CERTIFIED FINANCIAL PLANNER
BOARD OF STANDARDS, INC.

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BY ELECTRONIC MAIL

February 3, 2011

Office of Regulations and Interpretations
Employee Benefits 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 the Term "Fiduciary"

Ladies and Gentlemen:

Certified Financial Planner Board of Standards, Inc. (CFP Board) appreciates the opportunity to comment on the proposal by the Department of Labor, Employee Benefits Security Administration (the Department) to expand the definition of the term "fiduciary" under the Employee Retirement Income Security Act (ERISA).[1] CFP Board has been a strong advocate in favor of a uniform fiduciary standard of care, consistent with the standard currently applied to investment advisers under the Investment Advisers Act of 1940 (Advisers Act), for all financial professionals who provide personalized investment advice to retail customers. CFP Board, as a member of the Financial Planning Coalition, has urged the Securities and Exchange Commission (SEC) to use its authority under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to apply a strong and uniform fiduciary standard of care to all such financial professionals, whether those financial professionals are associated with broker-dealers or investment advisers.[2]

CFP Board commends the Department for taking steps to enhance protections for plan participants and beneficiaries. We believe that fiduciary status is appropriate for investment professionals under ERISA, and support adoption of the Department's proposal. Providing a broader and clearer understanding of what it means to provide investment advice should help protect participants and beneficiaries from conflicts of interest and self-dealing. However, we also recognize the effect of being deemed a fiduciary under ERISA is different from that of being deemed a fiduciary under the Advisers Act. In particular, while ERISA and the Advisers Act impose a similarly exacting fiduciary standard of care, ERISA treats all transactions between a plan (or its participants) and "parties in interest" having certain relationships with the plan as

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[1] Definition of the Term "Fiduciary," 75 Fed. Reg. 65,263 (Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510) [hereinafter Proposing Release].

[2] Letter from Kevin R. Keller, Chief Executive Officer, Certified Financial Planner Board of Standards, Inc., Marvin W. Tuttle, Jr., Executive Director/Chief Executive Officer, Financial Planning Association, and Ellen Turf, Chief Executive Officer, National Association of Personal Financial Advisors, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Aug. 30, 2010), http://sec.gov/comments/4-606/4606-2593.pdf.

"prohibited transactions" that are impermissible in the absence of an applicable exemption. Similarly, ERISA fiduciaries are categorically forbidden from acting where the plan's interests (or participants' interests) and their own interests conflict, absent an applicable exemption.

Many providers of investment advice have operated successfully as fiduciaries within the existing ERISA framework for some time, and it may be appropriate and desirable to expand the prohibited transaction provisions to additional relationships. However, to the extent the Department's proposal unnecessarily limits retail investors' access to quality investment advice, we believe the Department should revisit the prohibited transactions provisions as they apply to particular relationships. Further, we urge the Department to limit the scope of the "adverse interests" exception to the proposed definition to clarify that an adviser may not simply "opt out" of ERISA's fiduciary status by disclaiming any intention to provide impartial investment advice. We endorse the Department's suggestion that investment advice should be defined to include recommendations related to taking plan distributions. Finally, we believe that the Department should expand the class of persons and plans to whom investment professionals may provide "investment education" without assuming fiduciary status to include plan sponsors and administrators, defined benefit plans, and individual retirement accounts (IRAs).

I. Background on CFP Board

CFP Board is a non-profit organization that acts in the public interest by fostering professional standards in personal financial planning through setting and enforcing education, examination, experience, and ethics standards for financial planner professionals who hold the CFP® certification. Our mission is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for personal financial planning. We currently oversee approximately 62,000 CFP® professionals who agree on a voluntary basis to comply with our competency and ethical standards and subject themselves to the disciplinary oversight of CFP Board.

Financial planning professionals provide services that integrate knowledge and practices across the financial services industry. Financial planning typically covers a broad range of subject areas, including investment, income tax, education, insurance, employee benefits, retirement, and estate planning. Financial planners work with their clients to determine whether and how they can meet their life goals through the proper management of their financial resources. CFP® professionals advise clients on a broad range of issues, including retirement planning and the investment of assets in retirement accounts, and as a result, CFP Board has a strong interest in the rules governing financial planning and investment advice for retirement plan assets.

II. Financial Professionals Who Provide Investment Advice Should Be Held to a Fiduciary Standard

CFP Board supports a strong fiduciary standard for everyone who provides personalized investment advice concerning securities and other property. And that fiduciary duty should be uniform; fiduciary status should not allow certain firms to provide investment advice at a lower standard of care to clients simply to accommodate those firms' business models. A fiduciary standard that is both strong and uniform will result in substantial benefits to investors and to the markets as a whole.

