February 3, 2011

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

Attention: Definition of Fiduciary Proposed Rule

RE: EBSA Proposed Rules: Definition of the Term "Fiduciary" (Published on October 22, 2010)

DCIIA supports the goal of the Employee Benefits Security Administration (EBSA) to protect defined contribution plan (DC plan) participants and beneficiaries through regulatory oversight and initiatives. DCIIA has reviewed EBSA's proposed rule changes to the term fiduciary, as defined under Section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). We acknowledge that the issues are complex and understand DC plans and plan sponsors could in certain cases benefit from a clearer understanding of when plan service providers are acting as fiduciaries. However, we are concerned that the proposed rule changes, if finalized as proposed, could significantly harm DC plans and participants.

DCIIA is pleased to respectfully submit the following comments to the proposed rule to assist EBSA in this effort.

Summary of Comments and Recommendations:

In summary, EBSA's proposed rule would make fundamental changes to a long-standing, important regulation that was carefully considered at the time it was finalized in 1975 (shortly after the enactment of ERISA). We ask that before EBSA makes significant changes to fundamental provisions of existing law, EBSA carefully consider the many ways in which the proposed rules could impact existing business relationships and ensure there are no adverse unintended consequences to DC plans or rule changes that would stifle innovation and the pursuit of progress. As President Obama's Executive Order 12866 notes: "Each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public."

If maintaining flexibility and freedom of choice are key considerations, we fear that the proposed rules, if adopted, could prevent DC plans and participants from having the ability to access certain services and reduce the number and quality of service providers available. We also question to what extent the changes would create additional administrative burdens and costs or result in an increase in fees charged to DC plans and participants for existing services. The proposed rules would require service providers to modify products, services, licensing, training programs, insurance coverage, marketing materials and service agreements, among other

things. The cost of these changes would ultimately be borne by plans and participants, as well as by the financial service providers, of which well over half are small businesses.[1]

We also urge EBSA to coordinate its proposed rules with initiatives currently underway with the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). Understanding the important role that plan fiduciaries and service providers play in creating successful retirement outcomes, the rulemaking being undertaken by regulators with overlapping jurisdiction should be consistent and not create confusion. We noted in our comment letters to the SEC's recent proposed target date fund rule (Investment Company Advertising: Target Date Retirement Fund Names and Marketing)[2] and EBSA proposed target date fund disclosure rule,[3] inconsistent regulation can lead to poor outcomes.

As a result, we respectfully request that EBSA consider withdrawing and, if necessary, re-proposing rule changes once it has conducted a more comprehensive review, including by reconsidering EBSA's prior cost-benefit analysis, coordinating its efforts with other regulatory agencies involved in related rulemakings and addressing the comments received as a part of this process.

At a minimum, if EBSA does not withdraw the current proposed rule, DCIIA requests that EBSA revise the proposed rule to:

- Require that investment advice and recommendations be individualized to the needs of the plan in all cases.

- Avoid making providers of generic advice and recommendations ERISA fiduciaries solely because they are fiduciaries or registered investment advisers to the plan on other matters.

- Require that there be a reasonable expectation or mutual understanding that the advice or recommendations provided form a primary basis of, or at least be a significant factor in, plan investment or management decision making.

- Focus the types of advice and recommendations covered by the proposed rule to include only investment advice and not other types of advice or recommendations that do not constitute investment advice by including all of the exceptions from the definition of investment adviser under the Investment Advisers Act of 1940.

- Limit the changes so as not to inappropriately characterize an affiliate's advice, recommendations or activities as fiduciary advice when the affiliate is not providing investment advice or its activities are unrelated to or independent of any investment advice provided.

- Strengthen the "counterparty exception" to cover similar or less adverse relationships that commonly arise in DC plan relationships so that the exception is not strictly limited to purchases and sales of securities or property. Clarify that the exception includes ongoing communications and modifications of transactions otherwise covered by the

[1] "Retirement Intermediaries 6", Brightwork Partners LLC, 2010
[2] http://www.sec.gov/comments/s7-12-10/s71210-42.pdf
[3] http://www.dol.gov/ebsa/pdf/1210-AB38-025.pdf

exception and that the seller's non-fiduciary status can be established by disclosures of conflicts of interest or when the plan is represented by a QPAM or an INHAM.

- Clarify that the "investment platform exception" covers other valuable services commonly provided by platform providers, such as assisting with narrowing available investment options, when such services are based on objective third-party criteria that does not constitute investment advice.

- Add an exception that would allow sophisticated parties to contractually or otherwise expressly agree that a provider of advice is not acting in a fiduciary capacity when the advice or recommendation is impartial (not conflicted) (i.e., the provider of the advice or recommendation is impartial and not conflicted as to the outcome of the plan's decision).

- Develop guidelines for providing meaningful financial assistance to retiring participants both inside and outside of the plan, while also protecting against undisclosed conflicts of interest.

