



The
ERISA
Industry
Committee

February 2, 2011

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

Re: Comments on Proposed Definition of Fiduciary (RIN 1210-AB32)

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to submit these comments on the proposal to change the definition of the term “fiduciary.” The proposal is set forth in a proposed regulation that was published in the *Federal Register* on October 22, 2010.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America’s largest employers. ERIC’s members provide comprehensive retirement, health care, and other economic security benefits directly to tens of millions of active and retired workers and their families. ERIC has a strong interest in proposals affecting its members’ ability to deliver attractive benefits efficiently.

ERIC understands the Department’s desire to update the definition of “fiduciary” to reflect changes in the retirement plan community and financial marketplace since 1975. ERIC supports clear guidelines to ensure that persons who provide investment advice to plan fiduciaries and/or participants and beneficiaries are subject to ERISA’s fiduciary standards. However, before significantly broadening the scope of the fiduciary definition, the Department should consider carefully the unintended consequences that can result from swinging the pendulum too far in the other direction.

In particular, it is important to take into account the costs that service providers who are treated as fiduciaries are likely to pass through to plans. These costs might include, for example, new insurance costs and a fee premium for being exposed to new legal risks. ERIC is also concerned that if the fiduciary definition is broadened too much, the risk of liability might cause well-intentioned stakeholders to refrain from providing informal assistance to plan participants, beneficiaries, and others who are in need. In addition, the final regulation should be clarified to ensure that common transactions do not become prohibited as a result of adverse parties being treated as fiduciaries, and that the new fiduciary definition does not apply with respect to advice provided before the final regulation becomes effective.

Summary of Comments

1. ERIC recommends the following changes to ensure that well-intentioned stakeholders can offer informal assistance without the risk of fiduciary liability:
 - a. The final regulation should include a safe harbor for advisers whose principal responsibilities do not include providing investment advice. These advisers should not be treated as fiduciaries if they indicate orally or in writing the scope of their role and that they are not investment advisers and are not undertaking to provide investment advice. *See* Part 1.a, beginning on page 3, below.
 - b. The proposal to apply fiduciary standards to advice provided “pursuant to an agreement, arrangement or understanding . . . that such advice may be considered in connection with making investment or management decisions” should be changed to apply only if there is a “*mutual* agreement, arrangement or understanding . . . that such advice *will be a material consideration in a pending* investment or management decision.” *See* Part 1.b, beginning on page 4, below.
 - c. The final regulation should clarify that the “for a fee” condition is not satisfied unless (i) the adviser is engaged and paid to provide investment advice, or (ii) the adviser’s compensation will be affected if the investment advice is followed. *See* Part 1.c, beginning on page 5, below.
 - d. A fiduciary who is not responsible for providing investment advice should not be treated differently than anyone else who is not responsible for investment advice. *See* Part 1.d, on page 6, below.
2. Advice on whether to take a distribution should be treated like investment advice if (and only if) the advice is provided by an adviser who (a) is engaged before the distribution occurs for his or her investment or financial planning expertise, or (b) stands to gain from an investment decision related to the distribution. *See* Part 2, beginning on page 6, below.
3. With respect to any transaction, a person whose interests are adverse to the plan (or a participant or beneficiary) should not be treated as a fiduciary if he or she has taken reasonable steps to ensure that the recipient of the advice knows that the adviser is not undertaking to provide impartial investment advice. *See* Part 3, beginning on page 7, below.
4. Appraisals and fairness opinions should not be treated like investment advice unless (a) the appraisal or fairness opinion relates to a plan asset or property that will become a plan asset if it is purchased, and (b) there is a mutual understanding that the fairness opinion will be relied upon in a decision to buy or sell the property. *See* Part 4, beginning on page 8, below.
5. The final regulation should state expressly that it may not be taken into account with respect to advice provided before the effective date of the final regulation. *See* Part 5, beginning on page 9, below.

