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VIA E-MAIL E-ORI@DOL.GOV

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

Re: Proposed Rule Regarding Definition of the Term "Fiduciary"

Ladies and Gentlemen:

This letter is submitted in response to the request for comments by the Employee Benefits Security Administration ("EBSA") in Release No. RIN 1210-AB32, regarding the proposed rule published at 75 Fed. Reg. 65263 (Oct. 22, 2010) (the "Proposed Rule").

The focus of this comment is the interaction of Section 2510.3-21(c)(ii)(A) of the Proposed Rule (referred to in this letter as the "Acknowledged Fiduciary Provision") and Section 2510.3-21(c)(2)(i) of the Proposed Rule (referred to in this letter as the "Seller Exception").

As relevant to this comment, the Seller Exception generally provides that a person will not be considered to be rendering advice that will make him a fiduciary under ERISA if "with respect to the provision of advice or recommendations … such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a … seller of a security or other property, whose interests are adverse to the interests of the plan … and that the person is not undertaking to provide impartial investment advice."

The rationale underlying the Seller Exception is described in the preamble to the Proposed Rule: "This provision reflects the Department's understanding that, in the context of selling investments to a purchaser, a seller's communications with the purchaser may involve advice or recommendations … concerning the investments offered. The Department has determined that such communications ordinarily should not result in fiduciary status under the proposal if the purchaser knows of the person's status as a seller whose interests are adverse to those of the purchaser, and that the person is not undertaking to provide impartial investment advice." 75 Fed. Reg. at 65267.

However, under the Proposed Rule, the Seller Exception does not apply "with respect to a person … described in [the Acknowledged Fiduciary Provision]." In this regard, the Acknowledged Fiduciary Provision describes a "person either directly or indirectly (e.g., through or together with any affiliate) who represents or acknowledges that it is acting as a fiduciary within the meaning of [ERISA] with respect to providing advice or making recommendations" as to (for example) "the advisability of investing in securities or the management of securities."

The wording of these two provisions of the Proposed Rule is somewhat confusing and could lead to uncertainty regarding the scope of the Seller Exception, as illustrated by the following example. Assume that Company X is in the business of providing investment allocation advice to its customers, including Plan A. In its agreement with Plan A, Company X acknowledges that, in providing such advice to Plan A, it is acting as a fiduciary under ERISA. Company X has an affiliate, Company Y, which is in the business of sponsoring and managing private investment funds. Company Y offers an interest in one of its funds to Plan A, and in connection with that offering has communications with Plan A in which Company Y urges Plan A to purchase an interest in the fund. Under the relevant facts, the fiduciary acting on behalf of Plan A with regard to the decision whether to purchase an interest in the fund knows that Company Y is acting as a seller whose interests are adverse to Plan A and that Company Y is not undertaking to provide impartial investment advice. It would seem that, under these circumstances, Company Y should be able to take advantage of the Seller Exception. However, two aspects of the wording of the Proposed Rule make that conclusion uncertain.

First, the persons described in the Acknowledged Fiduciary Provision literally include a person who acknowledges fiduciary status "through or together with an affiliate." This language is unclear. The question might be raised whether, as applied to the example above, this language describes Company Y (the seller of the interest in the private investment fund), as Company Y's affiliate (Company X) has acknowledged its fiduciary status with regard to the advice provided by Company X. However, in context, it appears that the reference to "through or together with an affiliate' is intended to apply to a situation where affiliates act together in providing a combination of services designed to provide fiduciary advice to the plan. The preamble to the Proposed Rule states the Acknowledged Fiduciary Provision "relate[s] to the degree of authority, control, responsibility or influence that is possessed, directly or indirectly, by the person rendering the advice and the reasonable expectations of the persons receiving the advice." 75 Fed Reg. at 65266. In the example above, in connection with the sale of the interest in the fund, Company Y does not have any control or influence over Plan A based solely on the fact that its affiliate, Company X, provides fiduciary advice to Plan A. Further, given that the fiduciary acting on behalf of Plan A in connection with the sale specifically knows that Company Y is adverse to the plan and is not providing impartial advice, that Plan A fiduciary would not have a reasonable expectation that Company Y would be acting in a fiduciary capacity with regard to its recommendations that Plan A purchase an interest in the fund.

In light of the above, we would recommend that the language of the Acknowledged Fiduciary Provision be modified to clarify that the reference to "through or together with an affiliate" applies only to those affiliates of the person who has acknowledged fiduciary status that provide assistance to that person in performing the advisory services with respect to which the person has acknowledged it is a fiduciary (e.g., in the example above, the asset allocation services provided by Company X).

The second aspect of the uncertainty in the Proposed Rule relevant to the issue addressed by this comment relates to the manner in which the Seller Exception refers to the Acknowledged Fiduciary Provision. As noted above, the Seller Exception does not apply where "with respect to a person … described in [the Acknowledged Fiduciary Provision]." The scope of this language is unclear. However, the preamble to the Proposed Rule indicates that the intent is to make the Seller Exception unavailable where the seller has acknowledged fiduciary status in connection with the sale transaction with the plan: "if a person selling securities to a plan … makes a representation of ERISA fiduciary status *in connection with the sale,* orally or in writing, then [the Seller Exception] would not be available." 75 Fed. Reg. at 65268. We recommend that the language of the Seller Exception be modified to expressly provide that the reference to the Acknowledged Fiduciary Provision applies only where the seller has acknowledged fiduciary status in connection with the sale transaction with the plan.

We believe that these two suggested clarifications to the Proposed Rule would be in the interests of the plans and their participants and beneficiaries. Given the consolidation of the financial services industry in recent years there are many situations where one entity may be providing fiduciary advice to a plan and an affiliate of that entity may be selling securities or other property that will be desirable for the plan to purchase. If the sales activities of the one affiliate are unrelated to the advisory activities of the other, the seller should not have to be concerned that its marketing effort could possibly be viewed as fiduciary advice. Lack of clarity with respect to this issue in the rule defining fiduciary status could lead financial services companies to refrain from providing advice to plans, or to refrain from marketing securities or other property to plans. In that case, plans will be unnecessarily deprived of either valuable advisory services or potentially beneficial investments.

Very truly yours,

/s/ Daniel P. Condon

Daniel P. Condon

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