American Federation of Labor and Congress of Industrial Organizations

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Submitted by email to e-ORI@dol.gov

July 21, 2015

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

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule
Retirement Investment Advice; Proposed Rule
RIN 1210-AB32

Ladies and Gentlemen:

The American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments to the Department of Labor ("DoL" or "Department") on the Notice of Proposed Rulemaking regarding the definition of the term "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and of a plan under Section 4975 of the Internal Revenue Code of 1986 (the "Code") as a result of giving investment advice ("Proposed Rule").[1] Separately, the AFL-CIO is

[1] The Notice was published in the Federal Register on April 20, 2015 (80 Fed. Reg. 21928) and is available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf. The comment deadline was extended from July 6, 2015, to July 21, 2015, by Notice published in the Federal Register on June 18, 2015 (80 Fed. Reg. 34869) and available at http://www.gpo.gov/fdsys/pkg/FR-2015-06-18/pdf/2015-14921.pdf. The Notice also set the public hearing on the Proposed Rule and related proposed prohibited transactions exemptions ("PTEs") for August 10, 2015. The AFL-CIO will submit its request to testify at the hearing before the July 24, 2015 deadline.

submitting comments to DoL on the Notice of Proposed Class Exemption regarding the Best Interest Contract Exemption ("BICE").[2]

The AFL-CIO is a voluntary, democratic federation of 56 national and international labor unions that represent 12.2 million working people. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded and that their workplaces are safe. Further, to help our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men, and make their voices heard in corporate boardrooms and the financial system.

Union members have much at stake in the private-sector pension and retirement savings system:

- More than four-in-five (83%) union workers employed in private industry participate in workplace retirement plans, compared to just over two-in-five non-union workers (45%).[3]

- While most private-sector union workers are covered by defined benefit pension plans (66% compared to 11% of non-union workers), more than two-in-five (45%) participate in defined contribution plans—a greater share than non-union workers (42%).[4]

- More than one-in-four dollars in ERISA-covered retirement plans (27%)—totaling $1.9 trillion in assets—are in collectively bargained defined benefit and defined contribution plans.[5]

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[2] The Notice was published in the Federal Register on April 20, 2015 (80 Fed. Reg. 21960) and is available at http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.

[3] U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2014*, *Bulletin 2779* (Sept. 2014) t. 2 (private industry workers), *available at* http://www.bls.gov/ncs/ebs/benefits/2014/ebbl0055.pdf.

[4] U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2014*, *Bulletin 2779* (Sept. 2014) t. 2 (private industry workers), *available at* http://www.bls.gov/ncs/ebs/benefits/2014/ebbl0055.pdf.

[5] *Calculated from* U.S. Dept. of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2012 Form 5500 Annual Reports* (Jan. 2015 v. 1.2) t. A6, *available at* http://www.dol.gov/ebsa/pdf/2012pensionplanbulletin.pdf.

- Thousands of union members serve as fiduciary trustees jointly responsible with management-appointed representatives for administering retirement plans and overseeing the investment of retirement plan assets.

- Union workers and retirees from both the private and public sectors have retirement money invested through Individual Retirement Accounts ("IRAs"). Like non-union workers and retirees, many of them transfer money from workplace retirement plans into IRAs when they leave a job.

Regulatory Impact Analysis Supports the Urgency of Moving Forward

DoL's Regulatory Impact Analysis[6] is extensive and rigorous and its description of the retirement-income landscape today and projection for the future is consistent with the experience of our 56 affiliate unions, the members of which bargain for retirement benefits, along with wages and other benefits.

As DoL establishes, since it issued the 1975 rule, there have been dramatic changes in how, and from where, Americans build and receive retirement income, with the responsibility for retirement investing increasingly falling on the individual rather than her employer. That is, IRAs and 401(k)-type defined contribution plans have supplanted defined benefit pension plans as Americans' primary source of retirement income. That IRAs are the single largest and fastest growing form of retirement savings—outstripping both private-sector defined benefit and defined contribution plans—is uncontroverted, with rollovers from employer-sponsored plans accounting for most IRA funding. A key projection in the Regulatory Impact Analysis is that IRA rollovers from employer-based plans are expected to approach an astronomical $2.5 trillion over the next five years.[7]

