From: Michael Francis [mailto:Michael.Francis@francisinvco.com]
Sent: Monday, January 31, 2011 6:45 PM
To: EBSA, E-ORI - EBSA
Subject: Definition of Fiduciary Proposed Rule - Comment

Date: January 31, 2011

To: EBSA

From: Michael J. Francis
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Re: Definition of Fiduciary Proposed Rule - Comment

1. BACKGROUND

Francis Investment Counsel LLC writes in support of the Proposed Rule (the "Rule"). We are an SEC registered investment adviser and provider of independent, conflict-free advice to plan sponsors and participants since 2004. The services we provide fall into two main categories: investment consulting to employers sponsoring retirement plans and investment education and individualized investment advice to plan participants. We exist to help retirement plan fiduciaries better fulfill their mission, and to assist employees build the financial assets necessary to retire comfortably. We consider it essential to our role that we remain free from all conflicts of interest so that we can always act in the best interests of our clients. We expressly acknowledge our status as an ERISA fiduciary in our written client contracts regarding our investment consulting and participant investment advice activities. Currently we serve approximately 40,000 ERISA plan participants with our conflict-free investment advisory services.

2. SUPPORT FOR THE RULE

We support the Rule because we believe it serves the best interest of plan sponsors and participants to remove all conflicts from the investment adviser's role. To the extent the Rule broadens the definition of a fiduciary, by eliminating any concept that the investment adviser must have "regularly" provided the advice and that such advice must have served as the "primary basis" for investment decisions, it necessarily increases the scope of ERISA's protection. We believe that these changes will most assuredly be favorable to plan participants. We are especially supportive that under the Rule, those who provide fiduciary investment advice will be taken at their word and held to a duty of undivided loyalty to the plans for which they work. In sum, to allow an investment advice giver to operate within an ERISA environment with any conflict of interest present is like posting a fox to guard the henhouse. It is an all-too-common industry practice that this Rule will help stop.

We acknowledge EBSA'S concerns in striving to establish a Rule that does not cause service providers to charge higher fees or limit or discontinue their services.
We believe that this result is not likely for two reasons. First, the specific limitations proposed in the Rule for "platform" providers of investment options will allow the many institutions now offering these products and services to continue without undertaking fiduciary status, provided they make the specific written disclosure that they are not providing impartial investment advice. Secondly, there are already hundreds, if not thousands of independent firms (i.e. those that do not manufacture investment product or have any affiliation with existing funds) that are already providing (or have the ability to provide) conflict free fiduciary investment advice to the retirement plan marketplace. If

the only sources of potential investment advice were financial institutions or the fund families whose employees and agents have inherent conflicts, the Rule might act to undesirably narrow the choices for advice, but this is not the case. Indeed, because of the proliferation of participant directed defined contribution plans as noted in the preamble to the Rule, the existence of suitable investment advice solutions under the new Rule is on the rise.

3. APPLICATION OF THE RULE TO PLAN DISTRIBUTIONS.

Finally, with respect to whether and to what extent the final regulation should define the provision of investment advice to encompass recommendations relating to taking a plan distribution from a defined contribution plan, we believe the Rule should apply. Profit sharing and 401(k) plans often provide for distribution options in-service as well as at separation from service. In these individual account plans, where such advice will mean liquidation of the assets held within the participant's account, the advice necessarily amounts to a recommendation of the selling of securities and hence should be included within the Rule. In some instances, such as defined contribution plans holding employer securities in a participant's account or otherwise allowing an in-kind distribution (a rare occasion, in our experience), this reasoning would not apply and hence some limits on the application of the Rule may be appropriate. Under any circumstances, the decision by a defined contribution plan participant to take a distribution is a significant one relating to the participant's retirement security and may be laden with new investment, lifestyle, tax and estate planning implications. It is difficult to imagine many circumstances under which such a decision by a participant would not rise to the level of a major investment decision and be deserving of the increased protections provided under the Rule.

Thank you for your consideration of these comments.