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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

Re: Definition of Fiduciary Proposed Rule

Dear Sir or Madam:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee") to comment on the proposed regulation published by the Department of Labor (the "Department") on October 22, 2010, which would redefine the circumstances in which a person is considered an investment-adviser fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") and section 4975 of the Internal Revenue Code of 1986. The Committee is a coalition of life insurance companies formed in 1982 to participate in the development of federal policy with respect to annuities. The Committee's current 32 member companies represent more than 80% of the annuity business in the United States and are among the largest issuers of annuity contracts to IRAs and employer-sponsored retirement plans. A list of the Committee's member companies is attached.

The proposed regulation is arguably the Department's most significant rulemaking in recent memory. The definition of an investment-adviser fiduciary is foundational to both ERISA and the prohibited transaction rules of the Internal Revenue Code. It determines the extent to which a person providing investment-related services is subject to fiduciary standards of conduct under ERISA and the extent to which the prohibited transaction rules are potentially applicable. The current regulation was one of the first regulations the Department published following enactment of ERISA and the regulation has been substantially unchanged for more than thirty-five years. Existing practices associated with the sale and distribution of annuity contracts and other investment products, as well as retirement plan services to plans and IRAs have developed in light of the current regulation, and any changes will have potentially far sweeping consequences for interested stakeholders.

The proposed changes are also being made against a rapidly evolving landscape. The Department recently issued interim final disclosure rules for plan services arrangements under section 408(b)(2) of ERISA.[1] As the Department is aware, these rules require advance disclosure of whether a service provider reasonably expects to provide services as a plan fiduciary, thereby greatly limiting the extent to which a person may, after the fact, take the position that it was not a fiduciary. These new rules also highlight potential conflicts of interest by requiring disclosure of both direct and indirect compensation arrangements. It is possible, even likely, that many of the concerns identified as the impetus behind the proposed redefinition of fiduciary, most notably the Department's concern about undisclosed conflicts of interest on the part of persons who are not currently fiduciaries, will be assuaged through the enhanced transparency required under the new service provider disclosure regulations.

Moreover, as the Department is also aware, the Securities and Exchange Commission (the "SEC") is engaged in determining whether to extend the same fiduciary standard of care to broker-dealers that is currently imposed under the Investment Advisers Act on investment advisers who provide personalized investment advice. Broker-dealer representatives are perhaps the set of financial professionals who would be most affected by the Department's proposed rules, and we question whether it makes sense for the SEC and the Department to develop independent standards for when a person is treated as a fiduciary.

Accordingly, as an overarching comment, we urge the Department to proceed deliberately and cautiously, and evaluate the impact of the SEC's rulemaking as well as the impact of the interim final section 408(b)(2) regulations before finalizing the proposed regulation. The proposed changes have potential consequences that reach far beyond the usual employee benefits guidance project, and it is critical that any changes be carefully considered and vetted before they are made effective. The Department's decisions to hold a hearing and extend the comment letter deadline are a welcome first step along these lines.

With respect to the substance of the regulation, the Committee recognizes the concern the Department articulated in proposing to substantially revise the existing definition, namely, that the existing rule may inappropriately limit the types of investment advice relationships that give rise to fiduciary status. We also appreciate and support a number of ideas in the proposed regulation, including the notion of an exception for selling activity, the continuing viability of Interpretive Bulletin 96-1, and confirmation that the offering of a platform of investment alternatives ordinarily does not constitute fiduciary investment advice. However, on the whole, we believe that very substantial changes to the proposed rule are needed and that it would be appropriate for the Department to fundamentally rethink the regulation in light of stakeholder comments and the pending hearing.

Our specific comments on the proposed regulation are discussed below.

[1] Interim Final DOL Reg. § 2550.408b-2(c).

1. The Department should consider the definition of "fiduciary" for purposes of the prohibited transaction rules applicable to IRAs separately.

The proposed regulation would define the term "fiduciary" for purposes of the prohibited transaction rules of section 4975 of the Internal Revenue Code as well as ERISA. IRAs and certain other arrangements are exempt from ERISA but are subject to the Internal Revenue Code's prohibited transaction rules.

The Committee believes that the definition of fiduciary in the context of IRAs should not necessarily be the same as the definition used for employment-based plans, and we urge the Department to revise the proposed regulation to apply the new definition of an investment-adviser fiduciary solely to ERISA-covered plans.[2] To the extent the Department is concerned about the definition of fiduciary as applied to IRAs, the Department should separately consider whether a revision to the definition is appropriate for IRAs. Under the approach we suggest, the Department would explicitly except IRAs in the final regulation and would separately evaluate whether a rulemaking in the context of such arrangements is appropriate. Pending such a rulemaking, IRAs would continue to be governed by the current law definition of a fiduciary investment-adviser.

