From: Montana, William [mailto:WMontana@studley.com]
Sent: Friday, January 28, 2011 6:02 PM
To: EBSA, E-ORI - EBSA
Subject: Do Not expand the definition of fiduciary to include many commercial real estate services

Dear Sir or Madam,

I strongly oppose the DOL's proposal to amend the Employee Retirement Income Security Act ("ERISA") that would expand the definition of fiduciary to include many commercial real estate services. If this amendment is finalized in its proposed form, it would introduce new requirements and liabilities for appraisers, brokers, managers, and advisors to ERISA programs.

Please see the attached letter from the Real Estate Board of New York which specifically articulates my concerns.

Thank you for your time and attention to this matter.

Kind Regards,

Bill Montana

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January __, 2011

By first class mail and electronic delivery
to Federal eRulemaking Portal [*http://www.regulations.gov*]

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: Definition of Fiduciary Proposed Rule

Ladies and Gentlemen:

On behalf of the commercial real estate industry, we are pleased to submit this comment letter on the Department's proposed regulation (the "Proposed Rule") regarding the term "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Who We are

The Real Estate Roundtable, an organization that represents the leadership of the nation's top 130 privately owned and publicly-held real estate ownership, development, lending and management firms, as well as the elected leaders of the 16 major national real estate industry trade associations. Collectively, Roundtable members hold portfolios containing over 5 billion square feet of developed property valued at over $1 trillion; over 1.5 million apartment units, and in excess of 1.3 million hotel rooms. Participating Roundtable trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

The U.S. commercial real estate sector represents approximately $5 trillion of value supported by $3.3 trillion in debt. Its health is vital to the economy (estimates show commercial real estate constitutes 13% of GDP by revenue) and our nation's financial system. An estimated 9 million jobs are generated or supported by real estate. On the equity side, real estate accounts for 46% of the $13.6 trillion in assets held by partnerships in the U.S. It includes $450 billion of private investments, $160 billion from pension funds, $170 billion from the real estate investment trust (REIT) market and $30 billion from the life insurance companies. On the debt side, real estate is collateral for the nearly $2 trillion of commercial bank debt, $700 billion from commercial mortgage backed securities, $300 billion life insurance companies and over $30 billion from pension funds.

Why We Chose to Comment on the Proposed Rule

Because the members of our collective organizations include employee benefit plans and various service providers to benefit plans that are subject to ERISA, we have an interest in ensuring that the Proposed Rule will not unduly restrict these constituents from engaging in routine business transactions with each other on arms-length terms. We are concerned that the Proposed Rule is overbroad and will most likely lead to increased costs for benefit plans in need of real estate related services with little corresponding benefit and hamper the ability of benefit plans to utilize the resources of trusted advisers in the best and most cost effective way. Particularly troubling are the Proposed Rule's removal of the "a primary basis," "regular basis" and "mutual understanding" prongs of the current rule and emphasis on fiduciary status through affiliation, all of which create a substantial likelihood that service providers will become inadvertent ERISA fiduciaries. We anticipate that many real estate services providers will be reluctant to become ERISA fiduciaries and may simply stop doing business with benefit plans altogether. Additionally, given that in the real estate sector benefit plans often retain experts or advisers through other consultants or investment advisers, many real estate services providers will face significant difficulties in determining if the ultimate client is a benefit plan. To impose fiduciary status and its consequences on inadvertent or otherwise unknowing "fiduciaries" seems an undue and inequitable burden**.**

While we are cognizant of the intent behind the proposed regulatory change, we believe that it casts a net that encompasses almost <u>any</u> service provider that makes <u>any kind of statement</u> regarding property to a benefit plan. On behalf of our constituents, we want to ensure that the Department is aware of some of the consequences that the Proposed Rule is likely to have in the real estate services industry in particular.

Examples of Negative Consequences in the Real Estate Sector

A. **Brokerage Services.** It appears that the Proposed Rule will make brokers of all varieties ERISA fiduciaries to the benefit plans that they service.[1] From time to time, benefit plans (particularly union pension and welfare plans) purchase real estate or enter into leases for office space and retain commercial real estate brokers to facilitate their transactions. In many markets, a number of brokerage firms represent the owners of multiple buildings. If a broker retained by a benefit plan to lease space were to introduce the plan to a building where another broker within his or her organization were the leasing agent, a violation of ERISA's rule that prohibits a fiduciary from acting on both sides of a transaction will likely occur. The most natural solution will be for the broker representing the benefit plan not to show the plan any properties where brokers within its

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[1] See, for example, comment letter of Securities Committee of the Business Law Section of the State Bar of Texas, January 11, 2011.

organization are the agents. This would, in turn, result in the benefit plan being limited in its opportunities and perhaps being precluded from purchasing or leasing office space that would have otherwise been financially in its best interest.

