GROOM LAW GROUP

Stephen M. Saxon
(202) 861-6609
sms@groom.com

Jennifer E. Eller
(202) 861-6604
jee@groom.com

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By Electronic Mail to e-ORI@dol.gov

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, N.W.
Washington, D.C. 20210

Re: Comments on Definition of Fiduciary Proposed Rule

Ladies and Gentlemen:

Groom Law Group, Chtd. represents a number of financial institutions and administrative services providers that offer a variety of products and services to employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and individual retirement accounts ("IRAs") that are not subject to ERISA but would be impacted by the proposal. The members of this group (the "Group") also sponsor ERISA-covered plans, including individual account, participant-directed plans. This letter represents the comments of the Group on the proposed Definition of Fiduciary Rule (the "Proposed Regulation" or the "Proposal") published by the Department of Labor (the "Department") on October 22, 2010.[1] We appreciate this opportunity to file comments on behalf of the Group.

In its Proposal, the Department seeks to amend the regulation, in place for more than 35 years, that defines the circumstances under which a person is deemed a fiduciary under ERISA section 3(21)(A)(ii) due to that person's rendering of (or authority or responsibility to render) investment advice for a fee with respect to moneys or property of an ERISA plan. Group members are extremely knowledgeable about the provision of investment advice with respect to ERISA plans, fiduciaries and participants and understand the very significant effects that the Department's Proposal will have on the employee benefits community. We request that a representative of the Group be permitted to testify at the March 1, 2011 hearing regarding the Proposal. We would also be pleased to meet with the Department to discuss the concerns of the Group in greater detail.

[1] Proposed Regulation, 75 Fed. Reg. 65263 (Oct. 22, 2010).

Summary of the Comments

As service providers to ERISA-covered plans, the Group shares the Department's desire for an appropriate and straightforward regulation defining the circumstances in which a person becomes an ERISA fiduciary as a result of his or her provision of investment advice for a fee. However, the Group believes that the Proposed Regulation is so broad that it will impose fiduciary status on a significant number of people and organizations whom Congress never intended to be ERISA fiduciaries. And the consequences of the Proposed Regulation would be contrary to the very purposes for which it has been proposed. Specifically, the ability of millions of Americans to save for retirement will be hurt because financial institutions will not be able to deliver critical investment tools, information and services, or will only be willing to do so at an added cost to IRA account holders and retirement plan participants and beneficiaries. With the number of self-directed plans and IRAs increasing, and the ability to rely on Social Security as a source of retirement savings declining, it is more critical than ever that individuals be provided with low-cost tools for retirement planning.

The Group has identified a number of serious concerns about the Proposed Regulation and offers the following suggestions that the Group believes would provide a clearer and more workable definition of an investment advice fiduciary:

- **The Proposed Regulation should apply solely to ERISA-covered plans and not to "plans" as defined by the Internal Revenue Code.**

- **The Final Regulation should affirm and clarify the Department's Advisory Opinion 2005-23A, in which the Department took the position that a recommendation to a plan participant to take an otherwise permissible plan distribution does not constitute investment advice.**

- **The Department should eliminate the "status" of a person or his or her affiliate as a relevant factor in the analysis of fiduciary function, and instead should require on-going services and an explicit and mutual agreement, arrangement, or understanding between the parties in order for a person to be deemed an investment advice fiduciary.**

- **The Final Regulation should broaden the scope of the limitation available in connection with marketing or making available a universe or menu of securities from which a plan fiduciary may designate alternatives.**

- **The Final Regulation should clarify the types and frequency of disclosures that plan service providers must make in order to comply with the "limitations" provided under the Proposed Regulation.**

- **To the extent that the Department is concerned about valuation, it should study the issue in light of the comments received in connection with the Proposed Regulation, and, if necessary, should engage in a separate rulemaking process specifically addressing valuation. In any event, the "limitation" contained in subsection (c)(2)(iii) of the Proposed Regulation should not operate to broaden the scope of fiduciary status with respect to valuation of plan assets.**

Comments

I. The Proposed Regulation should apply solely to ERISA-covered plans and not to "plans" as defined by the Internal Revenue Code.

