To: United States Department of Labor - EBSA
From: Diane Berthel
RE: Proposed Rule: Definition of the Term Fiduciary/advice on otherwise permissible plan distributions
Date: November 23, 2010

Your proposed rule revising the definition of Fiduciary takes the position that, “as a general matter, a recommendation to a plan participant to take an otherwise permissible plan distribution does not constitute investment advice within the meaning of the current regulation, even when that advice is combined with a recommendation as to how the distribution should be invested”. Although I applaud the proposed rule in general, I strongly encourage you to reconsider this particular aspect of the rule.

Distributions from institutionally sponsored retirement plans generally represent an individual investor moving from the institutional market to the retail market, within the financial services industry. With that almost certainly comes higher fees and limited access to institutional money managers. This irreversible decision is always good for the financial services industry but rarely an improvement for the individual investor. This is not to say that there are no good reasons for this change. Such a change might involve a desire for improved financial planning or investment alternatives not present in the plan. Whatever the reasons, this transaction deserves a fair and balanced assessment of its costs and benefits; one that I believe will not be present without the requirement, for advisers, to serve as a fiduciary on this advice.

Asset distributions from institutionally sponsored plans represent a considerable pay-day for financial services companies and their individual advisers. The incentives to attract assets into a more profitable retail space are too compelling to go unchecked. Conflicted advisers have much to gain from this transaction and may not be inclined to disclose all of the pros and cons to an investor, without the incentive to do so. As an independent investment consultant for defined contribution plans, we have seen a variety of situations where this information was not fairly disclosed; in fact in some the information was unfairly manipulated to encourage rollovers.

One example was a plan with an unusual in-services withdrawal option. The plan sponsor noticed significantly increased withdrawal activity. They found that two local advisers were conducting seminars to encourage withdrawal. The plan offered fourteen categories of funds – all the institutional share class. The funds consistently ranked in the top quartile over the five and ten year periods. But the core of the seminar was to criticize the plan sponsor selected funds, as a reason to take a withdrawal.

For financial institutions, the subtle, and not-so- subtle, incentives to move investors to the retail market are considerable. With the move to open architecture, plan providers are now less likely to capture investment management fees for their in-house funds. A rollover offers an opportunity to move those dollars back into their in-house funds. For advisers, load or deferred load mutual funds, annuities, and asset based wrap fees are a few examples where the less experienced individual investor, without proper disclosure, could choose a significantly more expensive option with few, if any, benefits over their company sponsored plan.

Distribution decisions are typically made in a one-on-one manner. Therefore, no amount of regulation can control what is said in that scenario. However, extending fiduciary status to advisers for distribution advice will encourage full and fair disclosure, as well as, a balanced assessment of the outcomes.

The last few years have demonstrated that retirement security is in jeopardy for the average American. We also learned that the average plan participant is not equipped to make decisions about investment markets and their complex products and services. They need all of the help they can get. Especially at this critical point where they take, what are often inadequate assets, and determine how to turn them into the income they need for retirement. I would encourage you to support them in this difficult transition, by holding those who advise them to a fiduciary standard.