Discussion

1. Informal Assistance vs. Investment Advice

ERIC understands the Department's concern that the existing definition of "fiduciary" might be too narrow. However, ERIC is concerned that if the definition is broadened too much, the fear of fiduciary liability will chill well-intentioned stakeholders' willingness to help others. As outlined below, ERIC recommends four changes to avoid this unintended consequence.

a. *Safe Harbor for Advisers Who Do Not Undertake to Provide Investment Advice*

The final regulation should include a safe harbor carve-out that applies if the following conditions are satisfied:

- i. The adviser's principal responsibilities do not include providing investment advice; and
- ii. The adviser indicates orally or in writing—
 - The scope of the adviser's role, and
 - That he or she is not an investment adviser and is not undertaking to provide investment advice.

This safe harbor is an appropriate extension of the carve-outs in Section 2550.3-21(c)(2) of the proposed regulation. The following examples illustrate the safe harbor:

- **Example 1.** Employer maintains a call center for participants with questions about Employer's participant-directed section 401(k) plan. Call center representatives are not responsible for providing investment advice, and are not authorized to provide investment advice. Rather, call center representatives are responsible for answering questions about how the plan works, such as how to make deferral elections, the plan's rules for taking a distribution, and where to find information about the plan's investment options. Participant asks a call center representative whether the LMNO investment option is a good investment, and the representative gives an unauthorized answer. The representative's employer and plan sponsor should not be subject to fiduciary liability if the materials informing participants about the call center describe the purpose of the call center, and state that the call center is not a source of investment advice and should not be used as such.
- **Example 2.** Attorney advises Employer on fiduciary issues related to Employer's plan. In the course of advising Employer, attorney recommends that Employer engage an investment manager. Attorney states that ABC Managers has an excellent reputation and suggests that Employer interview ABC Managers. If Attorney has made clear that she does not intend to provide investment advice, suggesting that Employer interview ABC Managers should not make Attorney a fiduciary.

- **Example 3.** Employer distributes to plan participants a monthly newsletter with information about Employer’s participant-directed savings plan. One newsletter includes a letter from the manager of the plan’s stable value fund, stating that the stable value fund is a safe investment. Another newsletter includes a report by a research firm with a sell rating on one of the plan’s investment options. If the newsletters state that they should not be treated as investment advice, the employer should not be treated as a fiduciary solely by reason of passing along the investment information.

In each of the examples, the carve-out for investment education, the requirement that investment advice be individualized, and/or the requirement that investment advice be provided for a fee (see Part 1.c, below) might be sufficient to ensure that the well-intentioned adviser is not treated as a fiduciary. However, in light of the consequences that can result from a misunderstanding or an inadvertent mistake, and the lack of a bright line between investment advice and investment education, ERIC respectfully requests a safe harbor to help stakeholders stay on the intended side of the line.

A safe harbor would also improve the quality and consistency of advice, increase compliance, and protect the recipients of advice and other information. First, well-intentioned stakeholders who do not hold themselves out as investment advisers will have clear guidelines on the extent to which they can offer informal assistance without being subject to fiduciary liability. Second, advisers who are not willing to take the steps required to fit into the safe harbor will be compelled to satisfy the fiduciary standards.

b. ***Reasonable Boundaries for the Proposed “May Be Considered” Standard***

The proposed regulation would replace a requirement that investment advice be provided—

“on a ***regular basis*** . . . pursuant to a ***mutual*** agreement, arrangement or understanding . . . that such [advice] will serve as a ***primary basis*** for investment decisions” . . .

with a requirement that the investment advice merely be provided—

“pursuant to an agreement, arrangement or understanding . . . that such advice ***may be considered*** in connection with making investment or management decisions.”

(Emphasis added.)

ERIC understands the Department’s concern that the existing “regular” and “primary” basis requirements may exclude significant advice provided on major transactions. However, the proposed standard is deficient in two significant ways:

- i. The “may be considered” standard is too broad. ***All*** advice, even an off-the-cuff answer to an informal question, “may be considered.”

- ii. Eliminating the term “mutual” from the phrase “mutual agreement, arrangement or understanding” can make a well-intentioned adviser responsible for a misunderstanding. For example, suppose that the attorney described in Example 2, in Part a, above, told Employer that she would not be providing investment advice, but Employer nevertheless claims that it understood Attorney’s recommendation to interview ABC Managers to be advice that may be considered in connection with making the investment decision. This kind of misunderstanding should not make Attorney a fiduciary.