Lastly, DCIIA asks EBSA to provide transition relief for changes in business practices which would result from redefining the definition of fiduciary, including to obtain such exemptions as would be required to permit business practices that are in the best interests of DC plans and their participants and to promote successful retirement outcomes for ordinary Americans. As noted above, we urge EBSA to first withdraw and, as appropriate, re-propose rules prior to issuing a final regulation to allow for continued careful consideration by interested parties. In any case, applicability of any proposed rule changes should be no earlier than two years after the promulgation of any final regulation.

Specific Comments:

A Comprehensive Cost-Benefit Analysis Must Be Conducted.

DCIIA requests that EBSA review its cost-benefit analysis in connection with the proposed rule changes. As President Obama recently set forth in Executive Order 12866, regulatory agencies must "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."[4] We are concerned that the proposed rule redefining the term "fiduciary" does not fully take into account the costs associated with service providers to DC plans potentially having to restructure (or terminate) their relationships with their plan clients (and any associated fee increases that may result).

As an example, the preamble to the proposed rule changes[5] provides:

> The Department assumes that affected service providers will require on average 16 hours of legal professional time at a cost of approximately $119 per hour to perform the compliance review.

DCIIA believes this assumption significantly underestimates the amount of time that will need to be expended to review and implement compliance with any changes to the definition of fiduciary by internal and external legal professionals, compliance personnel, affected business representatives and other personnel at DC plan sponsors, investment advisors and other

[4] http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order
[5] 75 F.R. 204 at 65274.

intermediaries, platform providers, financial services institutions and other industry participants, and for review and coordination across affiliates of these affected parties.

Proposed Changes Are Overbroad.

<u>As Proposed, Advice and Recommendations Not Required to Be Individualized or Even Used by the Plan</u>**.**

Paragraph (c)(1)(ii) of the proposed rule would make a person providing advice or recommendations a "covered person" if such person:

> either directly or indirectly (*e.g.*, through or together with any affiliate) –
>
> (A) Represents or acknowledges that it is acting as a fiduciary within the meaning of [ERISA] with respect to providing advice or making recommendations . . . ;
>
> (B) Is a fiduciary with respect to the plan within the meaning of section 3(21)(A)(i) or (iii) of [ERISA];
>
> (C) Is an investment adviser within the meaning of the [Investment Advisers Act of 1940]; or
>
> (D) Provides advice or makes recommendation. . . pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary, that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.

The provisions of (A), (B), (C) and (D) of paragraph (c)(1)(ii) of the proposed rule establishing the categories of "covered persons" operate separately from one another. As a result, covered persons would not need to provide advice or recommendations that are individualized to the plan. What's more, there is no need for any understanding that the advice or recommendation be considered by the plan.

Specifically, under the proposed rule, the requirements in paragraph (c)(1)(ii)(D) that the advice or recommendation be provided "pursuant to an agreement, arrangement or understanding…that such advice may be considered in connection with making investment or management decisions" and "be individualized to the needs of the plan" need not be met if the person (or its affiliate) is (or represents or acknowledges that it is) a fiduciary or if such person (or its affiliate) is an investment adviser under the Investment Advisers Act of 1940.

For example, an independent plan fiduciary may receive research reports, white papers on best practices or a general newsletter from a person that is (or whose affiliate is) a fiduciary to the plan or an investment adviser under the Investment Advisers Act of 1940. Yet, under the proposed rule providing these types of generic information, even if at no cost to the recipient, could cause the advice or recommendation to be considered ERISA fiduciary advice, even if such information is limited to general advice or recommendations which are not individualized to the needs of the plan and which may not even be used by the plan.

We do not believe this result is necessary or workable. EBSA itself acknowledged in its preamble[6] to the proposed rules in the case of investment advisers:

> the Investment Advisers Act imposes on investment advisers an affirmative duty to their clients of utmost good faith, full and fair disclosure of material facts, and an obligation to employ reasonable care to avoid misleading their clients.

Furthermore, as expressed in President Obama's Executive Order 12866, overlapping and inconsistent regulation is unnecessary, confusing and costly.

Persons that serve as ERISA fiduciaries and investment advisers (and their affiliates) should not be discouraged from providing helpful information to plan fiduciaries, especially when independent plan fiduciaries understand the information is not investment advice and are not regarding it as such. A proposal that requires plans to consider the provision of generic information as fiduciary advice, even where there is no mutual understanding or agreement for that to be the case, limits the ability of plans and service providers to structure their relationships in a manner that is most helpful.

DCIIA Recommendation:

Delete paragraphs (c)(1)(ii)(A), (B) and (C) of the proposed rule or at a minimum require that the advice or recommendation also be described in paragraph (c)(1)(ii)(D) (*e.g.*, be individualized to the needs of the plan and be made pursuant to some type of reasonable agreement, arrangement or understanding that such advice or recommendation would be considered (taking into account the proposed modifications to paragraph (c)(1)(ii)(D) below)).