DoL documents the prominence of investment advisers in rollover decisions[8] and the harm incurred from conflicted advice. DoL's evidence that IRA holders receiving conflicted advice can expect their investments to underperform by an annual average of 100 basis points over the next 20 years, and that the underperformance associated with conflicts of interest in the mutual funds segment alone could cost IRA investors more than $210 billion over the next 10 years and nearly $500 billion over the next 20 years, is alarming. Since estimates of the

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[6] U.S. Department of Labor, Employee Benefits Security Administration, *Fiduciary Investment Advice: Regulatory Impact Analysis* (Apr. 21, 2015), *available at* http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf. ("*Regulatory Impact Analysis*")

[7] *Regulatory Impact Analysis* at p. 3, citing Cerulli Associates, "Retirement Markets 2014: Sizing Opportunities in Private and Public Retirement Plans" (2014).

[8] 54.5 percent of IRA investors with rollovers consulted a professional financial adviser as their primary source of information; sixty percent consulted a professional adviser in some capacity regarding a rollover decision. *Regulatory Impact Analysis* at p. 54.

magnitude of the proposal's 10-year investor gains are in the billions,[9] we think it fair to conclude that the proposal will serve to improve the dramatic and very worrisome $7.7 trillion gap between what American households have actually saved today and what they need to have saved today to maintain their living standards in retirement.[10]

Given this, assertions that reforms that address harmful conflicts of interest will increase costs for Retirement Investors are fundamentally misleading. Retirement Investors are paying huge costs for conflicted advice; the costs are just hidden. Bringing these costs out into the open will create genuine choice and help prevent overpaying.

While more private-sector union members than non-union workers are covered by traditional pensions—and our members understand that their defined benefit plans remain the soundest vehicles for building and safeguarding retirement income security—their vulnerability in retirement, too, is increasing, as employers at the bargaining table back away from traditional pensions.[11] Even where a collective bargaining agreement includes maintenance of a traditional pension, our private-sector unions typically negotiate alongside it a companion defined contribution plan, like a 401(k), that likely will become an IRA rollover in the event an employee changes jobs.

Further, despite the better security traditional pensions provide to plan participants, investment decisions by plan trustees and fiduciaries can also be compromised by conflicts of interest. The Regulatory Impact Analysis shows how advisers on whom plans rely to guide investment decisions "calibrate" their behavior so as to avoid fiduciary status.[12] DoL looks to a GAO study to quantify the problem: pension plans using consultants with financial conflicts of interest earned 1.3 percentage points less per year than other plans.[13] This is not an insignificant cost given the role of investment performance in a plan's ability to fund the long-term cost of

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9 *Regulatory Impact Analysis* at p. 214.

10 Testimony of Alicia Munnell, Director of the Center for Retirement Research at Boston College, "Bridging the Gap: How Prepared are Americans for Retirement?" Senate Special Committee on Aging, March 12, 2015 *available at* http://www.aging.senate.gov/imo/media/doc/Munnell_3_12_15.pdf.

11 Among the reasons employers disfavor these plans are: the real and perceived volatility of their contribution obligations, the cost of these contributions, their assumed risk in funding the plans, and counterproductive and complex legal and accounting requirements. To reverse this trend, Congress should, at a minimum, revisit the funding requirements for single-employer defined benefit pension plans established by the Pension Protection Act of 2006.

12 *Regulatory Impact Analysis* at p. 19.

13 *Regulatory Impact Analysis* at p. 8, citing U.S. Government Accountability Office, GAO-09-503T, *Private Pensions: Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans* (2009); *available at* http://www.gao.gov/new.items/d09503t.pdf.

promised benefits, and how plans' historical investment performance, broadly defined, informs federal legislation regarding the funding requirements for defined benefit pension plans.

From a broad public policy perspective, we appreciate that the Regulatory Impact Analysis includes mention of the costs of conflicted advice to American taxpayers. It is important to remember that retirement savings are tax-preferred savings. That is, most retirement contributions, both those made by employers and those made by workers, are government subsidized, with those subsidies valued at more than $130 billion for 2015[14] alone. Financial institution representatives, who characterize the DoL proposal as an unjustified interference with their long-standing business models, mistakenly overlook the fact that the success of their retirement business overall is a product of, and dependent on, government subsidy. As such, the business of investing retirement assets should, indeed, be subject to strict oversight.