In order to address these concerns, ERIC proposes revising the relevant phrase in proposed Section § 2510.3-21(c)(1)(i)(D) by adding back the word “mutual” and adding a materiality standard. The following phrase would be more appropriate:

“ . . . pursuant to a *mutual* agreement, arrangement or understanding . . . that such advice *will* be *a material consideration in a pending investment or management decision . . .*”

This language would resolve the Department’s concerns with the existing “regular” and “primary” basis standard, without sweeping in informal advice that is not intended to be relied upon.

If the Department nevertheless concludes that the word “mutual” must be removed from the regulation, the final regulation should at least include a requirement that the understanding be reasonable. The final regulation should also include a safe harbor standard for a well-intentioned service provider to avoid becoming a fiduciary as a result of a misunderstanding. The safe harbor standard described in Part a, above, would achieve this objective.

c. ***Linking Fee With Advice***

ERIC understands that fees for investment advice are not limited to direct fees. However, the final regulation should clarify that the “for a fee” condition is not satisfied unless either (i) the adviser is engaged and paid to provide investment advice, or (ii) the adviser’s compensation will be affected if the investment advice is followed.

For example, if a financial planner’s compensation is based on assets under management, or the adviser receives commissions from funds in which the advisee’s account is invested, the “for a fee” condition is clearly satisfied. In contrast, however, if a call center employee receives a salary for answering questions about the plan, and investment advice is not in the employee’s job description, the employee’s salary should not be taken into account for purposes of determining whether investment advice is provided for a fee.

Similarly, the final regulation should clarify that a salary paid to an employee responsible for providing research support to a plan’s investment fiduciaries is not taken into account for purposes of determining whether any investment advice is provided for a fee. For example, suppose that a defined benefit plan’s governing documents designate an investment committee as the fiduciary responsible for investing plan assets, and the investment committee relies on a salaried employee of the plan sponsor to research various investment alternatives. The employee is not authorized to

make investment decisions. The employee's salary should not be treated as a fee for providing investment advice.

d. ***Fiduciaries Who are Not Responsible for Investment Advice***

Proposed Section 2510.3-21(c)(1)(ii)(B) provides that if an individual is a fiduciary for a reason unrelated to providing investment advice (*e.g.*, because the individual exercises discretionary authority or control with respect to management or administration of the plan), the individual will automatically be treated as a fiduciary with respect to investment advice.

The mere fact that an individual is a fiduciary for one reason does not automatically make the individual a fiduciary for another reason. ERISA § 3(21)(A) makes clear that a person is a fiduciary only "*to the extent*" that he renders investment advice for a fee. Taking into account responsibilities unrelated to investment advice would be inconsistent with the well-settled principle that a fiduciary who wears two hats wears only one hat at a time. *See, e.g., Pegram v. Hedrich*, 530 U.S. 211, 225-26 (2000) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

For example, fiduciaries who are responsible for plan administration typically oversee the drafting of summary plan descriptions and other communications. It is common for these materials to include descriptions of investment alternatives that are provided by the fund managers; and the descriptions often include statements under headings like "who might want to invest in this fund." If the communication states that it should not be treated as investment advice, the fiduciaries responsible for the communication should not be treated like investment advisers merely because they are passing along information from the fund managers.

Similarly, suppose that a plan participant asks the plan administrator whether the plan's balanced fund is a good investment option. The final regulation should include a standard under which the administrator can be assured that providing a reasonable answer (*e.g.*, "I am not responsible for reviewing the plan's investment options, but I know that the balanced fund was designated as the plan's default investment alternative") will not subject the plan administrator to the same fiduciary scrutiny as a designated investment adviser.

The safe harbor standard described in Part a, above, would achieve this objective.

2. **Advice on Whether to Take a Distribution**

A routine recommendation to take a distribution or roll over an account balance to an IRA or another employer's plan should not be treated as investment advice. However, if the advice is provided by an adviser who is engaged before the distribution occurs for his or her investment or financial planning expertise, or who stands to gain from an investment decision related to the distribution, the adviser should be treated as a fiduciary.