The U.S. Supreme Court, in *SEC v. Capital Gains Research Bureau, Inc.*, held in the context of the Advisers Act that:

> Courts have imposed on a fiduciary an affirmative duty of "utmost good faith, and full and fair disclosure of all material facts," as well as an affirmative obligation "to employ reasonable care to avoid misleading" his clients.[3]

The fiduciary standard created by the Advisers Act is a federal standard, which is not dependent on the variations of state law.[4] The fiduciary standard has longstanding roots in American law, and there is an extensive and well-understood body of law applying this standard.[5] As Chief Judge Cardozo famously stated:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[6]

The fiduciary duty standard under the Advisers Act consists of several components. The fiduciary standard includes a duty of care, which includes an affirmative duty to seek out sufficient information and expertise on which to base decisions. The fiduciary standard also includes a duty of loyalty and a duty of honesty to the client. Finally, the fiduciary standard includes a duty of utmost good faith to act solely in the best interests of the client. In the investment context, the fiduciary standard has been summarized as a "prudent investor" standard: the fiduciary "shall invest and manage [client] assets as a prudent investor would . . . [and] shall exercise reasonable care, skill, and caution."[7] Because fiduciary duty is a principles-based standard, it is flexible and can be adapted to various situations that may arise in the future.

III. The Department Should Expand the Current Definition of Fiduciary

CFP Board agrees that the five-part test applied in 29 C.F.R. § 2510.3–21(c) does not capture some situations in which fiduciary status is appropriate. As the Department recognizes, the current regulation is substantially narrower than the plain language of Section 3(21)(A)(ii) of ERISA, which sets out a simple two-part test for determining fiduciary status: "A person renders investment advice with respect to any moneys or other property of a plan, or has any authority or responsibility to do so; and the person receives a

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[3] 375 U.S. 180, 194 (1963) (citations omitted).
[4] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979).
[5] *See generally* RESTATEMENT (THIRD) OF AGENCY (2006).
[6] Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).
[7] *See* UNIF. PRUDENT INVESTOR ACT § 2 (1994), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upia94.pdf. Section 404(a)(1)(B) of ERISA imposes a similar requirement.

fee or other compensation, direct or indirect, for doing so."[8] As the Proposing Release explains, if providers of investment advice are not deemed to be fiduciaries under ERISA, then "they may operate with conflicts of interest that they need not disclose to the plan fiduciaries who expect impartiality and often must rely on their expertise, and have limited liability under ERISA for the advice they provide."[9] We agree that amending the current regulation to establish additional circumstances in which advice providers are subject to ERISA's fiduciary responsibilities will better protect the interests of plans and their participants and beneficiaries.

As discussed in the Proposing Release, today the oversight of investment advisers focuses on establishing the technical elements of the current five-part test rather than on the actual conduct at issue in particular cases. We believe the current rule's narrow focus is fundamentally inconsistent with the broader, principles-based, facts-and-circumstances approach under which fiduciary duties are generally assessed under American law. For example, under the current regulation, a plan beneficiary may go to a financial planner or other investment professional for an important one-time investment decision (e.g., the decision whether to purchase a particular security or other property, or to withdraw assets from a retirement plan). We agree with the Department that it would be important for the plan beneficiary to have full fiduciary protection in that circumstance, even if the financial planner had not been giving that beneficiary advice "on a regular basis." In addition, we do not believe that the fact that a plan beneficiary has a self-directed account and uses multiple sources of advice should be an excuse for an investment professional who deals with that beneficiary to have undisclosed material conflicts of interest, even though that investment professional's advice may not be the "primary basis" for the beneficiary's investment decisions. In these two important respects, we believe that the current ERISA rules may not provide sufficient protection for plan participants and beneficiaries.

We recognize there is concern the Department's proposal may unnecessarily limit retail investors' access to quality investment advice. As compared to the principles-based fiduciary standard established under the Advisers Act, the fiduciary standard under ERISA status carries with it a substantial and detailed set of rules-based prescriptions, including the prohibited transaction restrictions. Much of the history of ERISA since its adoption has involved the Department's use of its regulatory authority to establish carefully balanced exemptions to the prohibited transaction restrictions, many of which depend on whether the party seeking the exemption (or an affiliate) is an ERISA fiduciary. Many providers of investment advice have operated successfully within the existing prohibited transaction provisions since that time. However, there may be situations in which broadening the definition of fiduciary may result in unintended restrictions on certain relationships because of the prohibited transaction provisions.

