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delivered electronically

TO: United States Department of Labor
Washington, DC

RE: Proposed Rule on the Definition of the Term "Fiduciary"

I am pleased to comment on behalf of the Profit Sharing/401k Council of America (PSCA) on the proposed amendments to 29 CFR 2510.3-21 relating to the definition of a fiduciary adviser. PSCA is a 64-year old nonprofit association representing companies that sponsor profit sharing, 401(k), and similar plans. PSCA speaks for over 1,200 companies who employ approximately five million plan participants throughout the United States. PSCA's members range in size from very small firms to conglomerates with hundreds of thousands of employees. All regard their defined contribution plans as vital factors in their business success.

The proposed changes will reduce uncertainty for plan sponsors, participants and beneficiaries, and advisers. More importantly, under the proposal, the confidence that advice provided to plans and participants is unbiased and provided solely for the benefit of the recipient is significantly increased. We also commend the Department for scheduling a hearing on the proposed rule. We offer the following specific comments that we believe will add to the success of the proposal.

Distributions
The decision by a participant or beneficiary to request a distribution of their account assets, and how to subsequently invest those assets, can be critical to the retirement security of an individual. PSCA's members invest considerable assets to helping their workers accumulate retirement savings. Many of our members provide varying degrees of pre-retirement educational programs to help workers manage their transition to retirement. Too often, despite these efforts, older employees and retirees are targeted by unscrupulous individuals providing highly inappropriate advice. This can be disastrous to these workers. It is critically important that advice about removing assets from an employer's retirement plan be of the highest standard. It is also critically important that employers and other parties remain confident in their ability to provide education and information regarding withdrawals or distributions from a plan.

For these reasons, we recommend that the Department reconsider its position in Advisory Opinion 2005-23A that a recommendation to take a distribution, even when combined with a recommendation as to how the distribution should be invested, does not constitute investment advice. PSCA respectfully disagrees

with the Department's finding in the Advisory Opinion that a recommendation to take a distribution does not constitute a recommendation to sell any particular investment in an individual account. It is not clear that non-ERISA laws regulating investment advice apply to a recommendation that a participant or beneficiary take a distribution. In any event, our recommendation is made regardless of other securities or consumer protection laws that might apply in this situation. PSCA agrees with the Department's finding in the Advisory Opinion that a recommendation regarding the investment of the proceeds of a distribution is advice with respect to funds that are no longer assets of the plan.

PSCA also strongly believes that there needs to be a clean line between such advice and vitally needed education and information. Education and information regarding the investment and management of retirement assets is not advice. Employers and other parties should be encouraged to provide this valuable service. We urge the Department to clarify in the preamble and the body of the final rule that educating participants about distribution options, including discussions of the advantages and disadvantages of seeking a distribution and managing retirement assets outside the plan, does not constitute advice. This information might be provided by the plan sponsor, a plan service provider, or a party unaffiliated with the plan. In other examples, a plan administrator might inform participants that it accepts rollovers from other plans, including a description of the advantages of such a rollover; a plan investment manager might approach recent retirees to advertise the advantages of seeking a rollover to the manager's investments held outside the plan; or a financial institution might have a general advertising campaign to explain the advantages of their rollover programs. As long as these communications do not include a clear recommendation to seek a distribution, they should not constitute advice under the proposed rule.

Education, information, and advice regarding the tax effects of taking a distribution should not constitute the provision of advice under the proposed rule. This important information is frequently sought by or provided to plan participants that are contemplating taking a distribution of their plan assets. Examples include education and advice about the tax implications of a distribution, a direct or indirect rollover to an IRA, or the treatment of net unrealized appreciation of employer securities. The Department should clarify that education and advice limited to the tax implications of taking a distribution should not constitute advice under the proposed rule.

Paragraph (c)(2)(ii) of the proposed rule should be amended to add a specific subparagraph stating that the provision of educational information to participants and beneficiaries about distribution options, including discussions of the advantages and disadvantages of seeking a distribution and managing retirement assets outside the plan, does not constitute advice.

Investment education regarding retirement decisions

PSCA commends the Department for preserving the status of Interpretive Bulletin 96-1, relating to participant investment education, in paragraph (2)(c)(ii)(A) of the proposed rule. In the course of the Department's joint inquiry with the Department of the Treasury, the agencies requested comments regarding the provision of information to help participants make choices regarding management and spend down of retirement benefits. PSCA and several other organizations identified the expansion and clarification of Interpretive Bulletin 96–1 to explicitly apply to the provision of information to help participants and beneficiaries make better informed retirement income decisions. We urge the Department to take this action in conjunction with the development of this proposed rule.

