February 3, 2011

Submitted Electronically Via E-mail (e-ORI@dol.gov)

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

RE: Fiduciary Investment Advice Proposed Regulation

Pension Consultants, Inc. assists retirement plan fiduciaries with the selection, evaluation, and monitoring of service providers furnishing banking, custodial, investment advisory, investment management, recordkeeping, securities or third party administration services. We support the Department's effort to update the regulations defining fiduciary investment advice under ERISA Section 3(21)(A)(ii).[1] We believe that the proposal, if adopted in its current form, would significantly advance the best interests of plan sponsors, participants, and beneficiaries of individual account retirement plans. We believe that the current regulation permits investment advisers to craft their services and advice in a way that inappropriately deflects fiduciary status. We agree with the position that conditioning fiduciary investment advice upon the satisfaction of each of the five factors of the current regulation is no longer a tenable framework for identifying the kind of advice that may constitute fiduciary investment advice. There are many instances of investment advice that significantly affect plan investments while avoiding fiduciary status by manipulating the five factor test. In today's diverse and complex industry of investment advisers, managers, brokers, and other retirement plan service providers, the existence of and/or potential for such evasion subjects plan sponsors, participants, and beneficiaries to unacceptable levels of risk. Again, we believe the proposal would enhance the fiduciary protections afforded to participants and beneficiaries. Therefore, we support the Department's proposal.

Our firm recognizes that it and other financial advisers will be significantly affected by the proposal. Although we support the Department's policy objectives (and we believe the proposal will effectively advance those objectives), we request additional information and/or further clarification regarding several provisions contained in the proposal. These provisions include:

1) "provides advice or makes recommendations as to the management of securities or other property of the plan;"[2]
2) "provides advice or makes recommendations described in (C)(1)(i)"[3]

[1] 29 U.S.C. § 1002(21)(A)(ii).
[2] Prop. Labor Reg. § 2510.3-21(c)(1)(i)(A)(3)

3) " . . . whose interests are adverse to the interests of the plan or its participants and that person is not undertaking to provide impartial investment advice;"[4] and
4) "a fee or other compensation . . . from any source . . ."[5]

1) *Provides Advice or Makes Recommendations as to the Management of Securities or Other Property of the Plan*

Many investment advisors "make recommendations as to the advisability of investing in, purchasing, and holding, or selling securities."[6] Often times, advice covered by this provision is the main type of advice rendered to a client. Furthermore, many investment advisors acknowledge in writing that they are acting as an ERISA Section 3(21)(A)(ii) fiduciary when rendering such advice. Many of these investment advisors, who primarily render advice covered by paragraph (c)(1)(i)(A)(2), also offer assistance as to proxy matters but do not necessarily acknowledge that they are acting as an ERISA Section 3(21)(A)(ii) fiduciary when offering such assistance.

We understand that paragraph (c)(1)(i)(A)(3) includes advice or recommendations as to the voting of proxies; however, we would like additional information on the breadth of this provision. We believe that additional guidance may help many investment advisers more accurately understand and communicate their fiduciary roles.

Specifically, does paragraph (c)(1)(i)(A)(3) cover assistance as to proxy matters offered by investment advisors who offer such assistance as an incidental, complimentary or ancillary service (i.e., complimentary or ancillary with respect to the investment advisor's primary services, which are described under paragraph (c)(1)(i)(A)(2))? In other words, does the Department perceive a meaningful difference between:

- investment advisors who acknowledge fiduciary status with respect to advice covered under paragraph (c)(1)(i)(A)(2) but who offer assistance as to proxy matters as an ancillary service; and
- advisers whose *primary function* is rendering advice as to the voting of proxies?

If the Department does not contemplate an exclusion based on the degree to which proxy advice composes the services offered by the adviser (i.e., if the Department does not contemplate an incidental, complimentary, or ancillary service exclusion), does the Department contemplate other grounds for excluding certain assistance as to proxy matters from coverage under

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[3] Prop. Labor Reg. § 2510.3-21(c)(1)(ii)(D)
[4] Prop. Labor Reg. § 2510.3-21(c)(2)(i).
[5] Prop. Labor Reg. § 2510.3-21(c)(1)(i)(A)(2).
[6] Prop. Labor Reg. § 2510.3-21(c)(1)(i)(A)(2).

paragraph (c)(1)(i)(A)(3)? For example, many investment advisers who offer assistance as to proxy matters do so on a *limited* basis only; such services might include the provision of a proxy policy statement or the provision of a generalized research report based upon the client's fiduciary proxy criteria. Does the Department intend for the limitations described in paragraph (c)(2) to apply to advice regarding the voting of proxies? For example, could the provision of a proxy policy statement qualify as the "provision of investment advice materials?"[7] Similarly, could the provision of generalized proxy research qualify as the "marketing or making available without regard to individualized needs of plans or participants . . . "[8] In what other ways might limited proxy advice be excepted from the regulations' definition of fiduciary investment advice?

We believe many investment advisers would benefit from the Department's confirmation as to whether the limitations described in paragraph (c)(2) are intended to apply to advice regarding the voting of proxies. Furthermore, if the Department intends for the limitations described in paragraph (c)(2) to apply to advice regarding the voting of proxies, then many investment advisers would benefit from additional guidance illustrating *how* the limitations described in paragraph (c)(2) would apply to proxy voting advice. Finally, if the Department does not believe the limitations described in paragraph (c)(2) apply to proxy voting advice, we request that the Department consider providing an analogous set of limitations to be applied to proxy voting and other types of advice covered by paragraph (c)(1)(i)(A)(3). We believe many investment advisers would greatly benefit from additional guidance in the form of specific, hypothetical examples illustrating the types of advice that may or may not constitute investment advice under paragraph (c)(1)(i)(A)(3). Therefore, we request that the Department consider issuing such examples, regardless of whether the limitations described in paragraph (c)(2) shall apply – or whether a different set of limitations shall apply to paragraph (c)(1)(i)(A)(3).