The Proposed Regulation includes a subsection that would specifically apply the new fiduciary definition not only to persons providing investment advice to ERISA-covered plans, but also to persons providing investment advice to "plans" as defined by Internal Revenue Code ("Code") section 4975(e)(1).[2] The Code's definition of a "plan" includes a number of types of savings arrangements not covered by ERISA, including individual retirement plans ("IRAs").[3] The Group has identified several issues and concerns raised by the application of the Proposed Regulation to IRAs:

First, although the Code contains provisions generally paralleling ERISA's prohibited transaction provisions, the Code does not otherwise establish any standards of conduct for fiduciaries, nor does the Code permit plans or their participants, beneficiaries, or fiduciaries to bring suit for breaches of fiduciary duties or prohibited transactions. Therefore, the proposed expansion of the fiduciary definition to include Code-covered plans provides no additional protection for plans and their participants outside of that offered by the Code's prohibited transaction rules enforceable by the Internal Revenue Service. Yet vastly expanding the circumstances and individuals to which the Code's prohibited transaction rules apply could work to harm rather than protect holders of IRAs. Chief among these harms are the increased costs that the Proposed Regulation would impose on IRAs. Simply put, service providers to IRAs would face a substantially higher risk associated with fiduciary status and would therefore charge higher fees. Unlike participants in ERISA plans, who typically do not have the ability to select the plan's service provider, each IRA holder has complete freedom to select providers and to select the level of service he or she is willing to pay for. As a result, there currently exist in the marketplace numerous IRA models—an IRA holder may choose to self-direct the IRA's investments, or may choose to hire a fiduciary investment adviser, or even a discretionary fiduciary to invest the IRA's assets. In this regard, costs generally increase as the level of service and risk of providing the service increases. Rather than allowing individuals to choose a level of service and cost with which they are comfortable, the Proposed Regulation would, in many

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[2] Proposed Regulation, 75 Fed. Reg. at 65277 (proposing new 29 C.F.R. § 2510.3-21(c)(4)).
[3] Code §§ 4975(e)(1)(B) and (C).

cases, act to simply impose costs and risk on providers, which would, as they are today, be passed through to IRA holders.

Moreover, in some circumstances, the commission of a prohibited transaction with respect to an IRA can cause severe tax consequences for the holder of the IRA. Unlike with ERISA plans, many prohibited transactions involving IRAs result in the assets of the IRA being deemed distributed and thus immediately includable in the gross income of the payee. As a practical matter, then, the Proposal's application of the new fiduciary definition to Code plans could increase the negative tax consequences to IRA holders. In the Group's view, the protection provided by the Code's prohibited transaction rules is insufficient to justify this risk.

Next, under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the Securities and Exchange Commission ("SEC") was directed to study the standards of care that should apply to broker-dealers registered under the Securities Exchange Act of 1934.[4] The SEC Study on Investment Advisers and Broker-Dealers was released on January 22, 2011.[5] The study addresses and makes recommendations with respect to a number of issues central to the Proposed Regulation. Specifically, the study recommends a uniform standard of conduct for broker-dealers and investment advisers. The Group recommends that the Department review the study and coordinate with the SEC, rather than unilaterally enacting the sweeping changes set forth in the Proposed Regulation.

The need for coordination with the SEC is particularly important in terms of helping avoid confusion on the part of individuals trying to save for retirement. By applying the Proposed Regulation to investment advice provided in connection with IRAs, the Department would create a substantial risk of confusing even relatively sophisticated individual investors. Consider, for example, the following fairly common scenario: Joe Smith participates in an ERISA-covered 401(k) plan sponsored by his employer. In addition, Joe maintains an IRA and a retail brokerage account. For his own convenience, Joe maintains his IRA and retail brokerage account with the same financial institution that acts as recordkeeper and directed trustee for his employer's 401(k) plan.

If the Proposed Regulation were finalized as currently drafted, the financial institution, as plan recordkeeper and directed trustee, could owe fiduciary duties to the plan while acting in both capacities and therefore be required to avoid prohibited transactions under ERISA. At the same time, the individual broker—an employee of that same financial institution—that Joe deals with for investment advice regarding his IRA would be a fiduciary by application of the Proposed Regulation, yet only for Code prohibited transaction purposes. And that same broker could owe a different standard of care to Joe with respect to the advice he gives Joe regarding his

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[4] Dodd-Frank Act § 913; SEC Rel. No. 34-62577; 75 Fed. Reg. 44996 (requesting public comments).