There are a number of reasons for treating IRAs differently than employment-based plans. First, as the Department recognized in the preamble to the interim final 408(b)(2) regulations, IRAs generally are marketed alongside other individual investment vehicles, such as retail brokerage accounts and nonqualified annuities, and it is important that rules avoid creating a bias against IRAs.[3] The existing definition of fiduciary already creates some limits on the types of investments and services that are available to IRAs relative to other savings vehicles. An expansion of the definition of fiduciary for IRAs would greatly expand the impact of the prohibited transaction rules and thereby exacerbate the differences. From the perspective of individuals, a different set of regulatory rules for IRAs and other individual savings vehicles is very difficult to appreciate. Individuals do not view their IRA and retail savings in dramatically different ways and the notion that certain services and investments are only available through a non-IRA account as a result of the prohibited transaction rules would make little sense to the typical IRA owner. This same dynamic is simply not present with employment-based plans, where the role of a third-party fiduciary creates an expectation that different rules are applicable and, therefore, that different investments are available.[4]

We realize that the prohibited transaction rules may mandate certain differences between IRAs and other savings vehicles. However, it makes sense to conform the applicable rules,

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[2] Keogh or HR-10 plans, *i.e.*, plans exempt from ERISA because they cover self-employed individuals only, are among the arrangements that are subject only to the prohibited transaction rules of the Internal Revenue Code. These arrangements should also be exempt from the final regulation. Keogh plans are the effective equivalent of IRAs.

[3] 75 Fed. Reg. 41,600, 41,603 (July 16, 2010).

[4] There are employment-based IRA arrangements, namely SEPs and SIMPLE IRAs. Internal Revenue Code §§ 408(k)(1) and 408(p). We express no view on the extent to which the proposed definition of fiduciary should apply to such arrangements.

including the definition of fiduciary, to the extent possible. The SEC's pending rulemaking on the standard of care owed by broker-dealers presents an opportunity to closely conform the two standards. As the Department is aware, the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted last July, deals with a similar issue by authorizing the SEC to impose the same fiduciary standard of care on broker-dealers as that imposed on investment advisers who provide personalized investment advice.[5] On January 21, 2011, the staff of the SEC issued a report to Congress on the effectiveness of the current standards of care. This standard will have an enormous impact on IRAs, and it makes little sense for the Department of Labor to proceed with new rules that are different than the rules created by the SEC.

Second, IRAs and annuities are qualitatively different than employment-based plans. As the Department noted in the preamble to the interim final 408(b)(2) regulation,[6] there are fundamental differences between plans and IRAs. An IRA owner is responsible only for his or her own plan's security and asset accumulation. The IRA owner is not acting in a fiduciary capacity with respect to a third-party participant. In this context, the IRA owner is much less likely to perceive a service provider as acting in a fiduciary capacity and, in fact, there is no notion under Internal Revenue Code section 4975 of a fiduciary relationship. The sole significance to fiduciary status under Internal Revenue Code section 4975 is the potential application of the prohibited transaction rules. The fact that a person is considered a fiduciary under Internal Revenue Code section 4975 does not mean that person is held to a fiduciary standard of conduct. Thus, simply extending the proposed definition of fiduciary to IRAs under Internal Revenue Code section 4975 is irrelevant to the basic standard of conduct.

Third, from a process perspective, the concerns that the Department articulated in the preamble to the proposed rule as the basis for the proposed redefinition of fiduciary investment-adviser appear to be unique to employer-maintained plans. In this regard, the Department has cited its challenges in holding persons who are clearly fiduciaries to a fiduciary standard as well as concerns about undisclosed conflicts of interest.[7] The Department has interpretive authority for the prohibited transaction rules of section 4975 of the Internal Revenue Code but not enforcement authority.[8] Thus, these experiences mentioned in the preamble presumably arise from the Department's experience with employment-based plans, not IRAs. Presumably the Department has coordinated with the Internal Revenue Service, which has enforcement authority for the Internal Revenue Code section 4975 prohibited transaction rules. We believe, however, that the Department should work closely with the Internal Revenue Service to specifically determine whether there are areas where persons who should be subject to the self-dealing prohibited transaction rules in connection with IRAs have somehow fallen out of the existing definition. In this regard, the very legal structure calls for a different approach to IRAs. It makes little sense to develop rules that will be enforced by another agency without getting the benefit of that agency's experience in enforcement and ensuring that the rules are appropriately tailored to the context.