For example, suppose that Plan's investment lineup includes the XYZ Fund, which invests in mid-cap stocks. Plan's fiduciaries recently added a new mid-cap fund and decided to restrict future transfers into the XYZ Fund. After this decision is implemented, Employee calls Plan's call-center and requests to transfer part of Employee's account balance to the XYZ Fund. The operator explains

that Plan no longer allows transfers into the XYZ Fund and then tells Employee that if she wants to invest in the XYZ Fund, she can do so by rolling over her balance to an IRA with Acme Bank. Providing this information should not make the operator a fiduciary.

In contrast, suppose that Employee has a right to choose between an annuity and a lump-sum distribution, and Employee has engaged Financial Adviser to help with the decision. Financial Adviser recommends taking a lump sum and engaging Best Investors to invest the proceeds, because Best can outperform the assumptions underlying the annuity calculation. Financial Adviser should be treated as a fiduciary, because the advice relates to investment of a plan asset and Financial Adviser has been engaged for her expertise. Similarly, if Best reaches out to Employee to solicit her business, Best should be treated as a fiduciary, because Best stands to gain from an investment decision related to Employee's distribution decision. (As described in Part 3, below, Best could avoid fiduciary liability if it takes steps to make sure that Employee knows or reasonably should know that Best's interests are adverse.)¹

3. Persons With Adverse Interests

The proposed regulation appropriately recognizes that a person whose interests are adverse to a plan or its participants or beneficiaries should not be treated as a fiduciary if the recipient of the advice or recommendation knows or reasonably should know the person's adverse status. *See* Proposed § 2510.3-21(c)(2)(i), (ii)(B) & (C). The final regulation should clarify that this carve-out applies with respect to any activity described in Proposed Section 2510.3-21(c)(1)(i), and without regard to the nature of the transaction.

For example, in the context of a swap or a real estate or private equity transaction, parties on the other side of the transaction often produce valuations and fairness opinions. The carve-out should cover providing this information. If simply providing a valuation or similar information could make the party a fiduciary, it would be almost impossible to avoid being on both sides of the transaction. As a result, many common transactions that are in the best interests of participants and beneficiaries would be prohibited by ERISA.

This issue was raised during the development of the Dodd-Frank Act, when a Senate bill assigned fiduciary responsibilities to swap dealers engaging in transactions with employee benefit plans. In order to avoid putting swap dealers on both sides of the transaction, the bill was revised to provide that swap dealers who are not acting as advisors do not have fiduciary responsibilities to plans. However, the Dodd-Frank Act still requires swap dealers to provide plans with daily marks (*i.e.*, valuations) of their swap investments. If a mark report is treated as investment advice, adverse swap dealers would end up on both sides of the transaction and almost every swap would be a prohibited transaction.

¹ We understand that the Department is considering expanding on the guidance in Interpretive Bulletin 96-1 to cover retirement income planning, including distribution decisions. ERIC supports this effort.

In order to avoid a de facto prohibition of common transactions, the final regulation should clarify that no action described in Proposed Section 2510.3-21(c)(1)(i) would result in a person being treated as a fiduciary if the recipient of the advice or other information knows, or under the circumstances reasonably should know, that the person providing the advice or other information is on the other side of the transaction. The final regulation should also state that providing the disclosure required by Section 4s(h)(5)(A)(ii) of the Commodity Exchange Act (as amended by the Dodd-Frank Act) is sufficient to demonstrate that the recipient of the advice or other information reasonably should know that the person providing the advice or other information is on the other side of the transaction.

A safe harbor standard for imputing knowledge to recipients of information will improve the level of compliance and protect the recipients of information. Parties that intend to be adverse to one another will have certainty on how to achieve their objectives; and advisers who are not willing to disclose their status will be compelled to satisfy the fiduciary standard.

4. Appraisals and Fairness Opinions

ERIC agrees that appraisals and fairness opinions are often relied upon when making investment decisions, and that appraisals and fairness opinions should be provided in good faith and based on a prudent investigation of the prevailing circumstances. However, there are many cases in which it is unnecessary to treat an appraisal or fairness opinion like investment advice. ERIC is concerned that subjecting service providers to fiduciary standards in those cases would unnecessarily increase the cost of delivering benefits to participants and beneficiaries.

The proposed carve-out for general reports and statements that are provided to comply with reporting and disclosure requirements is too narrow. Rather than establish a sweeping rule with a narrow carve-out, the Department should craft a more narrow rule that directly addresses the Department's specific concern.