[5] Available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

retail brokerage account that would not require fee leveling or other prohibited transaction compliance.

It is highly unlikely that Joe would understand the differences in standards applicable to his legally distinct interactions with a single financial institution. He may well be aware that the financial institution owes him a fiduciary duty with respect to his 401(k) account, and that such a duty means the institution must act in his best interest. If he then learns that the broker is technically a fiduciary as well, he will likely assume that the same standard applies to the investment advice he receives from his broker with respect to his IRA and his retail brokerage account. He would likely not understand that, although the broker, as a "fiduciary" under the Proposed Regulation, is subject to the Code prohibited transaction rules with respect to the IRA, this "fiduciary" label carries with it no corresponding legal standard of care, and Joe has no mechanism for enforcing the Code provisions. In addition, Joe would probably be unaware that the very same broker may be subject to a different standard of care in connection with Joe's investment in the retail brokerage account.

Although there are certainly many times in which ordinary investors do not fully comprehend the complex laws governing their interactions with service providers, in this situation the confusion could cause Joe to believe that the advice he receives from his broker regarding his IRA is made under the same fiduciary duties that govern his 401(k) plan. What Joe *will* definitely notice is that his broker will either substantially increase the cost of services or will simply be unwilling to continue to provide services.

For these reasons, the Group requests that the Department modify subsection (c)(4) of the Proposed Regulation to apply only to ERISA-covered plans, at least until the Department gathers further information about the impact of the Proposal on IRA holders and until the SEC determines how to implement its study of broker-dealer standards of care under the Dodd-Frank Act. In particular, the Group suggests that the Department modify the final sentence of subsection (c)(4) to read as follows: "However, the provisions of this paragraph (c) shall, for purposes of application of Code section 4975, apply only to plans subject to Part 4 of Title I of ERISA."

If the Department is unwilling to modify this subsection, the Group requests that the Department include two changes in the final regulation to ensure that fiduciaries of Code-covered plans are treated no more harshly than those of ERISA-covered plans. First, the Group requests that the Department clarify in the final regulation that, for purposes of the limitation related to investment education as described in the Department's Interpretive Bulletin 96-1(d), providing investment education with respect to a plan described in the Code (such as an IRA or HSA) will not cause the person providing the education to be deemed a fiduciary. The same standard set forth in Interpretive Bulletin 96-1(d) with respect to ERISA-covered plans should apply to Code-covered plans as well. Additionally, the Group requests that the Department create an additional section in that Interpretive Bulletin tailored specifically to the treatment of investment education with respect to IRAs and other plans that, unlike 401(k) plans (that provide

a limited core line-up of funds either alone or in combination with a wide universe of funds through a self-directed brokerage window), offer a virtually unlimited universe of investments to choose from. Finally, the Group requests that the Department revise subsection (c)(2)(ii) of the Proposed Regulation so that its limitations on what acts constitute the rendering of investment advice apply to plans described by Code section 4975(e)(1) as well as to individual account plans as defined in section 3(34) of ERISA. At the very least, the application of the Proposed Regulation with respect to Code-covered plans should be no broader and no more onerous than its application to ERISA individual account plans.

II. The Final Regulation should affirm and clarify the Department's Advisory Opinion 2005-23A, in which the Department took the position that a recommendation to a plan participant to take an otherwise permissible plan distribution does not constitute investment advice.

The preamble to the Proposed Regulation provides as follows:

> The Department notes that it also has taken the position that, as a general matter, a recommendation to a plan participant to take an otherwise permissible plan distribution does not constitute investment advice within the meaning of the current regulation, even when that advice is combined with a recommendation as to how the distribution should be invested. Concerns have been expressed that, as a result of this position, plan participants may not be adequately protected from advisers who provide distribution recommendations that subordinate participants' interests to the advisers' own interests.[6]

The Department took this position, of course, in Advisory Opinion 2005-23A, issued less than five years before the Proposed Regulation. Specifically, in Advisory Opinion 2005-23A, the Department opined that advising a plan participant to take an otherwise permissible plan distribution, even when combined with a recommendation as to how the distribution should be invested, does not constitute "investment advice" because it does not involve a recommendation or advice concerning a particular investment of the plan.