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[5] Pub. L. No. 111-203, § 913(g), 124 Stat. 1376 (2010).

[6] 75 Fed. Reg. 41,600, 41,603 (July 16, 2010).

[7] 75 Fed. Reg. 65,263, 65,265 (Oct. 22, 2010).

[8] Presidential Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Oct. 17, 1978).

Finally, the approach to IRAs that we suggest is consistent with the Department's long-standing approach. The Department has a history of issuing guidance that is unique to employment-based plans even when the guidance is interpreting a rule that is equally applicable to ERISA plans and IRAs. Most recently, for example, the Department's interim final 408(b)(2) regulations are entirely inapplicable to IRAs, notwithstanding the virtually identical reasonable services exemption in Internal Revenue Code section 4975.[9]

2. The Department should permit persons who are selling investments to disclose that they are not providing impartial investment advice and act in a non-fiduciary capacity.

The proposed regulation's avowed purpose is to expand the definition of fiduciary, and one consequence of this expansion would be to make it more likely that persons who sell retirement plan products will be considered fiduciaries. Under the existing regulation, persons are fiduciary investment-advisers only if any investment advice is provided on a regular basis and there is a mutual understanding that the advice will be a primary basis for investment decisions.[10] The notion has long been that incidental advice provided in connection with sales activity is not provided on a regular basis and is not provided pursuant to a mutual agreement that the advice will serve as a primary basis for the investment decision.

The proposed regulations would, however, eliminate the "regular basis" and "primary basis" requirements, and instead create an exception from the general definition of fiduciary investment advice for selling activity. The selling exception in the proposed regulation provides that a person will not be treated as a fiduciary only if he or she can demonstrate that the recipient of any advice knows or reasonably should know that the person providing the advice or making the recommendation is acting as a seller or a purchaser, or acting on behalf of a seller or purchaser, whose interests are adverse to the plan and the participants, and that the person is not undertaking to provide impartial advice to the plan or its participants.[11]

The Committee agrees that a specific carve-out for selling activity is appropriate. Persons who sell financial products should be able to talk meaningfully about why particular products and investments are appropriate to a participant. It is inevitable that a part of this conversation will bear some similarity to investment advice. There are, however, two fundamental problems with the proposed selling exception.

First, on its face, the selling exception in the proposed regulation appears to be limited to persons who are acting as counterparties, either directly or as agents. The exception does not appear to apply to intermediaries, such as brokers or even independent insurance agents, who broker a transaction or sell a non-proprietary investment product in other than a dealer capacity. In this regard, many financial intermediaries cannot be fairly characterized as agents of the financial institution. They are not acting on behalf of the product issuer but rather are facilitating

[9] Interim Final DOL Reg. § 2550.408b-2(c)(1)(ii); Internal Revenue Code § 4975(d)(2). *See, e.g.*, Class Prohibited Transaction Exemption 86-128, Section IV, 51 Fed. Reg. 41,686 (Nov. 18, 1986) (containing different standards for IRAs and plans).

[10] DOL Reg. § 2510.3-21(c)(ii)(B).

[11] Prop. DOL Reg. § 2510.3-21(c)(2).

a transaction. The notion that financial intermediaries cannot avail themselves of the selling exception if they are brokering a sale would be an enormous change from prevailing practices. It would also unfairly mandate that a financial intermediary either represent the plan as a fiduciary or represent the financial institution as its agent. There is, however, clearly a role for intermediaries between these two poles, and we strongly believe that such an intermediary should be able to work with a plan as neither a fiduciary nor an agent of the product issuer.

Even in the context of products directly sold by the issuer or its agent, there is some question whether the proposed rule's selling exception will be of much utility. It is very common for an insurer or other financial institution to make available a variety of different products. Within these product lines, there will be substantial decision points for which investment-related services are appropriate. Consider, for example, a plan that is funded through a variable annuity contract purchased directly from the insurer. The issuer consults with the plan fiduciary regarding which subaccount investments will be made available to participants. By way of another example, if the regulation applies to IRAs, consider an IRA owner who contacts an insurer to purchase a payout annuity. The issuer consults with the IRA owner to discuss whether a fixed or variable annuity contract is appropriate. Under the proposed regulation, it appears that the selling exception would not be applicable in either example because the insurer does not necessarily have an adverse interest with respect to the particular selection, *i.e.*, the choice of subaccount investments or the choice between fixed or variable payout annuities.