Advice and Recommendations Should Actually Form a Primary Basis of (or Be a Significant Factor in) the Plan's Investment or Management Decisions.

The requirement in paragraph (c)(1)(ii)(D) of the proposed rule that the advice or recommendation be provided "pursuant to an agreement, arrangement or understanding" requires only "that such advice *may* be considered in connection with making investment or management decisions." Also, the phrase "pursuant to an agreement, arrangement or understanding" omits any requirement that the arrangement or understanding be "mutual." Taken together, this creates a low threshold which could result in persons inadvertently and unintentionally being treated as ERISA fiduciaries for advice or recommendations never intended to actually form a primary basis of, or be a significant factor in, the plan's investment or management decisions. As an example, generic advice and recommendations included in general presentations and webinars, or even newsletters or published articles, could be deemed fiduciary advice.

DCIIA requests that EBSA reconsider this provision and reinstate the "primary basis" standard or at least propose a reasonable standard requiring that the advice or recommendation be a significant factor in the plan fiduciary's investment or management decisions with respect to plan assets. At the same time, unless any arrangement or understanding is required to be mutual, persons could unfairly be treated as fiduciaries. How can a person be expected to be a fiduciary if there is no reasonable expectation or mutual understanding that the advice would actually form a primary basis of, or be a significant factor in, the plan's investment or

[6] 75 F.R. 204 at 65267.

management decisions? The person providing the advice may have no idea (or reasonable expectation) that the advice is intended to be fiduciary in nature and may not even have knowledge of the plan's specific situation or circumstances.

DCIIA Recommendation:

Revise paragraph (c)(1)(ii)(D) to reinstate the "primary basis" standard or at least require that the advice or recommendation be a significant factor in the plan fiduciary's investment or management decisions with respect to plan assets. Add "mutual" before "arrangement or understanding."

Advice and Recommendations Covered Under the Proposal Do Not Have to Be Investment Advice.

The proposed rule[7] generally applies to a covered person who:

(1) Provides advice concerning the value of securities or other property,

(2) Makes recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property, or

(3) Provides advice or makes recommendations as to the management of securities or other property.

Notably, the proposed rule does not require that the advice provided or recommendations made be *investment* advice. For this reason, the proposed rule changes are broad enough to include as fiduciaries persons who provide advice incidental to the provision of investment advice, such as brokers, accountants and lawyers. For example, a lawyer drafting or otherwise providing recommendations on legal documentation for a client that is a plan fiduciary should not as a result also be deemed to be a plan fiduciary. These service providers may be forced to either increase fees or consider not providing these services to plans. Again, we do not believe this result would protect plans.

As EBSA acknowledges in the preamble to the proposed rule, the Investment Advisers Act of 1940 has specific exclusions from the definition of "investment advice", such as for brokers, accountants, lawyers, publishers, teachers and others.[8]

DCIIA Recommendation

Revise the proposed rule, through the use of cross references, to include all exceptions to the investment advice definition under the Investment Advisers Act of 1940 for each condition of the investment advice test, not just the condition relating to the provider's status as an investment adviser under the Investment Advisers Act.[9] For example, these exceptions include (1) a lawyer, accountant, engineer or teacher whose performance of such services is solely incidental to the practice of his or her profession; (2) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who

[7] See proposed §2510.3-21(c)(i).
[8] 75 F.R. 204 at 65266.
[9] Investment Advisers Act of 1940 Section 202(a)(11), 15 U.S.C. 8b-2(a)(11).

receives compensation therefor; (3) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regulation circulation.[10]

Proposal Applies Fiduciary Status to Affiliates Irrespective of Their Activities.

By including in paragraph (c)(1)(ii) of the proposed rule the clause:

> Such person directly or indirectly (*e.g.*, through or together with any affiliate)

the proposed rule change would also apply to any affiliate of a covered person that provides advice or make recommendations even if the affiliate has no involvement in such activities. This proposed change fails to appropriately acknowledge the broad range of products and services provided by financial services institutions and also the large number of affiliates providers may have. For example, many of these organizations cannot track relationships across business units and affiliates, such as when these affiliates operate as independent business operations or when information barriers have been established for legal regulatory compliance purposes. Operating in good faith based on long-standing EBSA regulations, many established business models that involve plans independently choosing to access one firm and/or its affiliates for a wide array of products and services could now be strictly prohibited and require additional administrative exemptions from EBSA to continue. This would be true even if such practices are otherwise determined by independent plan fiduciaries to be prudent and in the best interests of the plan and its participants and beneficiaries.

Our concern is compounded by the fact that the proposed rules have removed the requirement that advice be individualized to the needs of the plan and that such advice be investment advice. For example, as noted above, the requirement that advice be individualized to the needs of the plan is now only found in paragraph (c)(1)(ii)(D) of the proposed rule and not required of advice or recommendations of fiduciaries and investment adviser. By removing the necessity that any advice be individualized to the needs of the plan, generic information provided by an affiliate of a fiduciary or investment adviser could be deemed fiduciary advice. If the fiduciary or investment adviser has an affiliated dealer, the plan would also be precluded from trading with that affiliated dealer, absent additional exemptions or exceptions being issued by EBSA.