For example, under the Advisers Act, it is permissible for financial services professionals to receive Rule 12b-1 fees from mutual fund advisers. In part these fees compensate financial services professionals for providing advice to clients, and in part they compensate financial services professionals for performing servicing functions (e.g., statements, confirmations, mailings, etc.) that would otherwise fall on the mutual fund company. CFP Board believes that Rule 12b-1 fees are confusing to investors, and has supported a

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[8] Proposing Release, 75 Fed. Reg. at 65,264.
[9] *Id.* at 65,265.

recent SEC proposal to reform them.[10] However, in its comment letter, CFP Board agreed with the SEC that it was not appropriate to ban entirely continuing payments from mutual fund advisers to financial professionals. Allowing those payments in appropriate circumstances creates an alternative method that allows some retail investors to pay for investment advice. In particular, many beginning investors, and investors with smaller amounts to invest, either do not have sufficient assets to qualify for investment advice based on an assets-under-management fee, or such a fee would be prohibitively expensive for them. For these investors, their only practical access to investment advice may be through mutual funds that pay their investment professional an ongoing fee.

By contrast, under ERISA, receipt of payments by a fiduciary from a party other than the client in connection with a transaction involving assets of the plan (a "kickback") generally constitutes a prohibited transaction for which exemptions generally are not available.[11] Absent an exemption, ERISA fiduciaries typically either do not accept Rule 12b-1 payments with respect to mutual funds or rebate those payments to clients (usually as an offset against the client's investment advisory fees). Under the current prohibited transaction provisions, redefining some classes of financial services professionals as fiduciaries could have the effect of denying them the ability to be compensated through 12b-1 fees for investment advice they have already provided. Additionally, it may have the effect of denying retail investors the ability to pay their financial professional for investment advice through periodic payments from mutual fund advisers, which is the method that many IRA account holders use to pay for investment advice. As a result, some retail investors, who are unable to pay investment advisory fees or for whom such fees would be cost-prohibitive, might be unable to obtain that investment advice.

Again, we support adoption of the Department's proposal to provide a broader and clearer understanding of what it means to provide investment advice. To the extent this change unnecessarily limits access to quality investment advice, we believe the Department should consider whether any changes to the prohibited transactions rules and exemptions may be necessary.

IV. The Department Should Limit The Scope of the "Adverse Interests" Exception

The proposed regulation includes an express exception from the definition of fiduciary where the recipient of the advice knows or reasonably should know that the person providing the advice is a purchaser or seller (or an agent or appraiser for a purchaser or seller) of securities or other property whose interests are adverse to those of the plan or its participants and who is not undertaking to provide impartial investment advice.[12] The scope of this exception is not clear, as is evidenced by the widely differing interpretations accorded it in the various comment letters.[13] As we read it, this exception to the proposed definition could be

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[10] Letter of Kevin R. Keller, Chief Executive Officer, Certified Financial Planner Board of Standards, Inc., to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Nov. 5, 2010), http://www.sec.gov/comments/s7-15-10/s71510-1079.pdf.

[11] ERISA § 406(b)(3), 29 U.S.C. § 1106 (2006); I.R.C. § 4975(c)(1)(F) (2006). Section 4975(c)(1) of the Internal Revenue Code provides prohibited transaction rules that apply to IRAs, Keogh plans, and certain other non-ERISA plans, which parallel those of Sections 404(a)(1), 406(a), and 406(b) of ERISA.

[12] Prop. Reg. § 2510.3-21(c)(2)(i), Proposing Release, 75 Fed. Reg. at 65,277.

[13] Some have interpreted the exception as permitting a financial professional whose recommendations would otherwise rise to the level of "investment advice" under the proposed rule to choose *not* to assume fiduciary responsibility as an ERISA investment

interpreted to permit an adviser to "opt out" of ERISA's fiduciary status by disclaiming any intention to provide impartial investment advice. For example, a broker-dealer whose recommendations otherwise rise to the level of investment advice under the proposed rule may nevertheless continue to receive fees from third parties (impermissible "kickbacks" if the broker-dealer were a fiduciary) in connection with securities trades for the plan as long as it provides sufficient disclosure so that the recipient "knows or should know" that it has adverse interests and is not providing impartial investment advice.