2) *Provides Advice or Makes Recommendations Described in (C)(1)(i)*

Again, our firm believes the proposal is drafted effectively and will advance the Department's policy objective of protecting participants from conflicts of interests and self-dealing by giving a broader and clearer understanding of when investment advice is subject to ERISA's fiduciary standards. While some advisers will continue to look for ways to avoid fiduciary status, we believe the proposal's definition will significantly limit the opportunity for and effectiveness of *loop-hole* behavior in the industry.

We read the proposal as establishing three key factors in paragraph (c)(1): the *what* factor;[9] the *to whom* factor;[10] and the *by whom* factor.[11] Under the *by whom* factor, the Department has

[7] Prop. Labor Reg. § 2510.3-21(c)(2)(ii)(A).
[8] Prop. Labor Reg. § 2510.3-21(c)(2)(ii)(B).
[9] Prop. Labor Reg. § 2510.3-21(c)(1)(i)(A)(1)-(3) (describing three categories of *conduct* that may constitute investment advice).
[10] Prop. Labor Reg. § 2510.3-21(c)(1)(i)(B).

retained the basic structure of the current five factor test.[12] We understand that the proposal's application of the traditional five factors has been relegated to a mere component, or tier, (i.e., the *by whom* tier) of the "investment advice" inquiry; however, we would like to better understand why the Department has retained the five factors in the proposal – even for this limited application.

It appears to us that paragraph (c)(1)(ii)(D) functions as a catch-all provision intended to cover persons who may not be covered under paragraphs (c)(1)(ii)(A)-(C). However, because we believe that paragraph (c)(1)(ii)(D) may be as porous as the current five factors, we believe that paragraph (c)(1)(ii)(D) should be replaced with a less porous catch all provision.

3) *Interests are Adverse to the Interests of the Plan or its Participants and That Person is Not Undertaking to Provide Impartial Investment Advice*

We would like additional information regarding the limitation described in paragraph (c)(2)(i). Specifically, we would like the Department to consider the following questions:

- Is the limitation too broad in light of the proposal's purported policy objectives?
- To what extent should a "seller of a security" disclose that its interests may be adverse to the interests of the plan or its participants and that it is not undertaking to provide impartial investment advice?
- Would such a disclosure affect the "should have known" element of the provision?
- Does the "should have known" element depend at all upon the provision of such a disclosure?

Again, we applaud the Department's intent to protect participants from conflicts of interests by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA's fiduciary standards. However, we believe that the limitation described in paragraph (c)(2)(i), in the absence of additional guidance, will contravene the Department's policy objective of increasing transparency. We fear that the limitation may continue to blur the line between investment advisers and securities broker-dealers. We believe that the blurriness between investment advisers and broker-dealers is especially pronounced in the eyes of plan participants. This is because many broker dealers hold themselves out as investment advisers or bear similarities to investment advisers that, in the eyes of plan participants, muddle the distinction between broker-dealers and investment advisers. Furthermore, many investment advisers wear the dual hat of a broker-dealer. In these cases, it is especially difficult for participants distinguish between the adviser's broker-dealer and investment advisory functions. We believe that the proposal could do more to address this transparency issue, and we believe

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[11] Prop. Labor Reg. § 2510.3-21(c)(1)(ii)(A)-(D) (describing four categories of *actors* that may render the advice described in paragraphs (c)(1)(i)(A)(1)-(3)).
[12] Prop. Labor Reg. § 2510.3-21(c)(1)(ii)(A).

that the limitation described in paragraph (c)(2)(i) contravenes the Department's stated policy objectives. It is with these thoughts in mind that we ask the Department to reconsider the structure of paragraph (c)(2)(i).

4) *Fee or Other Compensation*

Our firm believes that a definition of "for a fee" under ERISA Section 3(21)(A)(ii) is much needed. The issue of what is and what is not a "fee" for the purposes of the statute is a longstanding point of controversy in our industry. While we are grateful for the proposal's attempt to define "fee or other compensation," we hope that the Department will address the following concerns:

First, we believe the proposal expounds upon the two key elements of ERISA Section 3(21)(A)(ii) – "investment advice" and "for a fee." Accordingly, we perceive the proposal as establishing a two factor test under ERISA Section 3(21)(A)(ii). The first factor is the three-tiered "investment advice" inquiry described in paragraph (c)(1). The second factor is the "fee or other compensation" inquiry described in paragraph (c)(3).

We believe that paragraph (c)(3) should become paragraph (c)(2) and that paragraph (c)(2) should become paragraph (c)(3). Furthermore, we believe that "for a fee" should be removed from the heading to paragraph (c)(1) to avoid the perception that the "fee" factor is intertwined with the "investment advice" factor. As a corollary to this change, we believe that the heading to the proposal's current paragraph (c)(3) should be worded in a way that clearly establishes "fee or other compensation" as an independent factor.

In addition to these structural recommendations, we would appreciate additional information and guidance illuminating the breadth of the provision, perhaps in the form of examples. For instance, if a third party record keeper offers investment advice to participants as a *free* incidental service, does such advice avoid fiduciary status because it is not for a fee or other compensation? We believe that this is one of many commonly occurring fact patterns that could be further addressed by a series of examples.

We appreciate the opportunity to provide these comments and would be happy to provide additional input or clarification.

Sincerely,

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consultants inc.