EBSA stated in the preamble to the proposed rule[11] that the change to the fiduciary definition will result in efficiencies by allowing EBSA to more efficiently allocate its enforcement resources. At the same time, we believe EBSA needs to carefully consider whether those cost savings will be reduced or outweighed by the increased number of exemption requests it will receive from service providers for affiliate products and services that would be prohibited as a result of the proposed change.

DCIIA Recommendation:

DCIIA proposes that EBSA clarify or delete the words “or together with an affiliate” in paragraph (c)(1)(ii) so the proposed rules do not unnecessarily extend ERISA fiduciary status to persons providing products or services that are unrelated to or independent of the provision of fiduciary

[10] Additional examples are included in the preamble to the proposed rule at 75 F.R. 65266.
[11] 75 F.R. at 65275.

investment advice by an affiliate and which are not individualized to the needs of the plan or otherwise considered investment advice.

Limitations Included in the Proposed Rule Need to Be Clarified and Expanded.

Limitations of the Counterparty Exception Too Narrow.

The proposed rules appropriately contained an exclusion from the general fiduciary definition where a person is acting as an adverse party to a plan in its capacity as a "purchaser or seller of a security or other property" or as an agent of a purchaser or seller. The "counterparty exception" provided in paragraph (c)(2)(i) of the proposed rule is as follows:

> . . . .a person shall not be considered to be a [covered person] with respect to the provision of advice or recommendations if [such person does not represent or acknowledge that it is acting as a fiduciary with respect to such advice or recommendation and] such person can demonstrate that the recipient of the advice knows or . . . 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.

However, DCIIA believes this exception should be broader and apply to other circumstances where there is a potential conflict of interest. For example, the exception should make clear it includes the selling of "services," not just securities or property. Asset management firms and 401(k) providers may provide educational information to plans in connection with an RFP or otherwise when seeking to be hired by the plan. If the proposed exception does not cover the sale of services (but only the sale of securities or property), the information provided by a firm when seeking a mandate could be viewed as investment advice (resulting in the firm being conflicted out from being selected by the plan and its consultant). As another example, the narrow reference to purchasing and selling securities or other property fails to cover common transactions such as securities lending, extensions of credit and other finance transactions. The use of "adverse interests" is also limited and does not apply to circumstances where the parties understand that similar or lesser conflicts of interest exist than in the purchase and sale context. For example, shouldn't the exclusion also apply to brokers that disclose their compensation or conflicts of interest? Otherwise even agency trades, such as in the futures market, could be restricted.

DCIIA also asks EBSA to make clear that the exception covers not just an initial purchase or sale transaction, but ancillary transactions, ongoing communications and amendments or modifications of covered transactions. For example, if the plan purchases interests in the seller's fund and then asks for ongoing valuation or educational information relating to that holding, the exception should apply to those ongoing communications.

DCIIA also notes that the exception shifts the burden of proof to the seller, the cost of which will ultimately be charged to plans. To mitigate against this result, EBSA should make clear that the seller's status can be satisfied through disclosure or in cases where a plan is already represented by an established fiduciary independent of the seller (such as a QPAM or INHAM).

DCIIA Recommendations:

DCIIA proposes that EBSA revise paragraph (c)(2)(i) as follows:

> . . . . a person shall not be considered to be a [covered person] with respect to the provision of advice or recommendations if [such person does not represent or acknowledge that it is acting as a fiduciary with respect to such advice or recommendation and] such person can demonstrate that the recipient of the advice knows or . . . 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 or services or otherwise acting in connection with a transaction, or as an agent of or appraiser for, such a person, whose interests are adverse to the interests of the plan or its participants or beneficiaries (or whose interests are not impartial), and that the person is not undertaking to provide impartial investment advice.

DCIIA also asks that EBSA provide clarification that the exception extends to follow-on advice and recommendations provided in modifying or terminating the transaction or services that were the subject of the initial advice or recommendation. The exception could also cover the provision of ongoing advice or recommendations incidental or appurtenant to the securities, property, services or transaction. Of course, we also suggest that the follow-on advice and recommendations would need to be subject to the same conditions (*e.g.*, the advice or recommendation would be provided by a person whose interests are adverse to the interests of the plan or its participants or beneficiaries (or whose interests are not impartial), and the person would not undertake to provide impartial investment advice). EBSA should also permit the seller to satisfy its burden of proof (a) through disclosure of the conflict of interest or (b) when the plan is represented in the transaction by a QPAM or an INHAM.

DCIIA appreciates EBSA's inclusion of the counterparty exception and believes that these proposals will make the exception more useful to service providers without compromising the protection of plans against undisclosed conflicts.