It is critical that the selling exception encompass recommendations provided within an issuer's broader line of products. In this regard, it will be clear to a participant or IRA owner that the issuer or its agents are marketing its products and therefore that the issuer is not providing impartial investment advice. However, under the proposed rule, it may be difficult to conclude that the seller or its agents have an adverse interest with respect to consulting on the selection of a particular product among the issuer's many products or, as in the example above, on the selection of subaccount investments in a variable annuity contract. Such an interpretation would undermine the exception since producers almost invariably have different offerings and options, and provide investment consulting incidental to selecting among these offerings and options.

To address these issues, the Committee strongly believes that the final regulation should include a selling exception that allows an investment service provider to affirmatively disclaim fiduciary status. This disclosure could be integrated into the disclosure provided in connection with the interim final 408(b)(2) regulations, which would mean the disclosure would be provided at the start of the services arrangement and in the event of any modification to the arrangement.

The Committee also believes that this exception should not depend on whether the provider discloses that it has an interest that is adverse to the plan or participants. A financial professional may have an economic interest in a particular product but that does not mean the professional's interests are adverse to the plan or its participants. The professional has every interest in developing an ongoing relationship and selling other products to the plan or IRA. Rather, we believe the selling exception should require a disclosure that the provider's compensation may vary based on the investments made by the participant as well as a statement that the professional is not providing impartial investment advice.

The approach we suggest is consistent with the fundamental principle that parties to an arrangement should be able to mutually agree to the nature of the arrangement. Service providers who offer investment services should be able to define the scope and nature of the services they are willing to provide, including the extent to which they are acting on behalf of the plan or a participant.

We also note that the selling exception should apply to the sale of investment advisory services. The proposed regulation would treat recommendations as to the management of securities, including the selection of an investment manager, as a form of investment advice.[12] However, the selling exception is limited on its face to sales of securities or other property. It is not uncommon for a financial professional to sell an investment management program or managed account option. These are, in concept, recommendations with respect to investment managers which would be considered fiduciary investment advice under the proposed regulation, and we are not aware of any basis for limiting the exception to recommendations with respect to securities or other property.

3. A recommendation to a participant to take a distribution should not be considered fiduciary investment advice.

The preamble to the proposed regulation requests comments on whether and to what extent the final regulation should define the provision of investment advice to encompass recommendations related to the taking of a plan distribution. The Committee strongly believes that recommendations made to a participant to take a distribution should not be treated as fiduciary investment advice.

As a conceptual matter, there is no inherent investment element in a plan distribution. Consider, for example, a plan that provides for in-kind distributions, such as, distributions of mutual fund shares or a distribution of an annuity contract. The investment made in the plan may be the exact same investment made outside the plan. In this sense, a distribution recommendation fundamentally involves a recommendation that a participant take his or her assets out of plan solution, rather than a recommendation that the participant sell a security. We appreciate that a recommendation to take a distribution has material ramifications, for example, loss of fiduciary oversight and perhaps access to institutional pricing and unique investments. There may, however, be advantages associated with investments outside of a plan, including access to different fee structures, other investment advisors and opportunities, and greater flexibility. But the key point is that a recommendation to take a distribution and forego the characteristics associated with plan asset status is not akin to an investment decision. Investment advice is appropriately limited to advice regarding securities and other property (and the related rights), not to the inchoate rights associated with plan solution.[13]

[12] Prop. DOL Reg. § 2510.3-21(c)(1)(i)(A)(3).

[13] We also note that there are already mandated disclosures that specifically address the impact associated with a participant's decision not to defer a distribution. In this regard, Congress has directed the Treasury Department to modify the disclosures required under section 411(a)(11) of the Internal Revenue Code to include a description of the consequences of failing to defer. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1102(b); Prop. Treas. Reg. § 1.411(a)-11(c).

The Committee recognizes that many plans do not provide for in-kind distributions and that advice to take a distribution will therefore implicitly involve a recommendation to liquidate the participant's existing investments. However, the liquidation inherent in many plan distributions should not be viewed as causing distribution advice to somehow become investment advice. The liquidation is incidental to the transaction. In fact, the participant may be replicating the very investments he or she holds outside the plan, for example, through a rollover to an IRA maintained by the same provider who provides investments to the plan.