Valuation of plan securities or property

In the proposed rule, the provision of advice, or an appraisal or fairness opinion, concerning the value of securities or other property of an employee benefit plan is a covered activity. The proposal adds "or an appraisal or fairness opinion" to the current language in 2510.3-21(c)(i). The Department simultaneously announced that the proposed rule supersedes its position in Advisory Opinion 76-65A where it held that making valuations to be used in establishing an ESOP does not establish a fiduciary relationship because a plan did not yet exist and that, under certain circumstances, advice provided to an existing ESOP regarding the value of employer securities also does not constitute the provision of advice. These combined actions will result in creating a new fiduciary relationship for a large group of service providers that provide valuation and appraisal services for all types of retirement plans.

Advisory Opinion 76-65A discusses the fiduciary status of valuation services provided before an ESOP is established and services provided for an established ESOP. The Department's position in the opinion that "Where a plan is not yet in existence, a fiduciary relationship within the meaning of section 3(21)(A) cannot be established" is widely recognized as established law that applies to all retirement plans subject to ERISA. In addition to our other concerns, PSCA urges the Department to clarify that it is not superseding this particular finding in the Advisory Opinion.

According to the preamble of the proposed rule, "The Department would expect a fiduciary appraiser's determination of value to be unbiased, fair, and objective, and to be made in good faith and based on a prudent investigation under the prevailing circumstances then known to the appraiser." PSCA supports this standard of conduct and generally supports the assumption of fiduciary status by plan service providers that deal with plan investments. However, we also share the significant concerns in the retirement plan community about the increased costs that may result from the proposed changes. The magnitude of the costs and the willingness of providers to provide valuation services under the proposed rule are, we believe, undetermined. We expect that additional information about the costs and benefits of this proposed change will be provided in the public hearing and are hopeful that a clearer understanding of the impact of this proposal will result.

IRAs

PSCA's comments are limited to employer maintained pension programs. Therefore, we are not commenting on the application of the proposed rule on individual retirement accounts. No inference should be made regarding our lack of comments on these products.

Limitation for Selling Activity

Under the proposed regulations, in paragraph (c)(2)(i), the seller/purchaser exception only applies if the recipient of the advice:

> "knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property…whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice."

PSCA applauds the Department for including this exception in the proposed rule and agrees that such activity should not constitute the provision of advice. Rather, the described activity is a sales proposal. A plan fiduciary who makes a decision regarding the investment of plan assets pursuant to a sales proposal is not acting in response to "advice" that is not impartial investment advice. Our concern is that a plan

fiduciary that acts on conflicted advice may be liable for a fiduciary breach. We suggest, for purposes of clarity, that the language in paragraph (c)(2)(i) be amended to read

> "knows or, under the circumstances, reasonably should know, that the person is providing **a sales proposal** in its capacity as a purchaser or seller of a security or other property…whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice."

Plan platforms and market reports and forecasts

The proposed rule specifies in subparagraph (c)(2)(ii)(B) that marketing or making available securities or other property from which a plan fiduciary may designate investment alternatives (a fund platform or similar arrangement) does not constitute the provision of advice if certain disclosures are made. Subparagraph (c)(2)(ii)(C) provides that general financial information and data to assist a plan fiduciary's selection or monitoring of such securities or property, if certain disclosures are made, does not constitute the provision of advice. PSCA strongly supports these provisions and urges the Department to retain and expand them in the final rule.

It is common for a fund investment manager to provide economic market analyses and forecasts to plan fiduciaries. For example, the recent worldwide debt crisis and its effect on capital markets, or reports about emerging markets such as China or Brazil, might be included in these reports. Another common topic of analysis is the Washington political environment and its potential impact on industries and markets. These reports and analyses may very well influence a plan fiduciary's decision about the selection and monitoring of plan investments. PSCA believes that the Department does not intend that these activities constitute the provision of advice. We request that the final rule include specific provisions that clarify our interpretation. Additionally, the final rule should specify that the provision of this information and any other information described in subparagraph (c)(2)(ii)(C) does not constitute the provision of advice regardless of whether it is provided in conjunction with a fund platform arrangement described in subparagraph (c)(2)(ii)(B).

Thank you for considering our comments. If I can of any assistance, or if you have any questions, please do not hesitate to contact me at 202 863 7272.

Sincerely,

Edward Ferrigno