Investment Platform Exception Needs Clarification

The proposed rule includes an exception for investment platform providers that states that a service provider will not be treated as rendering investment advice as a result of--

> [m]arketing or making available (*e.g.*, through a platform or similar mechanism), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property 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, if the person making available such investments discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice.[12]

The proposed rule also specifies that—

[12] Proposed §2510.3-21(c)(2)(ii)(B).

> the provision of certain information and data to assist a plan fiduciary's selection or monitoring of such plan investment alternatives will not be treated as rendering investment advice if the person providing such information or data discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice.[13]

DCIIA commends EBSA for recognizing the valuable role that investment platform providers play in making information and data available to retirement plans and their fiduciaries by including the investment platform exception. As noted above, however, we are concerned that the proposed rule does not sufficiently provide protection needed by investment platform providers to be able to continue to offer broad investment choices and these services to plans and plan fiduciaries.

As EBSA knows, many plan service providers allow plan sponsors to choose their plan's investment options from a list of funds that could include thousands of choices. At various times in the relationship between a plan and a service provider, plan representatives, including designated plan fiduciaries or other professionals hired by a plan, may ask the service provider to provide information, tools, education or other guidance to help narrow the choice of funds available to the plan, including based upon evaluation criteria approved or provided by an independent plan fiduciary or another independent third party. While the proposed rule allows for the "provision of certain information and data to assist a plan fiduciary's selection or monitoring of [sic] plan investment alternatives," it does not expressly exempt the ways in which "information and data" will be used.

Platform Narrowing Using Third-Party Criteria Should Not Result in Fiduciary Status.

As discussed above, plan fiduciaries and third party experts that they hire to assist them, seek information and guidance necessary to assist them in meeting their fiduciary responsibilities in many ways. Sometimes they seek the advice of an investment manager or consultant with the understanding that such investment manager or consultant is intended to serve in a fiduciary capacity to the plan. In an effort to assist plan fiduciaries in narrowing the list of potential investment options from a platform with thousands of available funds, platform providers may engage independent third parties to construct a narrowed list of funds solely as a service to the plan fiduciary but not focused on the individualized needs of the plan. In other cases, plan fiduciaries are only seeking information and data necessary to help them meet their fiduciary responsibilities to the plan. This occurs when plan fiduciaries look for information to assist them in mapping current investments to similar options offered by a new provider, as well as in putting together an investment lineup or replacing a nonperforming option with one that they believe will perform better. Included among the many sources from which plan sponsors (and their consultants and third parties assisting them) often seek such information are investment platform providers. As noted above, given that platform providers often offer a large number of funds to select from on their platforms, a plan fiduciary will often expect the platform provider to be a resource in providing information and assistance in narrowing the list of available funds.

To assist plan fiduciaries in narrowing platform choices, criteria that are objective or specified by a third party is often used as a tool to screen investment options meeting the criteria from a larger list of available funds. For example, a plan fiduciary might ask the platform provider to identify those funds in a specific asset class that are rated by Morningstar "4 stars" or

[13] Proposed §2510-3-21(c)(2)(ii)(C).

higher.[14] Similarly, a service provider might assist a designated plan fiduciary by identifying funds which have beaten their Lipper ratings for the past 3, 5 and 10 year periods.[15] Such narrowing is also performed to identify factors specified by the plan fiduciary beyond investment performance, such as cost, the existence of sales charges, manager tenure, the availability of institutional classes, etc.

The use of narrowing criterion is widely accepted in the retirement plan investment field and its use need not make the platform provider a fiduciary as a result, particularly if the platform provider is not providing individualized advice in connection with such activity that is specific to a particular plan.[16] It often is simply an attempt to use accepted criteria to assist the plan sponsor in narrowing or screening potential options, in obtaining additional information concerning different investment options or in reviewing how existing options are performing from the platform provider without an additional fee.

As well, we believe these same (narrowing) principles can and should be applied to other specific circumstances, such as fund mapping and the provision of sample fund line-ups.

DCIIA believes that, without clear guidance, service providers may not be able to continue to provide the type of information and data on investments available on their platforms that plan fiduciaries have come to expect. We are concerned that, absent clarification or modification, platform providers and other service providers will need to take conservative and restrictive approaches to avoid being treated as fiduciaries and potentially engaging in unintended prohibited transactions.