Instead, the relevant transaction that is potentially subject to regulation is the reinvestment of the distribution proceeds. The particular regulatory regime that is applicable to a reinvestment depends on what the participant chooses to do with the proceeds of the distribution. For example, if the distribution is rolled to an IRA annuity, state insurance law would regulate the investment inherent in the rollover. To the extent a distribution is reinvested in an IRA and advice is provided with respect to such reinvestment, the prohibited transaction rules may also be relevant. If the person recommending the reinvestment is an investment adviser, then the advice could also be regulated under the Advisers Act. If the distribution is rolled to another plan, the reinvestment may be regulated by ERISA. Regardless, however, this is a question that is governed by the law applicable to the reinvestment, not to the recommendation to take a distribution.

Broadly speaking, the analytic approach we recommend to distribution advice is the approach taken in Advisory Opinion 2005-23A.[14] The Advisory Opinion, however, layers on an additional concept. Specifically, it treats distribution advice that is provided by a person who is otherwise a plan fiduciary as fiduciary investment advice. The apparent notion is that a person who is otherwise a fiduciary should be treated as such if they would be perceived as a fiduciary by a participant. We question whether this analysis is sound. ERISA imposes a functional definition of fiduciary.[15] A person is only a fiduciary to the extent he or she is performing a fiduciary function. We struggle with the very notion that a fiduciary acting as such could recommend a distribution since such a distribution could be at odds with the interests of the plan, for example, by reducing plan assets and raising fixed costs or even simply by taking the assets out of the ambit of fiduciary oversight. We also note that this rule has been the source of some confusion, for example, does it depend on the particular fiduciary role played? Does it only apply where the person recommending the distribution is also providing participant-level investment advice? Does it apply where the person recommending the distribution is providing fiduciary advice to the plan's named fiduciary but not to participants or beneficiaries? Thus, we urge the Department to clarify that recommendations made to a participant to take a distribution should not be treated as fiduciary investment advice, regardless of whether the recommendation is made by a person who is otherwise a plan fiduciary.

4. <u>The Department should narrow the rule treating valuation advice as fiduciary advice.</u>

[14] ERISA Advisory Op. 2005-23A (Dec. 7, 2005).

[15] *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

The proposed regulation would treat advice concerning the value of securities or other property as a type of investment advice.[16] The proposed regulation clarifies that valuation advice does not include the preparation of a general report or statement that merely reflects the value of an investment if that report or statement was provided for purposes of compliance with the reporting and disclosure requirements of ERISA or the Internal Revenue Code.[17] This clarifying exemption does not, however, apply if the report involves assets for which there is not a generally recognized market and the report serves as a basis on which a plan may make distributions to plan participants or beneficiaries.[18]

The Committee strongly recommends that the Department reconsider this valuation rule and, at a minimum, clarify the scope of the rule to ensure that insurers are not treated as fiduciaries in performing the numerous valuations associated with annuity contracts that are necessary to plan administration.

Insurers routinely provide plans with valuations of annuity contracts, which ordinarily do not have a generally recognized market value after issuance, and these valuations involve some measure of discretion, for example, in the selection of actuarial assumptions. These valuations are generally done for compliance purposes and include, among others, valuations for purposes of required minimum distribution rules of section 401(a)(9) of the Internal Revenue Code, reporting on the Form 5500, reporting for purposes of Roth conversions, and for purposes of determining distributions more generally.[19]

Insurers also routinely perform valuations of separate account investments and engage independent appraisers to assist in certain valuations, for example, an independent real estate appraiser to value properties held in a real estate separate account investment. Some of these valuations involve investments for which there is no generally recognized market. For example, real estate property valuations ordinarily do not involve property with a generally recognized market.

Treating valuations as fiduciary functions will increase the costs of plan administration and it may even close off some investment opportunities for plans. Fiduciary status would greatly expand potential liability for valuation services and we cannot discern any identifiable benefit associated with imposing fiduciary status on insurers and the independent appraisers they hire. In the absence of any identified problems, we do not see any basis for concluding that the benefits associated with fiduciary status would justify the costs of treating insurance contract valuations as a fiduciary function.

We are also concerned about the potential collateral implications of fiduciary status, particularly prohibited transaction consequences. For many transactions involving fiduciaries,

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[16] Prop. DOL Reg. § 2510.3-21(c)(1)(i)(A)(1).

[17] Prop. DOL Reg. § 2510.3-21(c)(2)(iii).