Background

ERISA includes a broad definition of fiduciary by reason of having given investment advice. The statute provides generally, "[A] person is a fiduciary with respect to a plan to the extent…(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so…."[15] The Code includes a parallel definition for purposes of the tax on prohibited transactions.[16]

Unfortunately, this broad definition was narrowed considerably by virtually identical DoL- and Treasury-issued regulations in 1975.[17] While these rules define a person as rendering investment advice, in part, when a "person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property," they include additional conditions that greatly limit the circumstances in which such a person will be deemed a fiduciary. In particular, for a person without "discretionary authority or control…with respect to purchasing or selling securities or other property for the plan" to be considered a fiduciary:

- The advice must be given on a regular basis to the plan.
- It must be pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between the person giving the advice and the plan or a fiduciary for the

[14] Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 2014-2018 (JCX-97-14), August 5, 2014, p. 32.

[15] 29 USC § 1002(21)(A).

[16] 26 USC § 4975(e)(3).

[17] 29 CFR § 2510.3-21 and 26 CFR §54.4975-9(c).

plan.

- The agreement must be that the advice will serve as a primary basis for investment decisions with respect to the plan assets.

- The agreement must be that the adviser will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

The conditions imposed in the 1975 rule supplement the statutory requirement that the advice be provided for a fee, direct or indirect, in order for the advice provider to be considered a fiduciary.

Subsequent DoL guidance further constricted the narrow regulatory definition of fiduciary investment advice:

- In 1976, DoL issued an advisory opinion that "a valuation of closely-held employer securities that an employee stock ownership plan (ESOP) would rely on in purchasing the securities would not constitute investment advice under the regulation."[18]

- In 1996, a DoL Interpretive Bulletin (IB) explained the broad circumstances in which investment-related educational information provided to participants and beneficiaries in participant-directed individual account pension plans would be considered education, not advice, under the rule.[19] Under specified conditions, the IB treats investment allocation models and related tools as education, not advice, even when the model identifies a specific investment option available under the plan.

- In 2005, DoL issued an advisory opinion that advice from an individual, not otherwise a fiduciary, that a participant take a permissible pension plan distribution does not constitute investment advice under the regulation, even if that advice is combined with a recommendation about how to invest the distribution.[20]

Taken together, the existing rule and subsequent guidance add up to a regulatory approach that is riddled with loopholes favoring the financial interests of professional investment advisers over retirement savers. This approach is at odds with the pension and retirement savings system that exists today.

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[18] 75 Fed. Reg. 65264-65265 (Oct. 22, 2010) (citing Advisory Opinion 76–65A (June 7, 1976) (AO 76-65A).

[19] 29 CFR § 2509.96-1.

[20] Advisory Opinion 2005-23A (Dec. 7, 2005) (AO 2005-23A*) available at* http://www.dol.gov/ebsa/regs/aos/ao2005-23a.html.

The Proposed Rule

The DOL proposal replaces the existing test with a functional definition of investment advice, consistent with ERISA's definition in Section 3(21) that focuses on the functions performed in determining who is a fiduciary. Under the revised definition in the Proposed Rule, a person renders investment advice when she receives compensation, directly or indirectly, for providing a recommendation that is individualized or specifically directed to: an employee retirement plan, such as a traditional pension or 401(k); a plan participant, such as an employee saving for retirement in her company's 401(k); or an Individual Retirement Account (IRA); or an IRA owner.

As set forth in proposed Section 2510.3-21(a)(1)(i)-(iv),[21] recommendations falling within the scope of investment advice include those:

- Relating to acquiring, holding, exchanging or disposing of securities or other property, including a recommendation to take a benefit distribution or a recommendation about the investment of securities or other property to be rolled over or otherwise distributed from a plan or an IRA.

- Regarding the management of securities or other property.

- Constituting an appraisal, fairness opinion or similar statement concerning the value of securities or other property if provided in connection with a specific transaction.

- Regarding a person who will receive a fee or other compensation for providing any one of the three types of advice listed immediately above.

