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January 18, 2011

VIA ELECTRONIC MAIL - e-ORI@dol.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5655
Washington, DC 20210

Re: **Definition of Fiduciary Proposed Rule**
29 CFR Section 2510.3-21(c)

Ladies and Gentlemen:

We are writing to request clarification in the final regulation of two concepts contained in the proposed regulation. Our concerns relate specifically to the following provisions [emphasis added in each case]:

(1) paragraph (c)(1)(i)(A)(3) which relates to "advice or recommendations as to the *management of securities* or other property"; and

(2) paragraph (c)(1)((ii)(D) which relates to a person who "provides advice or makes recommendations ... pursuant to an agreement, arrangement or understanding, written or otherwise ... that such advice may be considered in connection with making investment or *management decisions with respect to plan assets*, and will be *individualized to the needs* of the plan, a plan fiduciary, or a participant or beneficiary."

Our concern is that the terms "management of securities or other property," "management decisions with respect to plan assets" and "individualized to the needs of the plan..." are not defined in the proposed regulation and are not adequately explained in the preamble.

In the preamble to the proposed regulation, the Department comments by way of example on the concept of "management of securities." You state:

> "This would include, for instance, advice and recommendations as to the exercise of rights appurtenant to shares of stock (*e.g.*, voting proxies), and as to the selection of persons to manage plan investments."

These two examples are the only references to the issue of "management" of securities or plan assets in the preamble; and since these are relatively new concepts being introduced in the proposed regulation, we submit that the Department should provide greater definition of the concept.

We recognize that the Department has previously taken the position that "the act of making individualized recommendations of particular investment managers to plan fiduciaries may constitute the provision of investment advice within the meaning of section 3(21)(A)." [*See* the preamble to the proposed regulation on participant investment advice, 74 Fed. Reg. 3822, 2824 (Jan. 21, 2009)]. This statement, we understand, was based in part on two 1984 Advisory Opinions (1984-03A and 1984-04A), in which the Department *assumed* that an RIA was rendering investment advice in providing consulting services to a plan with respect to the selection and monitoring of investment managers. [*See, also,* the Amicus Brief filed by the Department in *In Re J.P. Jeanneret Associates, Inc. et al ERISA Actions*]

Based on this position, it would appear that a broker-dealer that refers an investment adviser to a plan client would be considered a fiduciary to the extent of that referral and that its receipt of a solicitor fee pursuant to Rule 206(4)-3 under the Investment Advisors Act would constitute a prohibited transaction. It is unclear to us under the proposed regulation whether this was intended, and we request that this be clarified.

We do not question the Department's authority to reach the conclusion that recommending an investment manager constitutes fiduciary investment advice. Rather, we are concerned that the proposed regulation is unclear in certain respects. For example:

1. When the Department refers to "management of securities" in paragraph (c)(1)(i)(A)(3) and to "management decisions with respect to plan assets" in paragraph (c)(1)((ii)(D), it is unclear how the term is being used. Indeed, in the investment community, investment management is sometimes used to refer to non-discretionary investment advisory services as well as discretionary management of investments. Under ERISA, the principal context in which the term is used with reference to investments is in Section 3(38), where the term "investment manager" is defined. Based on the examples given in the preamble, it does not appear that the Department is using the term in the Section 3(38) context, but it is also unclear whether the Department is referring to discretionary or non-discretionary

investment advisory services. We believe that both of these issues need to be clarified in the final regulation or in the preamble to the final regulation.

2. Does the term "management" have the same meaning in both paragraph (c)(1)(i)(A)(3) and in paragraph (c)(1)((ii)(D)? Or does "management of securities" mean something different from "management decisions regarding plan assets"? Regardless of whether the concepts are different or the same, we request that the Department clarify its intent in the final regulation or in the preamble to the final regulation.

Our other concern relates to the concept of advice or recommendations that are "individualized to the needs of" a plan, fiduciary or participant. This is not new to the proposed regulation, having been part of the existing regulation for 35 years. Nevertheless, the term is not defined and is, at best, poorly understood. We submit that in the context of an overhaul of the regulation, it would be appropriate for the Department to provide guidance (if not a definition) of when advice or recommendations are considered "individualized."

Consider, for example, the following situation: A non-advisory service provider (*e.g.*, a broker-dealer) recommends to a plan sponsor that the plan offer a managed account service to the participants. The recommendation is based on the broker-dealer's general knowledge of the 401(k) industry and its belief that in most plans, the participants are unable to properly manage the funds in their accounts. The broker-dealer does not have any interaction with participants, and the plan sponsor selects the advisory firm to provide the managed account service and as the QDIA for plan.

It would appear that the recommendation would fall under paragraph (c)(1)(i)(A)(3) in that it is a recommendation as to the management of securities. On the other hand, if the broker-dealer recommends that the plan engage an investment adviser to provide non-discretionary assistance to the participants under the 408(b)(14) exemption, would that constitute a recommendation as to the management of securities under paragraph (c)(1)(i)(A)(3)?

Assuming the recommendation to use a managed account service does fall into the first category, a second question remains as to whether it would also fall under paragraph (c)(1)(ii)(D); in other words, would this type of referral, which is based on the broker-dealer's understanding of the needs of 401(k) plan participants generally, be considered to be "individualized to the needs of the plan..."?

We realize that it is not the role of the regulation to provide direct answers to specific fact situations. Nevertheless, we submit that it should be possible to determine the answers based on the provisions of the regulation or discussion of the Department's intent in the preamble. Given

the importance of these issues – especially the prohibited transaction implications noted above – we request that the Department provide additional clarification on these issues.

We would be pleased to discuss these issues with you if you have questions.

Very truly yours,

C. FREDERICK REISH

BLA/CFR:shm