[18] *Id.*

[19] Treas. Reg. § 1.401(a)(9)-6, Q&A 12; 2010 Instructions for Form 5500; Treas. Reg. § 1.408A-4, Q&A 14 (presumably this rule is equally applicable to in-plan Roth conversions under Internal Revenue Code § 402A(c)(4)).

there are existing class prohibited transaction exemptions that facilitate transactions that are in the best interests of participants and beneficiaries. Obviously these exemptions have not been developed with an eye to fiduciary appraisals or valuations. Thus, the exemptions will likely be unavailable to valuation fiduciaries and it is possible that certain transactions that are highly beneficial to plans will be foreclosed by the prohibited transaction rules.

We also struggle to understand how fiduciary status is consistent with the role that an appraiser or insurer performs when it provides a valuation. A fiduciary has a duty to act in the interests of the plan, rather than to act in a detached objective manner as does an appraiser or other person performing a valuation.[20] Thus, the very notion that an objective valuation is an appropriate fiduciary function is questionable - it would seem to place an insurer in the untenable position of either performing an objective valuation or fulfilling its fiduciary obligations. In addition, unlike an appraiser of privately held securities in an ESOP, an insurer has an interest in an annuity contract that it has issued. This interest is arguably in tension with acting as a fiduciary. Taken to an extreme, this could suggest that third-party valuation of annuity contracts is necessary, which could dramatically increase the cost of plan administration, with very little benefit to plans and participants.

Perhaps most fundamentally, we fail to see the statutory basis for treating valuation services as fiduciary investment advice. Many of the valuations that an insurer or its independent appraiser performs are not recommendations to buy or sell the property but rather are done for the purpose of informing participants and plan fiduciaries of the value of the property. This may be because ERISA or the tax law requires a valuation, for example, for purposes of computing required minimum distributions. It is often entirely unrelated to decisions about whether to buy or sell property or securities.

The preamble to the proposed regulation reflects that the purpose of this provision is to make persons who value employer securities in an ESOP maintained by a privately-held company into investment-adviser fiduciaries.[21] It also notes that the Department has frequently identified enforcement issues in which fiduciaries have reasonably relied on faulty ESOP valuations.[22] We realize that the Department has also questioned whether appropriate valuations are being obtained by plans that invest in hard-to-value investments, such as private equity funds, and that the Department's concerns are not limited to ESOPs. However, as mentioned above, we are not aware of any comparable problems or identified issues associated with annuity contracts or separate account investments. We submit that broadly extending fiduciary status to virtually all valuations is not appropriate. To the extent the Department believes that there are issues with ESOP or other types of valuations, the Department should consider more targeted solutions.

For these reasons, the Committee urges the Department to reconsider whether valuation is appropriately a fiduciary function and, at a minimum, more narrowly tailor the proposed rule's definition of valuation to ensure that a person's valuation of an annuity contract or a separate account investment does not cause the person to be a fiduciary.

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[20] ERISA § 404(a)(1); American Society of Appraisers Code of Ethics, Section 2.2.

[21] 75 Fed. Reg. 65,263, 65,265 (Oct. 22, 2010).

[22] *Id.*

5. The final regulation should clarify the exception for provider platforms.

The Committee greatly appreciates the platform provider exception in the proposed regulation. The platform provider exception makes clear that the provision of a platform of designated investment alternatives by a service provider is not investment advice, provided that (i) the platform is not individualized to the needs of the plan and its participants or beneficiaries, and (ii) the platform provider discloses in writing to the plan fiduciary that it is not undertaking to provide impartial investment advice.[23] Similarly, the provision of general financial information and data to assist a plan fiduciary in the selection and monitoring of designated investment alternatives in connection with the provision of a menu of plan investment options is not investment advice if the platform provider discloses in writing that the provider is not undertaking to provide impartial investment advice.[24]

We do, however, recommend additional clarifications to this rule. First, plan service providers routinely engage in certain practices associated with platforms and investment menu selection that should not cause the provider to fall outside of the platform exception. It is not uncommon, for example, for a provider to offer to narrow down the provider's platform by applying certain specified criteria, for example, narrowing the platform based on the Morningstar ratings for different investment options. It is also common to price plan services based on an assumed investment menu and to respond to a request for proposal utilizing a sample or initial investment menu that is a subset of the provider's platform. Providers will sometimes furnish the plan fiduciaries with a gap analysis that identifies investment classes that may be missing or underrepresented on a plan's investment menu. Each of these practices should not taint the platform exception. The use of criteria to narrow the platform is simply a mechanical tool made available to plan fiduciaries; it is not a recommendation. Also, the use of an assumed or initial investment menu is not a recommendation to use that menu. A gap analysis is also better thought of as investment education. Each of these services is valuable and helpful to plan fiduciaries, and it is important that the final regulations not discourage the offering of these tools to plan fiduciaries.