In response to the SEC's study mandated by Section 913 of the Dodd-Frank Act, we stated that the fiduciary standard is not just a "disclosure and consent" process standard. Rather, it is a substantive standard that requires an investment professional to act consistently with the long-standing and well-established duty to act as a "prudent investor." It is well-established that an element of fiduciary duty under the Advisers Act is (as part of the duty of due care) a duty of due diligence to assure that the investment professional fully understands and has fairly evaluated an investment recommendation. Even with full and fair disclosure and consent, if an investment professional gives investment advice that is inconsistent with what a prudent investor would do in similar circumstances, then the investment professional has violated the fiduciary duty to the client to engage in fair dealing and provide disinterested advice.

Fortunately, SEC staff has long agreed that disclosure and consent is not enough:

> We do not agree that "an investment adviser may have interests in a transaction and that his fiduciary obligation toward his client is discharged so long as the adviser makes complete disclosure of the nature and extent of his interest." While section 206(3) of the Investment Advisors [sic] Act of 1940 ("Act") requires disclosure of such interest and the client's consent to enter into the transaction with knowledge of such interest, the adviser's fiduciary duties are not discharged merely by such disclosure and consent. The adviser must have a reasonable belief that the entry of the client into the transaction is in the

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adviser by simply taking the view that it is acting as an "agent" of the seller of the property and ensuring that the recipient knows of its adverse interests. *See, e.g.,* Letter from American Society of Pension Professionals and Actuaries, National Association of Independent Retirement Plan Advisors, and Council of Independent 401(k) Plan Recordkeepers, to Department of Labor, Employee Benefits Security Administration, at 6 (Jan. 27, 2011), http://www.dol.gov/ebsa/pdf/1210-AB32-063.pdf ("The Proposed Regulation is significant in that it does not prohibit individuals who have a conflict of interest from providing advice, but instead merely requires that they disclose such information to the person receiving the advice in order to avoid fiduciary status."). Others assume that the exception as proposed may not permit a conflicted investment professional to disclaim fiduciary status merely because the professional—such as a broker-dealer making investment recommendations—will receive a fee or other compensation when the product or service is sold. *See, e.g.,* Letter from Securities Committee of the Business Law Section of the State Bar of Texas, to Office of Regulations and Interpretations, Employee Benefit Security Administration, at 5 (Jan. 11, 2011), http://www.dol.gov/ebsa/pdf/1210-AB32-039.pdf (assuming that a broker who recommends a mutual fund transaction may no longer receive trailers or Rule 12b-1 fees corresponding to the amount of plan assets invested in the investment company because it would be receiving consideration from a party dealing with the plan in connection with a transaction involving the assets of the plan); Letter from Committee on Employee Benefits and Executive Compensation of the New York City Bar Association, to Office of Regulations and Interpretations, Employee Benefit Security Administration, at 9–10 (Jan 28, 2011), http://www.dol.gov/ebsa/pdf/1210-AB32-070.pdf ("With respect to the exceptions, while we concur with the intent underlying the "Adverse Interest Exception" in paragraph (c)(2)(i) of the Proposed Rule, it is not clear that the exception has been drafted broadly enough to cover all the scenarios it should reasonably be expected to cover.").

> client's interest. The facts concerning the adviser's interest, including its level, may bear upon the reasonableness of any belief that he may have that a transaction is in a client's interest or his capacity to make such a judgment.[14]

The structure of the Advisers Act itself argues against the "disclosure and consent" position. For example, the provisions of Section 205 forbidding profit-sharing apply whether or not the client gives consent. The SEC staff has long found that hedge clauses in investment advisory agreements may be impermissible even if the client agrees and even if, read literally, nothing in the hedge clause was affirmatively misleading.[15] Additionally, Section 215 forbids investment advisers from seeking waivers from clients of the protections of the Advisers Act, no matter how fully informed the client is when the waiver is requested.

The SEC staff recently confirmed this approach in the study mandated by Section 913 of the Dodd-Frank Act. The staff's view is that a uniform fiduciary standard of conduct is appropriate for both "broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers."[16] Although the consequences of fiduciary status are different under the Advisers Act and under ERISA, the study does not suggest that disclosure of a conflict should ever *negate* fiduciary status. Rather, the study recommends that the SEC, in its rulemaking and other interpretive guidance, should specify that a fiduciary must either eliminate conflicts of interest, or fully and fairly disclose them and obtain client consent before proceeding to provide investment advice to a client.[17] We suggest that the Department take a similar approach: while a fiduciary may obtain disclosure and consent for potential conflicts from plans and participants, the Department should not allow disclosure of an adverse interest to negate fiduciary status.