DCIIA Recommendations

In order to ensure that plan sponsors continue to get the help they seek from their providers, we urge EBSA to clarify or modify the investment platform exception. In this respect, the final rule should allow platform providers to provide information and data to a plan sponsor or its designated fiduciaries about plan investment options that is intended to narrow the options available, or assist plan fiduciaries in monitoring plan investment options, provided that any such assistance is based on "objective third-party criteria", and the service provider discloses that (1) the assistance is not intended to be (and is not) investment advice, (2) the provider is not acting in a fiduciary capacity, (3) the service provider may have a financial interest regarding the decisions that are made (if applicable), and (4) the recipient is ultimately responsible for making the final decision. "Objective third-party criteria" should be defined to include criteria identified by the service provider, criteria from a plan's investment policy or other criteria provided to the service provider by the plan sponsor or other independent fiduciary, and the identity and characteristics of a plan's current investment options. Examples of this type of criteria would be publicly available information and data on asset classes, historical

[14] Morningstar is a provider of independent investment research**.** The Morningstar Rating™ for mutual funds is a quantitative assessment of a fund's past performance—both return and risk—as measured from one to five stars. It is based on a mathematical evaluation of past performance. Morningstar intends it will be used as a first step in the fund evaluation process.
[15] Lipper is a Thomson Reuters Company that supplies mutual fund information, analytical tools, and commentary. All Lipper ratings are based on an equal – weighted average and represented as a percent for each measure of three-, five-, and 10-year periods.
[16] Criteria used in evaluating retirement plan investments are generally understood to include: publicly available information and data on asset classes, historical performance, manager tenure, expense ratios, benchmarking and comparisons, and quality ratings, among others.

performance, manager tenure, expense ratios, benchmarking and comparisons, and quality ratings, among others.[17]

DCIIA's suggested changes will avoid forcing plan sponsors and their designated fiduciaries from having to hire a fiduciary for the information and data they need and paying higher fees for it. It will also allow platform providers to provide assistance to their customers and prospects without substantial risk that they will unwillingly and inadvertently become plan fiduciaries and engage in prohibited transactions.

To be clear, DCIIA is not suggesting that a platform provider providing investment advice intended to be relied upon or otherwise acting in a fiduciary capacity can, or should, avoid fiduciary status simply by providing the disclosure we have proposed. However, the smooth and efficient functioning of retirement savings system relies on the ability of platform providers to provide significant value added services to plan sponsors that are not intended to be relied upon, and should not be deemed to be fiduciary in nature.

Propose Additional Limitation for When Sophisticated Parties Expressly Agree Provider of Advice Is Not a Fiduciary.

DCIIA agrees that a person who represents or acknowledges that it is a fiduciary with respect to specific advice or recommendations should be considered a fiduciary for that purpose and to that extent. At the same time, DCIIA asks EBSA to consider that the parties may also expressly agree that the advice or recommendation is not to be relied upon as, or otherwise considered to be, fiduciary in nature.

For example, a sophisticated plan fiduciary may retain an independent consultant to provide fiduciary advice, but may wish to also solicit information from competing sources for informational purposes, including as a part of an RFP process or where the plan fiduciary also has another existing relationship with other advisers that are knowledgeable and can provide a different perspective. It may also be the case that a sophisticated plan fiduciary may wish to receive specific information or analytics that is strictly limited in scope and may not wish to incur additional expenses for ERISA fiduciary level services.

DCIIA Recommendation:

DCIIA proposes that EBSA consider a common sense approach whereby an additional limitation is provided so that a person is not considered to be a fiduciary if (1) the parties contractually or otherwise expressly agree that the person is not expected to be a fiduciary in connection with the advice provide or recommendation made, (2) the plan is represented by an independent fiduciary that is sophisticated in such matters and (3) the advice or recommendation is impartial and not conflicted (i.e., the provider of the advice is impartial and not conflicted as to the outcome of the plan's decision).

Distributions

In response to EBSA's request in the preamble to the proposed rule for comment on whether and to what extent the final regulation should address recommendations relating to plan distributions, DCIIA can provide the following comments specifically regarding DC plans:

[17] We note that many of the services and assistance described above are comparable to the non-fiduciary participant education services defined by EBSA in Interpretive Bulletin 96-1 ("IB 96-1").

Participants who are nearing retirement with a defined contribution plan account balance have a great need for expert financial help, but are also uniquely vulnerable to the negative effects of poor or conflicted advice. These participants need to decide whether to keep their same investments or change them to be more consistent with a withdrawal strategy, whether to leave their account in the plan to take advantage of the educational support, fiduciary oversight, access to lower cost funds, and other benefits offered in a plan, to roll over to an IRA where they have more investment flexibility and an opportunity to consolidate their plan funds with other retirement funds, or to take a cash distribution. They must look at these decisions not only from the perspective of their plan account, but as part of their total financial picture. Participants in this situation may be looking at annuity options for the first time and require education as to what those options are and how they might fit in to an overall financial plan. Since the help participants need at this juncture is more individualized and broader than how to invest their plan account, their employer is unlikely to provide the type of education they need. DCIIA believes that EBSA's rules and policies need to support making professional financial help broadly available to retiring participants.

This group of participants is also uniquely vulnerable to negative financial impacts of poor or conflicted advice. Any changes to or liquidation of their investments will result in realization of any gains or losses in their account. If they roll their money into an IRA account they will be entering into a financial arrangement without the benefit of a layer of fiduciary oversight regarding the selection of investments or the reasonableness of fees. If they select an annuity option they may be irrevocably committing their retirement assets into a vehicle that may or may not serve their retirement income needs. DCIIA believes EBSA's rules and policies must also take into account this vulnerability and protect participants against the negative effects of poor or uneducated investment decisions.