If the Proposed Rule is adopted in its current form, the examples of the chilling effect it will have on the ability of benefit plans to most effectively operate in the marketplace abound. For instance:

- Once it hires a brokerage team, a benefit plan would be unable to bid on or buy any property represented in the sale, or managed, by that brokerage firm.

- Once a benefit plan selects a leasing agent for a property it owns or has an interest in, any tenant looking for space but also represented by that brokerage firm would be unable to take space in the building, potentially rendering the building "undesirable" in the marketplace.

- If a benefit plan retains a brokerage firm to sell a building or property in which it has an interest, it would not be able to entertain any bidder represented by that brokerage firm.

We would be surprised if this is the intent of the Department's Proposed Rule, and, in any event, we do not believe it is in the best interests of benefit plans. As others have already suggested with respect to the scope of broker-dealer fiduciary duties in the securities industry, we do not believe Congress intended for brokers to be treated as ERISA fiduciaries.[2]
We believe that the added level of regulation in this area would not necessarily be any more protective of plans. To the contrary, it would have an adverse impact on plans and their participants by putting them at an economic disadvantage relative to other market participants.

B. **Multiple Service Providers.** Some of our constituents are full service real estate services companies that offer a variety of services to their clients and customers ("Multiple Service Providers"). For example, a single company may provide any number of the following services: property management, project management, general consulting, project finance, general market research, commercial brokerage (both sales and leasing), portfolio management, and appraisal and valuation. For these organizations, the Proposed Rule will have the effect of depriving plans of the benefit of a multi-faceted approach to services, which generally results in cost efficiencies and improved service. The most likely result is that benefit plans will again be disadvantaged in the marketplace.

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[2] See Id.

As we understand the Proposed Rule, the effect on Multiple Service Providers will be twofold. First, if they are affiliated with investment adviser (which the majority of them are) and/or each other, such an affiliation makes it likely under the Proposed Rule that any advice or recommendation that they give to a benefit plan will be treated as fiduciary advice. The Proposed Rule, therefore, will require Multiple Service Providers to institute new methods of tracking and monitoring the various relationships that they may have to benefit plans, which will likely present significant operational challenges given that these relationships are not necessarily tracked for any other purpose. Identifying and keeping track of entities that hold "plan assets" based on ERISA's "significant participant" or "25%" test may be particularly difficult for organizations that may not have had a reason to track these relationships in the past. When coupled with the indirect manner in which benefit plans often invest in real estate and/or retain Multiple Service Providers, this will place an inequitable burden on such conglomerates while potentially increasing costs for benefit plans or depriving them of necessary services, even if they are preferred by the benefit plan.

Second, it is common for Multiple Service Providers to "cross sell" services, a practice that can often result in significant cost savings and other efficiencies (e.g., enhanced institutional knowledge of the client's overall business approach and strategy). Another unfortunate result of the Proposed Rule, then, is that the "first service in" may foreclose the benefit plan's ability to further utilize <u>any other services</u> of a Multiple Service Provider, even if at arm's-length and no matter how attenuated from "investment advice" the first service is. For example, if a branch of a Multiple Service Provider provides brokerage services to a benefit plan purchasing a property, the broker's affiliates could be prohibited from providing other services to the Plan for that property (e.g., management services), depending on how broadly the broker's fiduciary duties will be considered to extend. Similarly, if and when the plan wants to retain a leasing agent for that same property, the Multiple Service Provider could be ineligible for that assignment and the benefit plan could be denied the ability to have an arm's length competition for the best provider. It appears that the Proposed Rule will make the choices for the benefit plan. We doubt that the intent of the Proposed Rule is to substitute for open market opportunities. Instead of protecting a plan (which is a laudable goal), the Proposed Rule seriously hurts a plan's ability to retain and best utilize the services of world class Multiple Service Providers.

C. **Market Research.** Certain of our constituents provide their clients with generalized information regarding the state of, and outlook for, various real estate markets or sectors. If the research provider is affiliated with an investment adviser, as will frequently be the case, this generalized information could render the research provider an ERISA fiduciary to any benefit plan that receives it. If the research leads the benefit plan to hire an affiliated service provider, a violation of ERISA's self dealing rules may have occurred. Again, it is likely that the Proposed Rule would result in many research providers ceasing to provide these types of reports to benefit plans. It would be an unfortunate outgrowth of the Proposed Rule for benefit plans not to have access to important market information that improves their ability to maximize plan assets.

D. **Valuation Services.** The Proposed Rule would also result in all real estate appraisers becoming ERISA fiduciaries to the extent their appraisals are provided to a benefit plan. We believe applying ERISA's fiduciary standards to real estate appraisers is wholly inconsistent with commonly accepted notions of the role of appraisers and, again, will likely lead only to increased costs of doing business without any corresponding benefit. In this regard, we echo the key observations of the joint comment of the Appraisal Institute and American Society of Farm Managers and Rural Appraisers.[3] Particularly, that "[r]eal estate appraisers do not act as advocates, but rather objective third parties who provide opinions of value based on research and analysis," and that "offering investment advice is vastly different than providing objective opinions of value." As that comment letter also notes, real estate appraisers are already subject to their own standards of professional conduct that prohibit them from advocating the cause or interest of any party and from acting in a matter in which the appraiser has an interest that could bias his or her conclusion.