The Group requests that the Department not rewrite its requirements related to discussions with participants regarding distributions. In order for participants to receive information from financial professionals necessary to help them make informed decisions about plan distributions, the Department must remain consistent in this position. If financial institutions are going to be deemed fiduciaries when they provide distribution consulting services, they will simply stop providing such services, and participants will be left without information relating to, among other things, the possible consequences of taking a distribution before retirement age. In considering its approach on this point, the Group believes the Department must recognize that cashouts of plan account balances at job separation have the

[6] Preamble to Proposed Regulation, 75 Fed. Reg. at 65266 (footnote omitted).

greatest impact of any form of "leakage" affecting retirement plans.[7] In its 2009 report on retirement plan leakage, the GAO found that, under existing policies, about 15% of participants initiate some form of leakage from their retirement plans, and of this, the substantial majority is in the form of cashouts at a job change. The report also found that getting information to participants about the long-term effects of these cashouts would help improve the existing leakage problem. The Group cautions the Department that changing the position stated in Advisory Opinion 2005-23A could substantially exacerbate this problem by removing from the marketplace the primary source of information for participants about the long-term negative effects of leakage. For these reasons, the Group believes that there are strong policy reasons why the Department should refrain from adding any provision to the Final Regulation respecting discussions with participants regarding distributions, and instead adhere to its position set forth in Advisory Opinion 2005-23A that such conversations do not constitute investment advice.

In addition, as recognized by the Department in Advisory Opinion 2005-23A, distribution scenarios often involve a participant who has already made the "fiduciary" decision to liquidate his or her current investments in the plan, usually for reasons unrelated to the plan investments (*e.g.*, account consolidation, tax or estate planning, etc.). In these cases, the participant is *not* seeking the adviser's opinion on whether doing so is prudent; he or she is only seeking advice on the appropriate investments to make *following* the distribution. In such cases, advice on the distribution proceeds no longer relates to plan assets and therefore cannot constitute a fiduciary activity with respect to the plan.

Imposing a fiduciary definition that fails to recognize the distinction between advice with respect to the assets of the plan and advice with respect to the investment of assets after they have been distributed from the plan would serve to cut off participants' access to a wide range of non-investment-related professional advice on distributions. For example, a financial professional or attorney may provide tax planning advice that only indirectly affects plan investments, such as whether to rollover the participant's company stock holdings to an IRA or to take an in-kind distribution. In this scenario, any investment commentary is likely to be limited to general considerations, such as the ability to diversify the company stock holdings without tax consequence in an IRA compared with an in-kind distribution. Such distribution advice is directed primarily or exclusively at analyzing the tax aspects of the distribution without evaluating the prudence of the plan investments.

We also note that a plan participant is not left without recourse if fiduciary status is not imposed with respect to advice related to a plan distribution. Financial advisers are subject to regulation under federal and/or state securities laws, and an adviser may also be subject to a wide range of state law claims if he or she mishandles an IRA holder's funds or makes any material misrepresentations concerning investments. Other professionals who may provide advice with

[7] 401(k) Plans, Policy Changes Could Reduce the Long-term Effects of Leakage on Workers' Retirement Savings, GAO Report to the Chairman, Special Committee on Aging, U.S. Senate, August 2009 (available at: http://www.gao.gov/new.items/d09715.pdf).

respect to certain aspects of plan distributions, such as attorneys and CPAs, may also be subject to discipline under their professional codes of conduct for failure to deal fairly with a participant. In fact, applying fiduciary status to many such individuals may actually have the perverse effect of denying participants a number of other avenues of relief, as ERISA would arguably preempt most of a participant's potential state law claims against the adviser.

If the Department should decide to reverse its position in Advisory Opinion 2005-23A that a recommendation to take a distribution, even when combined with a recommendation as to how the distribution should be invested, does not constitute investment advice, we would urge the Department not to impose fiduciary status unless the advice provider has solicited the participant and is giving the participant specific advice primarily directed at the prudence of the participant's *plan* investments or the plan's investment options, either by themselves or in comparison with options available outside the plan. Only in such cases could the advice provider be reasonably considered to have rendered investment advice with respect to plan moneys or other property, as described in ERISA section 3(21)(1)(ii).

