participants? The history of fiduciary principles is grounded in the recognition that investors place their trust in and rely on an expert service provided by fiduciary advisors. And in the instant case, the Department thought it was necessary to act because of the difficulties experienced by Department investigators in determining fiduciary status of certain service providers and advisors to plans.⁹ Thus, we believe that while it is important to ensure that plans and participants will have access to products and services, it is just important to ensure that the determination of fiduciary status be addressed in a way that does not permit those holding a position of trust to evade, purposely or otherwise, the intent of Congress in originally imposing fiduciary obligations.

Finally, we would like to address assertions that the Department's actions are inconsistent with the Dodd-Frank Act and related SEC actions.¹⁰ We believe such statements are misleading and mischaracterize the state of regulatory affairs in Washington today. While it is true the SEC was granted authority to adopt rules setting forth a fiduciary standard of care for both broker-dealers and investment advisers, the SEC operates under a different legislative structure than the Department and is also in a much different posture with regard to its current rulemaking initiatives. In fact, while SEC staff has released a report on broker and adviser obligations, the SEC has yet to propose any rules which can be compared to the Department's current initiative.¹¹ As we have previously stated, we believe it is important for the Department to be aware of new SEC initiatives, but an impending rulemaking alone is not a reason to delay overdue clarification of ambiguities in existing law that ultimately provides greater protection for plans and participants.

⁹ See U.S. Department of Labor Employee Benefits Security Administration Public Hearing, Definition of Fiduciary Investment Advice, 47, (Mar. 2, 2011) (statement of Alan Lebowitz, Deputy Assistant Secretary for the Employee Benefits Security Administration), at <http://www.dol.gov/ebsa/pdf/1210-AB32-HearingTranscript2.pdf>; Definition of the Term "Fiduciary," 75 Fed. Reg. 65,263, 65,265 & 65,2675 (Oct. 22, 2010).

¹⁰ See March 1 Definition of Fiduciary Hearing at 86, 195-196 (statements of Ken Bentsen, Executive Vice President for Public Policy and Advocacy, SIFMA, and Jim McCarthy, Managing Director, Morgan Stanley Smith Barney).

¹¹ Recent statements by SEC senior staff and industry observers indicate that the SEC likely will not have a proposal until late 2011 at the earliest. See Joseph Giannone, *US SEC sees fiduciary standard rules late in 2011*, Reuters (Apr. 7, 2011), available at <http://www.reuters.com/article/2011/04/07/wallstreet-regulations-idUSN0720336220110407>. Based on such statements, it is not even clear that SEC staff have begun to draft proposed rules for the Commission to consider.

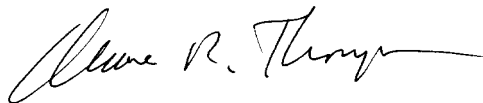
Conclusion

We truly appreciate the opportunity to provide our views on these important issues. Please do not hesitate to contact us at (412) 221-0292 if you have any questions or would like additional information.

Sincerely,



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CEO



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