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DELIVERED VIA E-MAIL TO e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefit Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of Fiduciary Proposed Rule, 29 CFR §2510.3-21(c)

To Whom It May Concern:

Fiduciary360 (fi360)¹ appreciates the opportunity to comment on the proposal to broaden the definition of “fiduciary” under Section 3(21) of the Employee Retirement Income Security Act (“ERISA”) and the related regulation at 29 CFR §2510.3-21(c).

General Comments

Fi360 applauds the Department of Labor on its efforts to provide greater protection for retirement plans and their participants and beneficiaries, which is consistent with a broader trend in federal securities laws and among professional organizations to expand the definition of fiduciary to advisory services where previous application of the standard was fact-specific and often ambiguous.² In particular, we commend the Department for recognizing the need to update

¹ Fi360 offers a full circle approach to investment fiduciary education, practice management, and support. Our mission is to promote a culture of fiduciary responsibility and improve the decision making processes of investment fiduciaries, including investment advisors, managers, and stewards. With legally substantiated Practices as our foundation, we offer training, tools, and resources in support of that mission. We also manage the Accredited Investment Fiduciary® (AIF®) and Accredited Investment Fiduciary Analyst™ (AIFA®) designation programs. AIF designees receive training that provides a unique comprehensive overview of fiduciary standards of excellence, asset allocation, preparation of investment policy statements, manager search and due diligence, performance measurement, and other related subjects. AIFA designee training builds on that foundation and prepares students to provide Fiduciary Assessments to institutions. At present, there are over 4,600 active AIF and AIFA designees.

² See Staff of the U.S. Securities and Exchange Commission, “Study on Investment Advisers and Broker-Dealers,” January 2011 (“SEC Fiduciary Study”), at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>; see also Sec. 913, Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), P.L. 111-203 (2010) (requiring the SEC to study the obligations of broker-dealers and investment advisers); Sec. 975(c)(2), Dodd-Frank Act, P.L. 111-203 (requiring a fiduciary duty for municipal advisors); CFP Board of Standards, Inc., Rules of Conduct, Rule 1.4 (2011), at <http://www.cfp.net/Downloads/2010Standards.pdf>.

regulations in light of the significant shift to defined contribution plans and the more complex investment product and service offerings in the marketplace. We support the Department's proposal to update the definition of "fiduciary" and the advisory relationships that give rise to fiduciary duties. Specifically, we believe plans and participants will greatly benefit from the Department's efforts to move from a 5-part test that created limitations related to the enforcement of fiduciary obligations, to a more flexible test that covers a greater range of investment advice arrangements.

Although we generally support the Department's proposal, we believe there are certain areas that require further clarification and provide specific recommendations herein for the Department's consideration.

Application to Investment Advisers (and Brokers)

Under proposed Paragraph (c)(1)(ii)(C), a person would render investment advice if the person is "an investment adviser" within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940 ("Advisers Act"). We recommend the Department modify this provision to cover any person who is registered with the Securities and Exchange Commission ("SEC") or a state as an investment adviser, including individuals affiliated with advisers as "investment adviser representatives."³ Under the current proposal, it is unclear how this provision is meant to apply because it only refers to the Advisers Act definition of an investment adviser rather than the Advisers Act registration requirements. Thus, given the changing landscape of registration requirements under the federal securities laws,⁴ we believe it is best to clarify that any person registered as an investment adviser (or an investment adviser representative) at the federal or state level is covered by the Department's rule.

In addition, as the Department moves forward with its consideration of the definition of fiduciary, we recommend it monitor other potential changes under the federal securities laws. As previously noted, the SEC recently published the results of its study of broker-dealers and investment advisers, and SEC staff made recommendations to expand the application of the fiduciary standard of conduct to brokers providing "personalized investment advice."⁵ We encourage the Department to review carefully the SEC's work on fiduciary issues and take its findings into consideration as the Department adopts new rules. We would note, however, that while we support coordination on fiduciary issues among regulators, we do not believe that the Department should delay its plans to finalize new regulations nor should it apply a lesser standard of care than currently exists under ERISA. We believe taking prompt action in adopting an expanded fiduciary definition will provide greater clarity and enhanced protections to plans, participants and beneficiaries. Therefore, we believe the Department should finalize its

³ See 15 USC § 80b-3a(b)(1)(A).