V. The Department Should Extend Fiduciary Duty Status to Advice About Whether to Take a Plan Distribution

The Proposing Release requests comment on whether the Department should define the provision of investment advice to include recommendations related to taking a plan distribution. CFP Board strongly urges the Department to include advice about whether to take a distribution from a benefit plan. In our disciplinary process and investigations of abusive investment practices, some of the greatest abuses we have seen began with bad and self-interested advice that a plan beneficiary take a lump-sum distribution from a benefit plan.[18] In some cases, the financial professional then advised the plan participant to use the distribution proceeds in a way that did not constitute investment advice (e.g., to buy a house through an

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[14] Rocky Mountain Fin. Planning, Inc., 1983 SEC No-Act. LEXIS 2132 (Mar. 28, 1983).

[15] *See* Heitman Capital Mgmt., LLC, 2007 SEC No-Act. LEXIS 159 (Feb. 12, 2007) (discussing previous no-action requests concerning hedge clauses and announcing staff would not entertain future requests on the subject). Public policy supports the principle that investment professionals should not be free to seek to have clients negate the fiduciary duties to which they are subject. *See* Erlich v. First Nat'l Bank of Princeton, 505 A.2d 220 (N.J. Super. Ct. Law Div. 1984).

[16] STAFF OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER DEALERS vi, 109 (Jan. 2011), http://sec.gov/news/studies/2011/913studyfinal.pdf.

[17] *Id.* at 112–18.

[18] We would be glad to provide the Department with specific examples of financial abuses involving egregiously bad and self-interested advice that plan beneficiaries take lump-sum distributions.

affiliated real estate broker). If the Department does not capture the advice concerning the distribution, then those types of transactions will be exempt from review.

It is difficult to see how a financial professional can give a “bare” recommendation to a plan participant to take a distribution from an individual account plan without a contemporaneous implicit investment recommendation, as a participant taking a distribution is both (i) making a decision that the plan’s current investments or investment menu are not appropriate for him and that something else will serve his retirement objectives better; and (ii) generally required to liquidate the assets to cash—an investment decision in itself—prior to the distribution. Even in less egregious situations, such as where the financial professional’s investment advice is appropriate and not conflicted, there can be very significant tax consequences to taking a distribution, especially if the distribution is not then rolled over into another tax-deferred account. Similarly, in some circumstances beneficiaries at certain ages are required to take distributions and can suffer significant adverse financial consequences if they fail to do so. Because these issues are complex and nuanced, many investors need professional advice about whether and when to take such distributions, and in what amounts. We cannot perceive any public policy reason why advice about taking distributions from a plan should be treated any differently from advice about how to invest account balances while they are held within the plan. We strongly urge the Department to extend the definition of “investment advice” to include advice about taking distributions.

VI. The Department Should Extend the Exemption for “Investment Education” to Plan Officials, Defined Benefit Plans, and IRAs

The proposed changes to the definition of fiduciary contain an exception for “investment education information and materials,” but only, it appears, where the education is provided to a participant or a beneficiary in a participant-directed individual account plan.[19] The proposal does not except investor education directed to plan sponsors and their investment committees, whether the plan is an individual account plan or a defined benefit plan. More significantly, the proposal does not except investment education directed at IRA owners and beneficiaries, who make up a large percentage of the country’s self-directed retirement plan investors.

We therefore urge the Department to consider whether its exception is sufficiently broad. We believe it is vitally important that the Department encourage generalized education and information about general financial concepts (e.g., asset classes, asset allocation). Studies regularly show that the “financial literacy” of many Americans is lower than they need to make well-informed financial decisions. Imposing ERISA liability for generalized educational and informational materials could have the unintended consequence of making both employers and financial services firms less willing to offer much-needed general educational materials about investing. The Department should make it clear that generalized educational and informational materials, which clearly disclose that they are not tailored to a specific customer’s financial situation, do not by themselves establish fiduciary status in any plan context.

[19] Prop. Reg. § 2510.3-21(c)(2)(ii)(A) cross-references 29 C.F.R. § 2509.96-1(d), which by its terms is limited to investment education provided to participants and beneficiaries in a self-directed individual account pension plan.

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CFP Board appreciates the opportunity to comment on the Department's proposed changes to the definition of the term "fiduciary." We would be happy to meet with the Department or its staff to discuss these important issues further. If you should have any questions regarding this comment letter, CFP Board, the financial planners it certifies, or the CFP® marks, please contact Marilyn Mohrman-Gillis, Managing Director, Public Policy and Communications, at (202) 379-2235, or visit CFP Board's Web site at www.CFP.net.

Sincerely,

Kevin R. Keller

Kevin R. Keller, CAE
Chief Executive Officer