To be considered a fiduciary under proposed Section 2510.3-21(a)(2)(i) and (ii),[22] a person giving any of these types of advice must:

- Represent or acknowledge that she is acting as a fiduciary with respect to this advice; or

- Give the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to the securities or other property of the plan or IRA.

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[21] 80 Fed. Reg. 21956-21957.

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[22] 80 Fed. Reg. 21957.

DOL provides that, in certain circumstances, financial professionals may give investment recommendations or other communications to plans, plan fiduciaries or participants, and IRA owners without being treated as a fiduciary under the Proposed Rule. The Proposed Rule includes seven carve-outs of activities that will not be treated as investment advice:

- Sales Exception for Transactions with Expert Plan Fiduciaries: Sale recommendations made *to a fiduciary with financial expertise* of a large employer-sponsored plan (with 100 or more participants, or $100 million or more in assets) will not make the seller a fiduciary so long as the sales pitches are part of an arm's length transaction where neither side assumes that the advice giver is acting in the plan's best interests.[23]

- Swap and Security-Based Swap Transactions: Advice given by a counterparty to the plan in connection with a swap or security-based swap will not render the counterparty a fiduciary if, among other conditions, the plan is represented by another independent fiduciary that represents he will not rely on the recommendation.[24]

- Employees of a Plan Sponsor: An employee who does not receive additional compensation, beyond her normal compensation, to provide the advice will not be considered a fiduciary.[25]

- Platform Providers: Those marketing and making available to a plan, without regard to the individualized needs of the plan, its participants and beneficiaries, securities or other property through a platform, from which a plan fiduciary may select or monitor investment alternatives, into which plan participants or beneficiaries may direct investment of their individual account assets will not be considered fiduciaries providing investment advice.[26]

- Selection and Monitoring Assistance: Platform providers that identify investment alternatives that meet objective criteria specified by the plan fiduciary or provide objective financial data and comparisons with independent benchmarks to the plan fiduciary will not be considered fiduciaries providing investment advice.[27]

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[23] Proposed 29 CFR §2510.3-21(b)(1)(i) at 80 Fed. Reg. 21957. The $100 million threshold may also be satisfied through combining the assets of more than one plan if the fiduciary is responsible for managing those assets.

[24] Proposed 29 CFR §2510.3-21(b)(1)(ii) at 80 Fed. Reg. 21957.

[25] Proposed 29 CFR §2510.3-21(b)(2) at 80 Fed. Reg. 21957.

[26] Proposed 29 CFR §2510.3-21(b)(3) at 80 Fed. Reg. 21957.

[27] Proposed 29 CFR §2510.3-21(b)(4) at 80 Fed. Reg. 21958.

- Financial Reports and Valuations: Those providing an appraisal, fairness opinion, or statement of value to an ESOP, certain investment funds holding the assets of more than one unaffiliated plan or a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner will not be investment advice fiduciaries so long as the information is provided for purposes of complying with certain reporting and disclosure requirements.[28]

- Education: The provision of educational information and materials to individuals and plan fiduciaries will not be considered investment advice as long as that information does not contain any specific investment recommendations upon which the retirement saver or plan fiduciary can reasonably be expected to act.[29]

The Proposed Rule also includes the current exemption for the execution of securities transactions directed by a fiduciary of a plan or IRA with updated references to reflect the structure of the Proposed Rule.[30]

Plain Language Definition of Investment Advice

We strongly support DoL's proposed approach to defining what it means to provide investment advice. It is entirely consistent with the broad statutory language this Proposed Rule implements and the approach taken by other regulators, and it removes the current rule's technical hurdles that defeat the common sense expectations of retirement investors.[31] At a minimum, the key features of the Proposed Rule that should be retained in the final rule include:

- The clarification that fiduciary advice includes advice provided to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner.

- The use of an objective standard that looks at whether the communication, "based on its content, context, and presentation, would reasonably be viewed as a suggestion that the

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28 Proposed 29 CFR §2510.3-21(b)(5) at 80 Fed. Reg. 21958.