⁴ See Sec. 410, Dodd-Frank Act, P.L. 111-203 (raising the threshold for investment advisers required to register at the federal level to \$100 million assets under management).

⁵ SEC Fiduciary Study, *supra* note 2.

proposal as soon as practical and consider further modifying its regulations in the future should the SEC publish any new guidance or adopt new fiduciary rules.

Disclosure of Conflicts

Fi360 supports recommendations made by other commenters⁶ that more detailed disclosure requirements be implemented for the limitation under proposed Paragraphs (c)(2)(i). Under this limitation, a person will not be considered a fiduciary if such person can demonstrate that the recipient of the advice knows or reasonably should know that the person is in a conflicted position and is not undertaking to provide impartial advice. While the burden of compliance and proof would be placed on the person providing advice, given the significance of the conflict involved, we believe that concrete disclosure requirements are needed. In particular, we recommend that the Department require that the advice-provider disclose the conflict of interest in writing in clear and conspicuous language, and that the plan fiduciary acknowledge the disclosed conflict in writing. As articulated by Assistant Labor Secretary Phyllis Borzi, under the proposal, those giving advice on an investment would be considered a fiduciary, while those that are only selling their product would not.⁷ In order to ensure that plan fiduciaries can adequately distinguish between advice and product providers, we believe disclosure controls are warranted.

In addition to recommending disclosures for plan fiduciaries, we also recommend that the Department clarify that the limitation under proposed Paragraph (c)(2)(i) only applies to advice given to plan fiduciaries and is not applicable to participant-level investment advice. We believe participants should receive greater fiduciary protections given the important role the advice they receive plays in their financial well-being and retirement planning.

Definitional Guidance

As noted by other commenters, the Department has introduced new terms and phrases in the proposed rule that have not been clearly defined in previous or current guidance.⁸ In particular, proposed Paragraph (c)(1)(i)(A)(3) refers to advice related to “the management of securities or other property,” and proposed Paragraph (c)(1)(ii)(D) refers to advice related to “management decisions with respect to plan assets.” As further discussed in the preamble, proposed Paragraph (c)(1)(i)(A)(3) would apply to advice and recommendations “as to the selection of persons to manage plan assets,” but little other guidance on the terms “management” and “manage” is

⁶ See ASPPA, NAIRPA and CIKR, “Response to Request for Comments on Definition of the Term ‘Fiduciary’ Proposed Regulation,” January 27, 2011, available at <http://www.dol.gov/ebsa/pdf/1210-AB32-063.pdf>.

⁷ See “Labor Department Rule Expands Adviser Responsibility for 401(k) Plans,” Bloomberg, October 21, 2010, at <http://www.bloomberg.com/news/2010-10-21/labor-department-rule-expands-adviser-responsibility-for-401-k-plans.html>.

⁸ See Comment Letter from C. Frederick Reish, Reish & Reicher, January 18, 2011, available at <http://www.dol.gov/ebsa/pdf/1210-AB32-045.pdf>; ASPPA, NAIRPA and CIKR, “Response to Request for Comments on Definition of the Term ‘Fiduciary’ Proposed Regulation,” January 27, 2011, available at <http://www.dol.gov/ebsa/pdf/1210-AB32-063.pdf>.

provided. We recommend that the Department provide additional guidance and examples with regard to the range of advice and services that would be covered by the phrases “management of securities or other property” and “management decisions with respect to plan assets” given that these terms do not appear in the current regulation defining “investment advice” and are new concepts that plan fiduciaries, participants, beneficiaries and service and advice providers likely will struggle to interpret when determining whether fiduciary obligations arise under the proposed rule.