The reality today is that the majority of participants who are eligible to take a plan distribution cash out their account balance.[18] Studies have also shown that participants want one-on-one financial counseling, but that the majority of employers do not offer it and concern with fiduciary liability is a core reason why it is not offered.[19] Unfortunately, less than half of participants nearing retirement have received professional help on critical issues such as minimizing exposure to investment risk, minimizing income taxes, or ordering of withdrawals.[20]

If financial help is to be made more broadly available to participants nearing retirement, the rules concerning who is or isn't a fiduciary, and what acts are or are not fiduciary acts, need to be clearly delineated. In DCIIA's view, the Department's current position on this topic, as outlined most definitively in DOL Adv. Op. Ltr. 2005-03A, does not create a clear line. DCIIA understands the concern that some existing plan advisers might improperly use their authority or relationship to cross sell in a manner that improperly benefits the adviser at the expense of the participant. However, we do not believe that EBSA's current position strikes the right balance between making meaningful help available to participants at reasonable cost, and protecting participants against undisclosed conflicts of interest.

1. DCIIA Recommendations:

DCIIA believes EBSA should develop guidelines for providing financial help to retiring participants consistent with the following objectives:

[18] "Defined Contribution Plan Distribution Choices at Retirement", Investment Company Institute, 2007
[19] "Trends and Experience in 401(k) Plans – 2009", Hewitt Associates, LLC
[20] "The Positioning of Assets in Retirement", Life Insurance and Market Research Association (LIMRA), 2009.

1. It should be clear to plan sponsors, plan participants and service providers when help is being offered in a fiduciary capacity.

2. A safe harbor for plan sponsors who select and monitor financial advisers to assist with distribution planning should be developed to encourage the availability of financial help to participants at this critical juncture in preparing for retirement.

3. EBSA should support the ability of financial advisers to educate participants about investment alternatives available both inside and outside the plan, as well as about general issues and education, such as tax planning, managing withdrawals, maintaining flexibility, etc., without being subject to ERISA's fiduciary rules as long as clear and proper disclosures are made regarding any potential conflicts of interest. A new safe harbor similar to DOL Interpretive Bulletin 96-1 (or model disclosures), dealing more specifically with the type of information relevant to participants nearing retirement or another distributable event should be created to make clear what activities are permitted for non-fiduciary advisers.

4. The DOL should retain its current position as outlined in DOL Ad. Op. Ltr. 2005-23A that distribution counseling services and recommendations that a person take a distribution are not investment advice under ERISA, even when combined with recommendations about how to invest the distributed funds.

5. Outside or "cold calling" advisers should not be afforded greater access to, or influence over, plan participants than current plan service providers. Participants working with either type of adviser should receive mandated disclosures that address conflicts of interest, the pros and cons of keeping money in the plan versus rolling it over or annuitizing it, and other relevant information.

Coordination with Other Regulatory Initiatives Is Critical.

Taking into account President Obama's Executive Order 12866, DCIIA urges ESBA to seek "[g]reater coordination across agencies . . . , reducing costs and simplifying and harmonizing rules." Indeed, the President observes that "some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping" and urges "coordination, simplification, and harmonization" among agencies to achieve regulatory goals while ensuring consistency and coordination where appropriate."[21]

The Study on Investment Advisers and Broker-Dealers recently issued by the SEC,[22] as required by Section 913 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), and the proposed rules published pursuant to the Dodd-Frank Act in late December of 2010 by the CFTC on Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties,[23] are both examples of where coordination of rulemaking is necessary to ensure that the DOL's proposed rule will not

[21] http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.
[22] http://www.sec.gov/news/studies/2011/913studyfinal.pdf.
[23] 75 F.R. 245 at 80638

undermine or conflict with the Dodd-Frank Act or lead to inconsistent regulatory requirements. For example, in the Section 913 Study recommendations to modify the standard of care applicable to broker-dealers were made with a view of minimizing cost and disruption and to reflect the interests of customers in having multiple fee and business models available to them by not strictly prohibiting them. Specifically, in recommending a uniform fiduciary standard of conduct, the recommendations of the study would preserve, among other things, (i) commission based arrangements, (ii) sale of proprietary products, and (iii) principal trades. We are concerned that EBSA's proposed rule redefining the term "fiduciary" could potentially have the opposite result.

Further consideration should also be given to the requirements under the Dodd-Frank Act to provide daily marks and scenario analyses, and whether compliance with those requirements could trigger ERISA fiduciary status under these proposed rules.

We believe it is critical that the various rules on business conduct standards applicable to persons dealing with DC plans be harmonized in order to ensure that plans are not inadvertently harmed or lose access to necessary services.