29 Proposed 29 CFR §2510.3-21(b)(6) at 80 Fed. Reg. 21958-21959.

30 Proposed 29 CFR §2510.3-21(d) at 80 Fed. Reg. 21959.

31 *See*, e.g., Brown Kathi S., *Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants* (Sept. 2013) *available at* http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2013/Fiduciary-Duty-and-Investment-Advice-Attitudes-of-401k-and-403b-Participants-AARP-rsa-gen.pdf (finding that more than 9-in-10 respondents with money saved in a 401(k) plan or 403(b) arrangement favor a requirement that plan providers give advice that is in the best interest of plan participants).

> advice recipient engage in or refrain from taking a particular course of action"[32] to determine whether a communication rises to the level of a recommendation.

- The elimination of the requirement that a recommendation is treated as fiduciary investment advice only if there is a mutual agreement that it "will serve as a primary basis for investment decisions."

- The inclusion of advice irrespective of its frequency.

- The coverage of advice constituting an appraisal, fairness opinion or similar statement concerning the value of securities or other property if provided in connection with specific transactions and regarding a person who will receive a fee or other compensation for providing any one of the other covered types of advice, in addition to advice relating to actions involving securities and other property and to the management of securities and other property.

- The inclusion of recommendations related to distributions and the rollover of assets from plans and IRAs.

We note, and are pleased, that DoL's proposed facts-and-circumstances approach to determining whether an investment recommendation has been made mirrors the facts and circumstances approach that the Financial Industry Regulatory Authority ("FINRA") takes in its oversight of brokers when determining whether the current-law duty of care imposed on brokers, the so-called suitability standard, is triggered.[33] FINRA provides, in part:

> [A] communication's content, context and presentation are important aspects of the inquiry. The determination of whether a "recommendation" has been made, moreover, is an objective rather than subjective inquiry. An important factor in this regard is whether—given its content, context and manner of presentation—a particular communication from a firm or associated person or customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy.[34]

(Citation omitted) Similarly, Securities and Exchange Commission ("SEC") interpretive guidance provides that determining whether an individual is an investment adviser within the

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[32] Proposed 29 CFR § 2510.3-21(f)(1) at 80 Fed. Reg. 21960.

[33] According to FINRA, "The determination of the existence of a recommendation has always been based on the facts and circumstances of the particular case." FINRA Regulatory Notice 11-02 (effective Oct. 7, 2011) at 2.

[34] FINRA Regulatory Notice 11-02 (effective Oct. 7, 2011) at 3.

meaning of the Investment Advisers Act "depends upon all of the relevant facts and circumstances."[35]

Recommendations Relating to Distributions from Plans and IRAs and the Rollover of Distributions from Plans to IRAs

An essential component of the Proposed Rule that, in our view, must be maintained in the final rule is its treatment of a "recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA" as advice, as the current interpretation reflected in AO 2005-23A leaves workers, retirees, and their family members vulnerable to conflicted advice that is not in their best interests.

For many individuals, deciding what to do with an accrued pension benefit available as a lump sum or an accumulated 401(k) or IRA account is one of the most consequential financial decisions they will make in their lifetime. The rise of 401(k)s as the dominant retirement plan available to workers in the private sector has meant that vastly more people today will take lump sum distributions from their workplace retirement plans than when ERISA was enacted or the existing rule was adopted.

Even—and perhaps especially—for workers covered by defined benefit plans, deciding what form of benefit to take can be critical. These are one-time, irrevocable decisions, often involving large dollar amounts. Today, many pension plan participants—one-in-four in traditional defined benefit plans and nearly all participants in hybrid plans[36]—are given the option of a lump sum distribution when they retire or separate from employment in addition to the default annuities required by law. In some cases decisions about benefit form—whether to take a lump sum or whether to take a qualified joint and survivor annuity—can impact eligibility for other valuable benefits, such as retiree health benefits. Even if a participant settles on an annuity, payment options can have significant implications, particularly for surviving spouses.

Unfortunately, workers and retirees who can take a lump sum distribution from a defined benefit plan often fall prey to conflicted advice about what to do with their money. Numerous accounts have appeared in the media following the same story line—an adviser convinces a retiree to take a lump sum distribution so the adviser can invest that money; and the retiree loses

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[35] SEC, *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Components of Other Financial Services,* Investment Advisers Act Release No. 1092 (Oct. 8, 1987).