We also believe that the Department should provide additional guidance with regard to advice that is “individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary” under proposed Paragraph (c)(1)(ii)(D). The current regulation covers “individualized investment advice to the plan based on the needs of the plan.”⁹ Comparing the current and proposed language, it appears that the proposed rule would cover a broader range of individualized advice that considers more than just the needs of the plan as currently required. Thus, we recommend the Department further clarify when advice or recommendations would be considered to be “individualized” under the proposal.

In addition, we note that recent initiatives to expand fiduciary obligations to a wider range of advice providers under the federal securities laws are focused on circumstances where “personalized investment advice” is rendered.¹⁰ The term “personalized investment advice,” however, has not yet been defined under the federal securities laws and related regulations, and the SEC is expected to provide guidance on the term’s meaning.¹¹ Again, we do not believe that the Department should delay its regulations, but because the terms “individualized” and “personalized” may take on similar meaning, we recommend the Department consider any guidance issued by the SEC in the future and consider further modifying its regulations if doing so would provide greater fiduciary protections to plans, participants and beneficiaries.

Plan Distributions

The Department requests comment on whether to extend the proposed rule to encompass recommendations related to taking a plan distribution, having taken the position, as a general matter, that it should not.¹² Fi360 believes that not extending the proposal to plan distributions would perpetuate a serious gap in regulation and protection of plan

⁹ 29 CFR § 2510.3-21(c)(1)(ii)(B)

¹⁰ See Sec. 913(f)-(g), Dodd-Frank Act, P.L. 111-203 (granting the SEC rulemaking authority to adopt rules establishing a fiduciary duty for broker-dealers and investment advisers who provide personalized investment advice to retail investors).

¹¹ SEC Fiduciary Study, *supra* note 2, at 123-127 (recommending that the SEC engage in rulemaking and/or issue interpretive guidance to explain what it means to provide “personalized investment advice about securities”).

¹² See Definition of the Term “Fiduciary”, 75 Fed. Reg. 65,263, 65,266 (Oct. 22, 2010) (noting that the Department has taken the position that a recommendation to a plan participant to take an otherwise permissible plan distribution does not constitute investment advice under current regulation, even when the advice is combined with a recommendation as to how the distribution should be invested).

participants and beneficiaries, due to uneven standards of care applied to advice-givers under other financial services laws.

For example, an insurance producer who provides personalized investment advice to a participant or beneficiary as a fiduciary advisor may recommend a rollover or distribution following the participant's or beneficiary's job change or retirement. There is no requirement under state insurance laws, however, for the producer to disclose to the participant or beneficiary that the producer is no longer acting solely in their interest when recommending and executing the rollover or distribution. No state to our knowledge requires a producer to act in a fiduciary capacity to the client, and 18 states do not even have a suitability requirement in the sale of annuities.¹³ A recent report by the Government Accountability Office ("GAO") highlights this problem while discussing the regulation of financial planners, although the report does not directly address the distribution issue.¹⁴

We encourage the Department to examine the GAO report and, at a minimum, consider implementing a disclosure requirement for any advisor acting as a fiduciary under ERISA who will no longer serve as a fiduciary after distribution. Under such circumstances, the advisor should disclose the conflict to the participant or beneficiary in writing and receive written acknowledgement of the conflict prior to the distribution or rollover.

¹³ See U.S. Government Accountability Office, "Regulatory Coverage Generally Exists for Financial Planners, but Consumer Protection Issues Remain" (Publication No. GAO-11-235) at 8, January 2011, *at* <http://www.gao.gov/new.items/d11235.pdf>.

¹⁴ *Id.* at 7-12.

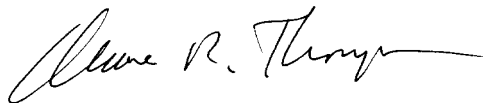
Conclusion

We truly appreciate the opportunity to provide our views on these important issues. Please do not hesitate to contact us at (412) 221-0292 if you have any questions or would like additional information.

Sincerely,



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