Specific Suggestions

Based on the foregoing, we respectfully suggest that the Proposed Rule be revised as set out below.

- Affiliation alone should not be relevant for purposes of determining whether a real estate service provider is an ERISA fiduciary. The Proposed Rule's concept of becoming a fiduciary by affiliation creates a high likelihood that a service provider will become a fiduciary merely because of some other relationship that the service provider's affiliate has with a benefit plan or because of the affiliate's status (e.g., if the affiliate is an "investment adviser"). For many larger Multiple Services Providers with more complex corporate structures, tracking whether one affiliate has given advice or has a status that would result in advice given by another affiliate becoming ERISA fiduciary advice will be time consuming and costly at a minimum and, as stated above, nearly impossible to know due to the attribution rules relating to commingled funds. Depending on how various affiliates within an organization track their client and potential client relationships, avoiding becoming an inadvertent ERISA fiduciary will present significant operational challenges. For example, some affiliates within an organization may track clients by property address, not by the name of the principal. Others (e.g., those providing generalized research services) may not currently gather enough information about clients or potential clients to determine whether the client's beneficial owner is over or under 25% owned by a benefit plan. In short, we think the affiliation rule will be disruptive and detrimental to Multiple Service Providers and the benefit plans that value their input.

- Appraisers should not be considered ERISA fiduciaries. As noted above, we think that the Proposed Rule's treatment of real estate appraisers is inconsistent with generally accepted notions of a real estate appraiser's proper role in a

[3] Submitted January 5, 2011.

transaction. Moreover, while the Proposed Rule's preamble concludes that its rules will be beneficial in enhancing the Department's "ability to redress abuses," the Department did not specifically address whether it had considered or even identified particular instances of abuse in the real estate appraisal context, nor did it identify any other particular benefits that would justify making appraisers ERISA fiduciaries.

- The current regulatory regime should continue to apply to services provided outside the self-directed defined contribution plan context. The Department cites two key motivating factors for the Proposed Rule's adoption in the Preamble—the "significant changes in … the financial industry" and "the expectations of plan officials and participants who receive investment advice." The Department further notes that one of the key developments since the enactment of the Current Rule is the "shift from defined benefit (DB) plans to defined contribution (DC) plans." Thus, overall, the broadened scope of the Proposed Rule seems largely intended to protect individual plan participants and sponsors of small 401(k) plans, who generally did not have a role (or a significant role) in the investment of retirement plan assets when ERISA was enacted. As a general matter, however, the assets of large defined benefit plans, welfare plans and non-self-directed defined contribution plans ("Trustee Directed Plans") are invested in a much different manner than self-directed plans. Only Trustee Directed Plans invest in real estate or otherwise utilize real estate related (and many other) services.

  The statute itself contemplates a standard of care that varies depending on the circumstances[4]—the more complex a plan's operations, the greater the level of expertise required of the plan's fiduciaries. We submit that the fiduciaries that are most likely to utilize real estate services (fiduciaries of large Trustee Directed Plans) should already be in a position to critically evaluate any "advice" provided to them by their real estate services providers and do not require the purported protections of the Proposed Rule. For these plans, the Proposed Rule most likely represents nothing more than substantially added costs without any material corresponding benefit. We therefore suggest that whether advice provided to sophisticated fiduciaries of Trustee Directed Plans results in fiduciary status should continue to be evaluated under the current regulation. At a minimum, the Department should consider a moratorium on the application of the Proposed Rule outside the self-directed defined contribution plan context until the Department has more fully studied the potential effects of the Proposed Rule in other contexts (such as in the real estate services sector).

We thank you for taking the time to consider our comments. We wish to extend our thanks to Linda Lindman, Esq. Assistant General Counsel, CB Richard Ellis and Jeffrey Ross, Esq. of Fried, Frank, Harris, Shriver & Jacobson LLP for their kind assistance in

[4] ERISA Section 404(a) (1) (B) requires a fiduciary to act "with the care, skill, prudence, and diligence **under the circumstances** then prevailing that a prudent man acting in a **like capacity** and familiar with such matters would use in the conduct of an enterprise **of a like character and with like aims**." (Emphasis added.)

coordinating this comment letter. If you have specific questions or would like further details regarding any of our comments, please contact Mr. Ross at his direct dial (212-859-8678) or by e-mail at Jeffrey.Ross@friedfrank.com.

Respectfully,

Real Estate Board of New York
The Real Estate Roundtable
[other NREO groups]