DCIIA Recommendations:

DCIIA recommends that EBSA closely coordinate its efforts with SEC and CFTC initiatives to avoid inconsistent or overlapping rulemaking that would harm DC plans and participants. Separate efforts on related topics that address similar issues in different ways or create somewhat inconsistent rules with cross purposes should not be pursued.

Transition Relief Needed to Facilitate Compliance.

DCIIA expects that EBSA will receive a number of comments and testimony on its proposed rule from experts, businesses and ordinary citizens. DCIIA also expects that comments received will highlight the broad scope and potential myriad ways in which the changes could have significant adverse or unintended consequences.

EBSA stated in its preamble[24] that it is uncertain whether, and to what extent, the proposed rule will lead to higher fees for plans and/or a compression of the plan service provider market. We believe EBSA needs to address concerns, particularly at a time when plan sponsors are being pushed to reduce fees, that this proposal will increase costs to plans, reduce the services available to them and shrink the number of competent service providers in the market. We ask EBSA to reconsider the potentially significant costs to DC plans both in actual cost and in quality of services available that could result from these regulations in light of these comments.

Accordingly, we are asking EBSA to withdraw and, as appropriate, re-propose the regulations prior to issuing a final regulation to enable all parties to continue the process of working together to create best practices and better outcomes. As well, we ask that EBSA address the need for transition relief for those that have put in place business practices and systems over the past 35+ years in good faith to allow for an orderly transition that does not unduly disrupt existing retirement plan investment programs and the products and services currently provided. Providers will need time to re-examine their policies, including across affiliates, that may currently lack the reporting systems to do so. Applicability of any proposed rule changes in

[24] 75 F.R. 204 at 65275.

these circumstances should be no earlier than two years after the promulgation of any final regulation.

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Who We Are. The Defined Contribution Institutional Investment Association (DCIIA) is a non-profit trade association dedicated to enhancing the retirement security of American workers. DCIIA members include investment managers, consultants, record keepers, insurance companies, plan sponsors and others committed to improving retirement outcomes for American workers by advocating for better defined contribution plan design and institutional investment management approaches.

DCIIA's Core Beliefs. DCIIA members believe the current defined contribution retirement system, with the adoption of institutional design approaches available today, can and will provide for the retirement security of working Americans. The important advances contained in the Pension Protection Act, particularly the safe harbor protections for plan automation features and appropriate default investment selection, provide plans with important guidance and fiduciary safeguards which can result in higher participation and savings rates, more appropriate investment allocations and improved long-term investment performance.

By incorporating techniques of professional pension management found in traditional defined benefit pension plans, defined contribution sponsors can improve retirement savings outcomes, affording their employees a better quality of life in retirement while managing their own fiduciary liabilities in plan governance. Some of the most prominent best practices include:

1. Flexibility in Assembling Best-in-Class Plan Design

Plan sponsors and their consultants should have the ability to select the best combination of partners to meet plan needs, including investment and retirement solutions, record keeper, custodian, managed account, advice and other service providers.

2. Full Support for All Investment Vehicles and Product Solution Formats

The continued development of standard industry trading systems and information sharing protocols provides plan sponsors with a very wide range of DC-appropriate investment and pricing options which, depending on plan preferences, may be best delivered through mutual fund, insurance contract, collective trust or individual and institutional separate account formats.

3. Improved Default Programs as Most Effective Path to Realizing Successful Outcomes

Auto-enrollment and sufficient auto-escalation of contribution rates – coupled with a well-constructed qualified default investment and an effective employee communications and education program – can generate sufficient balances for workers to fund an adequate income replacement rate at retirement. Spending needs and longevity risk can be addressed by existing as well as new post-retirement investment and income management solutions being introduced to the market.

4. Full Lifetime Approach to Providing Retirement Income Adequacy

The likelihood of a successful retirement income outcome may be improved by careful attention during both the working (accumulation) and retirement (distribution) phases, and by including a combination of employer-sponsored and individual retirement accounts, to initially grow and ultimately preserve savings necessary to meet spending needs over an individual's total life expectancy.

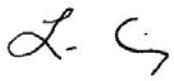
5. Full Expense Transparency from All Service Providers

Plan participants benefit from plan sponsors providing fiduciary oversight of plan economics, and being knowledgeable about the breakdown of all plan costs and sources of revenue, including but not limited to investment management, record keeping and other administrative expenses.

* * * * *

Thank you again for the opportunity to provide comments to your proposed rules on the definition of the term "fiduciary" to improve the retirement security of American workers, including in defined contribution plans. DCIIA's Core Beliefs are consistent with EBSA's stated intent in the preamble to the proposed rules to facilitate best practices in the discharge of fiduciary duties, and "to protect participants from conflicts of interest and self-dealing" by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA fiduciary standards." In sum, we are concerned that the scope and timing of this proposed rule raises a number of issues for DC plans and participants that need to be addressed before any final rulemaking is undertaken.

Sincerely,



Lew Minsky
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