Finally, It should be noted that the Group disagrees with the view expressed in Advisory Opinion 2005-23A, wherein the Department seemed to take the position that, once a particular fiduciary becomes a fiduciary, every action that person takes with respect to a plan or a distribution is a fiduciary act. That notion is inconsistent with the fundamental underpinnings of how fiduciary status is determined under ERISA's functional approach, and it flies in the face of other Department authority suggesting that an individual can operate in both a fiduciary and a non-fiduciary role with respect to the same plan.[8] The Group requests that the Department take this opportunity to reiterate that the test for fiduciary status is a functional one, and to clarify that a person's status as a fiduciary (or an affiliate of a fiduciary) is not a relevant factor in determining whether he or she is a fiduciary in connection with distribution counseling activities.

III. The Department should eliminate the "status" of a person or his or her affiliate as a relevant factor in the analysis of fiduciary function, and instead should require on-going services and an explicit and mutual agreement, arrangement, or understanding between the parties in order for a person to be deemed an investment advice fiduciary.

Under the Proposed Regulation, a person will be a fiduciary to the extent that the person engages in certain activities with respect to a plan, a fiduciary, a participant, or a beneficiary, and such person "either directly or indirectly (*e.g.*, through or together with any affiliate)" holds one

[8] *See, e.g.*, Advisory Opinion 1997-16A; *Bell v. Pfizer, Inc.* 626 F.3d 66 (2d Cir. 2010); *see also* section III, *infra*.

or more of certain enumerated types of "status."[9] The "status" elements identified by the Department in the Proposed Regulation include: (a) representing or acknowledging status as an investment advice fiduciary; (b) otherwise meeting the definition of a fiduciary under ERISA section 3(21)(A)(i) or (iii); (c) being an investment adviser required to register under the Investment Advisers Act of 1940; and (d) providing advice or making recommendations pursuant to an agreement, arrangement, or understanding that such advice will be individualized and "may be considered in connection with" plan investment decisions.[10]

By structuring the Proposed Regulation in this way, the Department has established an approach that is incompatible with one of the central tenets of ERISA: that fiduciary status is determined by function. *See Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000) ("[ERISA] does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only 'to the extent' that he acts in such a capacity in relation to a plan.") (citations omitted); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (explaining that ERISA defines "fiduciary" in "functional terms of control and authority over the plan"). Thus, with the exception of a named fiduciary, a person's "status" (let alone that of his or her affiliate) has never been a basis on which to conclude that the person is a fiduciary with respect to a particular plan.

A second and related problem with the "status" elements of the Proposed Regulation is that it is unclear how the Department intends a person's status in one context to affect that person's interactions with a plan in a different context. An important limitation on the scope of fiduciary status under ERISA has always been that a person is a fiduciary only "*to the extent that*" he or she performs certain functions. Thus, a person can be a fiduciary for some purposes, but not a fiduciary for other purposes. For example, the Department has explained that members of the board of directors of an employer which sponsors an employee benefit plans, as well as the employer's officers and employees, will be fiduciaries "only to the extent that they have responsibility for the functions described in section 3(21)(A)."[11] Although we do not believe it was the Department's intent to do so, the Proposed Regulation could be read as a significant departure from the Department's long-standing approach. As discussed in section II, above, the Group requests that the Department take steps to clarify that this is not the case.

The proposed new provisions of subsection (c)(1)(ii) provide that any person who has acknowledged that he or she is a fiduciary, actually functions as a fiduciary, or is a registered investment adviser, is, without more, deemed to be a fiduciary with respect to any of the very broad types of advice listed in subsection (c)(1)(i). The consequences of these "status" elements

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[9] The Group notes that, although the Preamble to the Proposed Regulation makes clear that a person must meet the provisions of both subsections (c)(1)(i) and (c)(1)(ii) to be deemed an investment advice fiduciary, *see* 75 Fed. Reg. 65263, 65267, the conjunction "and" that is needed to connect those two subsections appears to be missing from the Proposed Regulation.
[10] Proposed Regulation, 75 Fed. Reg. at 65277 (proposing new 29 C.F.R. § 2510.3-21(c)(1)(ii)).
[11] 29 C.F.R. § 2509.75-8, Q&A 4 and 5.

of the fiduciary definition are very significant because any person possessing the requisite status can become a fiduciary even if the advice provided is not individualized (*i.e.*, is just general market information) and is not intended to be considered by the recipient in making investment or management decisions with respect to plan assets.