[36] Wiatrowski, William J., Bureau of Labor Statistics, "The Last Private Industry Pension Plans: A Visual Essay," *Monthly Labor Review* (Dec. 2012) p. 2, 16, *available at* http://www.bls.gov/opub/mlr/2012/12/art1full.pdf.

out in the end.[37] We have even seen entire groups of union members targeted by financial advisers who encouraged them to take lump sum distributions from their pension plans so that the adviser could manage the money without any apparent regard as to what was in each worker's best interest.

Carve-Outs from Fiduciary Investment Advice

We support the proposed carve-outs of advice and communications from the definition of fiduciary investment advice, except for the financial reports and valuations carve-out as it would apply to the valuation of employer securities for an ESOP (discussed in detail below).

As a general matter, we believe the proposed carve-outs appropriately identify specific kinds of communications that clearly are not "investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan." As defined by DoL, none of these involve communications that would "reasonably be viewed as a suggestion by the advice recipient engage in or refrain from taking a particular course of action." Our support for these carve-outs is contingent on the final rule adopting the descriptions, limitations, and conditions included in the Proposed Rule. With respect to the education carve-out, a more detailed discussion of our views is below.

We also believe DoL appropriately carves out recommendations made to certain independent plan fiduciaries by certain plan counterparties in the context of asset sales or purchases. In the case of counterparty transactions with an independent plan fiduciary with financial expertise, the conditions of the proposed carve-out (such as the requirements related to the nature of the transaction and context for the investment recommendation provided, plan size, the expertise of the independent fiduciary, and the amount of the assets managed by that fiduciary) sufficiently protect the interests of the plan and its participants and beneficiaries.

Investment Education Carve-Out

We commend DoL for building upon and strengthening its prior guidance on what kinds of communications and information constitute non-fiduciary investment education, especially:

- Broadening the categories of eligible recipients of investment education, from "participants and beneficiaries in participant-directed individual account pension plans"[38] under IB 96-1 to any plan, plan fiduciary, participant or beneficiary, IRA, or IRA owner.

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[37] *See*, e.g., Gibbs, Lisa and Ian Salisbury, "4 Disastrous Retirement Mistakes and How to Avoid Them: Advisers Touting Sunny Scenarios in Hopes of Snagging Your IRA Rollover Can Imperil Your Retirement," *Money*, *available at* http://time.com/money/3546592/ira-rollover-mistakes-retirement/.

[38] 29 CFR § 2509.96-1(a).

- Expanding the subjects addressed by covered investment-related information and materials beyond just those related to savings needs and investment management during a retirement saver's accumulation phase to include also those related to benefit distributions and retirement-phase asset management.

- Closing the loopholes in the IB 96-1 that have permitted financial services providers to make recommendations for specific investment alternatives through asset allocation models and interactive investment materials without being considered to be providing fiduciary investment advice,[39] and replacing those loopholes with requirements that asset allocation models "not include or identify any specific alternative available under the plan or IRA" [40] and interactive investment materials "not include or identify any specific investment alternative available or distribution option available under the plan or IRA, unless such alternative or option is specified by the participant, beneficiary or IRA owner." [41]

Carve-Out for ESOP Valuations and Appraisals

We strongly oppose DoL's proposed codification of the Department's prior guidance interpreting the definition of fiduciary investment advice so as to exclude valuations provided to an ESOP regarding closely-held employer securities. Although DoL validates and restates the concerns it first raised and sought to address in the 2010 proposal[42] about a plan's reliance on faulty valuations in such instances, it summarily concludes that these concerns "raise unique issues that are more appropriately addressed in a separate regulatory initiative"[43] without justification or explanation. Further, there is no indication that DoL will in fact initiate such a separate regulatory initiative or when it intends to do so.

We note that the problems with ESOP valuations are so widespread that the Department has established an ESOP national enforcement project and continued it for a decade or more. In the face of these problems, we urge DoL to eliminate the carve-out for valuations of employer securities provided to ESOPs. Doing so would not only improve the retirement security of workers and retirees but also improve the effectiveness of DoL's ERISA enforcement program, especially given the limited enforcement resources available to the Department.

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39 29 CFR § 2509.96-1(d)(3)-(4).