Specifically, an appraisal or fairness opinion should not be treated like investment advice unless (a) the appraisal or fairness opinion relates to a plan asset or property that will become a plan asset if it is purchased, and (b) there is a mutual understanding that the appraisal or fairness opinion will be relied upon in a decision to buy or sell the property. The rule should also make clear that simply aggregating valuations of assets that are not plan assets (and will not be plan assets upon purchase of a fund interest) is not a fiduciary act.

For example, it might be appropriate to treat an appraisal or fairness opinion that is used as the basis for an ESOP's purchase of stock in a private company as investment advice. The same might be true for an appraisal of real estate that the plan wishes to purchase or sell.

In contrast, however, the economics of many investments in unregistered funds depend on the expectation that if the fund's underlying assets are not plan assets under 29 C.F.R. § 2510.3-101, the fund manager will not be a fiduciary to the plan. In the normal course of business, fund managers provide periodic statements with valuation information. Merely providing these statements, or appraising the underlying assets (which are not plan assets), should not change the

fund manager's status. Existing standards for the fiduciaries of plans that invest in the fund are sufficient to protect the interests of plan participants and beneficiaries.

Similarly, as noted above, providing daily mark reports to plans that invest in swaps should not result in a swap dealer being treated as a fiduciary.

If the final regulation retains the rule that appraisals and fairness opinions may be treated as investment advice, the Department should issue a prohibited transaction exemption to prevent appraisers from being disqualified merely because they are affiliated with parties to the transaction. For example, many qualified real estate appraisers are affiliated with real estate firms that could be parties to transactions with plans. If these appraisers are automatically disqualified out of prohibited transaction concerns, it might be difficult to obtain quality appraisals at a reasonable cost. A reasonable prohibited transaction exemption would prevent this result, while at the same time specifying standards to ensure that the appraiser's judgment is not impaired by a potential conflict.

5. **Effective Date**

As the Department has acknowledged, the proposed regulation would significantly change a rule that has been in effect for 35 years, establishing new circumstances under which service providers are subject to ERISA's fiduciary responsibilities. 75 Fed. Reg. at 65265. Although we understand that the Department now believes it is appropriate to make a change, service providers and other stakeholders have relied on the existing interpretation of the statute for over 35 years.²

Consistent with the significance of the change, the Department has proposed a prospective effective date—180 days after the final regulation is published in the *Federal Register*—for its new interpretation of the statute. 75 Fed. Reg. at 65269. However, the proposed regulation does not expressly foreclose referring to the new regulation as persuasive authority with respect to advice provided before the effective date.

In light of the unique responsibilities that go along with being treated as a fiduciary—responsibilities that advisers acting outside the scope of the existing regulation reasonably believed that they did not have—the final regulation should state expressly that the Department's new interpretation of the statute may not be taken into account with respect to advice, recommendations, or other information provided before the effective date. For example, if a claim brought after the effective date of the new regulation relates to advice given before the effective date, the new

² See, e.g., *Schloegel v. Boswell*, 94 F.2d 266, 272-73 (5th Cir. 1993) (applying the existing regulation to determine whether an individual who provided advice was a fiduciary); *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1179 (3d Cir. 1996) (referring to the existing regulation to “clarify” what it means to “render investment advice”).

regulation should not be taken into account for purposes of determining whether the advice was provided by a fiduciary.³

Notwithstanding the Department's concerns with the existing regulation, service providers who relied on the existing regulation in good faith should not be exposed to potential liability for advice provided when the existing regulation was in effect.

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ERIC appreciates the opportunity to submit these comments. If we can be of further assistance, please let us know.

Sincerely,

Mark J. Ugoretz
President & CEO

³ See generally, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (absent an express statutory grant of retroactive rulemaking authority, administrative rules should not be given retroactive effect); *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423-25 (D.C. Cir. 1994), cert. denied 513 U.S. 1147 (1995) (like legislative rules, interpretive rules should not be given retroactive effect); *Nat'l Mining Ass'n v. DOL*, 292 F.3d 849, 859, 864-65 (D.C. Cir. 2002) (new interpretation of existing rule should not apply with respect to transactions occurring before effective date).