Second, the platform exception appears to be limited to employment-based retirement plans. The exception itself is specific to a platform "from which a plan fiduciary may designate investment alternatives into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts".[25] To the extent the final regulations apply to IRAs and Keogh plans, the Committee firmly believes that the platform exception should also apply to IRAs and Keogh plans. Many IRA providers limit the investments that may be selected through the IRA to a specified universe of investments. These investments may be solely proprietary or may include both proprietary and non-proprietary investments. The mere offering of such an investment platform should not be viewed as investment advice to IRA owners.

[23] Prop. DOL Reg. § 2510.3-21(c)(2)(ii)(B).

[24] Prop. DOL Reg. § 2510.3-21(c)(2)(ii)(C).

[25] Prop. DOL Reg. § 2510.3-21(c)(2)(ii)(B).

6. The Department should conduct a comprehensive review of the existing class prohibited transaction exemptions before finalizing the proposed rules.

The definition of fiduciary is closely tied to a number of class prohibited transaction exemptions, which provide relief from the prohibited transaction rules for certain plan and IRA transactions involving fiduciary advice. The current regulation defining fiduciary investment advice was released along with Class Prohibited Transaction Exemption ("CPTE") 75-1.[26] There are also a number of other exemptions that potentially apply to investment-related transactions, including CPTE 86-128 and, most notably for issuers of insurance contracts such as the Committee's members, CPTE 84-24, which exempts the receipt of commissions in connection with the sale of an insurance contract if certain disclosure requirements are satisfied.[27]

If finalized as proposed, the new regulations will place substantial pressure on the extent to which the existing class exemptions are applicable. Many insurers and financial professionals currently take a "belt-and-suspenders" approach to compliance. That is, the insurer or financial professional may take steps to ensure that it is not acting as a fiduciary and satisfies an exemption. The proposed regulation, if finalized, will remove one of the two grounds for concluding that there is no prohibited transaction and will therefore force affected persons to perform a closer analysis of the potentially applicable prohibited transaction exemption. There are numerous open and uncertain issues with respect to the existing class prohibited transaction exemptions. These issues have not been as significant as they might otherwise be simply because an exemption from the self-dealing prohibited transaction rules is not necessary if a person is not acting in a fiduciary capacity.

If the regulations are finalized substantially as proposed and the existing class exemptions are left in place, we are deeply concerned about potential marketplace disruption. Many routine transactions which today are not subject to the prohibited transaction rules would suddenly be subject to those rules and there may be no potentially applicable exemption. Thus, entire classes of transaction may be foreclosed. This market disruption could be particularly significant if the final regulation is extended to IRAs, for which the web of existing transactions is less well developed.

For life insurers, the most notable exemption is CPTE 84-24. Notwithstanding that insurers and financial professionals who distribute insurance contracts have relied upon CPTE 84-24 for more than 25 years, there are numerous questions about its scope and the extent to which it exempts the receipt of certain types of compensation. Over the years, for example, questions have arisen whether CPTE 84-24 covers the sale of both proprietary and nonproprietary annuity contracts and we urge the Department to clarify that the exemption is broad enough to encompass both types of contracts. Another issue is the need for confirmation that compensation received by an affiliated insurance company and an affiliated money manager of a variable annuity contract subaccount is within the ambit of CPTE 84-24. Yet another question is the extent to which various payments made by an issuer to a broker-dealer in connection with the placement of contracts are considered commissions covered by CPTE 84-24.

[26] Class Prohibited Transaction Exemption 75-1, 40 Fed. Reg. 50,845 (Oct. 31, 1975).

[27] Class Prohibited Transaction Exemption 84-24, 49 Fed. Reg. 13,208 (April 3, 1984).

For these reasons, we strongly recommend that the Department review its existing class prohibited transaction exemptions and provide additional guidance before finalizing the proposed regulations to ensure that plans and participants are able to engage in beneficial transactions.

7. The Department should issue additional guidance clarifying the distinction between investment advice and investment education.

The Committee greatly appreciates that the proposed rule would not disturb the existing guidance delineating the line between non-fiduciary investment education and fiduciary investment advice at the participant level. The existing guidance – Interpretive Bulletin 96-1 – has been very helpful in facilitating the provision of information about generally accepted investment theory to plan participants.[28] There is, however, a very substantial need for additional guidance on permitted non-fiduciary investment education.