40 Proposed 29 CFR § 2510.3-21(b)(6)(iii)(C) at 80 Fed. Reg. 21958.

41 Proposed 29 CFR § 2510.3-21(b)(6)(iv)(D) at 80 Fed. Reg. 21959.

42 "A common violation found in [DoL's] ESOP national enforcement project arises in cases where plan fiduciaries have reasonably relied on faulty valuations of securities prepared by professional appraisers." 80 Fed.Reg. 21936-21937.

43 80 Fed. Reg. 21936-21937.

Confusion Created by Advisers to Plan Sponsors

While we think the Proposed Rule is clear that advice related to workers' selections of health care benefit packages and other welfare benefits available under an employer-provided plan does not fall within the scope of investment advice,[44] we are concerned that some advisers to plan sponsors are sowing confusion about the scope of the Proposed Rule and raising unnecessary alarms. We suggest DoL consider including additional guidance to address these potential areas of confusion.

Treatment of Other Professionals Providing Services Related to Investments

As the Department states in the Preamble, the Proposed Rule addresses concerns raised in response to the 2010 proposal that certain professionals could be considered to be providing investment advice through the performance of their professional services. The Preamble provides that:

> The new proposal clarifies that attorneys, accountants, and actuaries would not be treated as fiduciaries merely because they provide such professional assistance in connection with a particular investment transaction. Only when these professionals act outside their normal roles and recommend specific investments or render valuation opinions in connection with particular investment transactions, would they be subject to the proposed fiduciary definition.

The AFL-CIO supports the clarification included in the Preamble, but we note the absence of any explicit language in the Proposed Rule addressing the issue. We suggest that the text of the final rule include the clarification so there are no questions.

Prolonged Rulemaking Process

DoL has undertaken an inordinately lengthy and extensive rulemaking process[45]:

- The Department first issued a proposed revised definition of fiduciary in October 2010. During the 104-day public comment period, DoL received 202 comment letters.

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[44] The Proposed Rule is also clear that transactions involving the assets of a funded welfare benefit plan and its related trust, such as a voluntary employees' beneficiary association established pursuant to Code Section 501(c)(9), may fall within its scope and afford protections to the fiduciaries of those plans. See Proposed 29 CFR 2510.3-21(f)(2)(i) defining "Plan," in part, to mean "any employee benefit plan described in section 3(3) of the Act."

[45] The chronology detailed below is based on EBSA's webpage on the 2010 Proposed Rule (http://www.dol.gov/ebsa/regs/cmt-1210-AB32.html) as well as the discussion in the Preamble of Proposed Rule. 80 Fed. Reg. at 21932.

- A two-day public hearing followed in 2011, with 38 witnesses and a post-hearing public comment period during which DoL received more than 60 additional comments.

- The notice for the Proposed Rule, published on April 20, 2015, initially provided for a 75-day comment period, which was subsequently extended to 90 days. As of today, more than 400 comment letters have been submitted in response, along with 70,052 petition signatures. DoL has announced a three-to-four-day hearing on the Proposed Rule and related PTEs beginning August 10, 2015, to be followed by yet another public comment period.

- Interspersed throughout this nearly five-year period have been a great many meetings at which the public, including financial services industry lobbyists and worker, retiree, and consumer representatives, has been able to share information and perspectives with not only officials and staff from DoL, but also from the Executive Office of the President.

- DoL has gone out of its way to consult and coordinate with the SEC to avoid any potential conflicts. Both SEC Chair White and DoL Secretary Perez have spoken publicly about their ongoing communications.

We are aware of calls to extend the rulemaking process even longer, with yet another re-proposed rule or some other procedural hurdles. With so much at stake for workers and retirees and after such a prolonged rulemaking process, we adamantly oppose any proposal to delay or obstruct stronger protections for retirement investors. We urge DoL to act quickly to finalize its proposal so that workers, retirees, and employee benefit plan trustees who rely on professional investment advice can begin to benefit from the new protections without further delay.

We greatly appreciate the opportunity to submit these comments. Please do not hesitate to contact me with any questions you may have about them.

Very truly yours,

/s/ Shaun C. O'Brien

Shaun C. O'Brien
Assistant Policy Director for Health and Retirement