First, the Department should clarify that the exemption in the proposed regulation also applies to investment education materials provided to IRA owners. This clarification may be necessary even if IRAs are not covered by the final rule. Interpretive Bulletin 96-1 deals solely with investment education materials provided to participants in plans that permit participant-investment direction. It does not apply on its face to IRA owners, although many financial institutions and professionals have relied on the Interpretive Bulletin to provide educational materials on investing to IRA owners.

Second, the Department should provide additional guidance on investment education in two contexts. First, as we have previously recommended,[29] the Department should develop guidance similar to Interpretive Bulletin 96-1 for investment education about decumulation. In addition, as mentioned above, the Department should develop guidance for investment education that may be provided to plan fiduciaries. Many of the issues arising about the scope of the regulation are attributable to the lack of guidance about the line between investment education and investment advice in the context of investment-related services that are provided to plan fiduciaries. This guidance should similarly be exempt from the definition of investment advice under the proposed regulation.

8. The regulation appears to inappropriately create a presumption that investment-related services constitute fiduciary investment advice.

As a final point, there are a number of aspects of the proposed regulation that appear to create a system under which financial professionals are effectively presumed to be investment-adviser fiduciaries, and we encourage the Department to carefully consider whether the cumulative effect of these aspects makes the regulation overly inclusive.

[28] Interpretive Bulletin 96-1, 61 Fed. Reg. 29,585 (June 11, 1996).

[29] Comment Letter submitted by the Committee of Annuity Insurers in response to the Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, RIN 1210-AB33, page 7 (May 3, 2010).

First, the proposed regulation would treat a person who provides recommendations about the advisability of investing in securities or other property as a fiduciary if the person or an affiliate is otherwise a fiduciary of the plan, *e.g.*, a directed trustee, or is an investment adviser under the Investment Advisers Act.[30] This is apparently true even if the advice is not individualized and there is no mutual understanding that the advice will be considered in making investment decisions. This could greatly expand the universe of fiduciary activity in contexts where there does not appear to be a reasonable expectation that advice is in fact fiduciary in nature, including, for example, generalized reports and commentary provided by a person who is an RIA or has an RIA affiliate. By way of another example, a provider that serves as a plan fiduciary, for example, a directed trustee, would appear to have the type of status that would cause any advice to be fiduciary advice even if it is not individualized to any particular plan or participant.

The Committee is concerned that this status-based rule could cause routine marketing and communications materials to be considered fiduciary investment advice. Insurers often have affiliates that are RIAs and may serve as directed trustees. As a result, under the proposed regulation, it appears that any recommendation could be considered fiduciary investment advice. This notion of a status-based definition is not consistent with the functional definition of fiduciary under ERISA. It is particularly troubling because of the many different roles that financial institutions play in plans, and we strongly recommend eliminating the status-based prongs of the proposed regulation.

Second, the proposed regulation provides that advice may be investment advice if there is a mutual agreement that the advice will be considered in making investment decisions and the advice is individualized.[31] The current regulation provides that advice is investment advice only if it will be a primary basis for investment decisions. This would appear to cause many conversations about individualized investment decisions to be fiduciary investment advice even if no particular recommendation is made and even if there is no shared understanding that the advice will be important to the investment decision.

Third, the proposed rules would also appear to shift the burden of proof to an investment service provider to establish that it is not acting in a fiduciary capacity. In this regard, the selling exception is only available under the proposed rule if the service provider can demonstrate that the recipient of its services reasonably should know that the services fall within the exception.[32] This notion is not supported by the statute and we see little reason for presuming that all investment service providers are fiduciaries in the absence of a demonstration to the contrary.

Taken as a whole, we view the proposed rule as creating something near to a presumption of fiduciary status in any situation in which an investment or investment-related service is involved. We urge the Department to carefully consider the appropriate balance in defining fiduciary investment adviser, and avoid the creation of a de facto presumption of fiduciary status.

[30] Prop. DOL Reg. § 2510.3-21(c)(1)(i)(2).

[31] Prop. DOL Reg. § 2510.3-21(c)(1)(ii)(D).

[32] Prop. DOL Reg. § 2510.3-21(c)(2)(i).

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Should any questions arise in connection with our comments, or if the Committee can be of any assistance to the Department in its consideration of this important issue, please contact Jason Bortz or Joseph McKeever, both of Davis & Harman LLP. They can be reached by phone at 202-347-2230, or *via* electronic mail at jkbortz@davis-harman.com or jfmckeever@davis-harman.com, respectively.

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The Committee of Annuity Insurers was formed in 1982 to participate in the development of federal tax and securities law policies with respect to annuities. The member companies of the Committee represent more than 80% of the annuity business in the United States.

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