In addition, the Proposed Regulation is inconsistent with Congressional intent in passing the Pension Protection Act ("PPA") and undermines the prohibited transaction exemption for participant investment advice enacted as part of the PPA. The PPA amended ERISA and the Internal Revenue Code to add a statutory exemption permitting the provision of participant investment advice through an "eligible investment advice arrangement." The Department shortly thereafter issued a Field Assistance Bulletin clarifying that the level fee alternative under an eligible investment advice arrangement applied to the compensation received by the individual providing the advice and his employer, but not to that paid to affiliates of the fiduciary adviser.[12] The Proposed Regulation could substantially limit the application of this exemption and therefore the provision of high-quality investment advice to participants and IRA account holders. This is because many fiduciary advisers relying on the exemption will be affiliated with broker-dealers that may receive variable compensation. Under the Proposal, these affiliated brokers would be considered to be acting as ERISA fiduciaries in recommending their affiliates' advisory programs, merely because the recipient "may consider" the recommendation. The DOL has taken the position that a fiduciary engages in prohibited self-dealing if it uses any of its fiduciary authority in a way that results in the payment of an additional fee to the fiduciary's affiliate, so brokers would be prohibited from suggesting an affiliate's advisory program even where that program meets all of the requirements of the PPA statutory exemption and provides important assistance to the participants and IRA account holders.

In the Group's view, the cleanest and best approach to addressing the issues raised by these status elements would be to eliminate subsections (c)(1)(ii)(A),(B), and (C) in the final regulation. We believe that this step would remedy the inconsistency between the Proposed Regulation and the language and interpretations of ERISA that have been in place for many years, and would help prevent the problem of "inadvertent" fiduciary status.

With the "status" subsections eliminated, the Group believes that subsection (c)(1)(ii)(D) of the Proposed Regulation, which describes the type of arrangement, agreement or understanding that must exist between an adviser and a plan, participant or plan fiduciary for fiduciary status to attach to the relationship, should be incorporated into section (c)(1)(i)(B), so that subsection (c)(1)(ii) may be eliminated entirely.

Although, in the Group's view, subsection (c)(1)(ii)(D) represents a positive step toward limiting the broad reach of subsection (c)(1)(i), the provision should require something more than an agreement that advice "may be considered." Surely, it is difficult to imagine parties

[12] DOL Field Assistance Bulletin 2007-01 (Feb. 2, 2007) (available at: http://www.dol.gov/ebsa/regs/fab_2007-1.html).

entering into an agreement to provide advice that the parties expect will be ignored; a plan fiduciary has an obligation to consider relevant information in the context of making an investment decision. If the Department is uncomfortable with "a primary basis" as an element of the test for fiduciary status, the Group suggests the standard be that an agreement, arrangement or understanding be in place under which the adviser agrees to provide the services described in section (c)(1)(i) in a way that is individualized to the needs of the recipient and is provided as part of an ongoing advisory plan, program or arrangement. The Group does not believe that it is reasonable to define as "fiduciary" isolated and one-off sales interactions or product descriptions, but is concerned that, without modification, the Proposed Regulation would do just that.

The Group also suggests that the Department clarify that a person will not be an investment advice fiduciary merely because he or she wears more than one "hat" with respect to a single plan. As discussed above, a person may provide both fiduciary and non-fiduciary services to a single plan. It is even more likely that a single organization can wear two "hats" one fiduciary and the other non-fiduciary with respect to a single plan. ERISA acknowledges and permits this. A person can only be a fiduciary to the extent that he or she provides fiduciary services; one cannot be deemed a fiduciary simply because of services provided by an affiliate, or even by that same person in a separate context. The Department must make clear that the mere fact that a person (or its affiliates) act in a fiduciary capacity (or as an RIA) in some unrelated context, will not cause the person, without more, to be deemed a fiduciary simply by engaging in an "advice" activity described in subsection (c)(1)(i) of the Proposed Regulation

IV. The Final Regulation should broaden the scope of the limitation available in connection with marketing or making available a universe or menu of securities from which a plan fiduciary may designate alternatives.

In the experience of members of the Group, plan fiduciaries frequently request "sample" or "model" investment lineups from prospective recordkeepers. In addition, plan fiduciaries often ask a recordkeeper to provide a lineup of investment alternatives into which participant account balances could be "mapped" from existing options. Service providers may also "screen" investment alternatives based on a set of objective or quantitative criteria, such as performance, fees, ratings, etc. These services provide useful information to plan fiduciaries, and, in many cases, the plan fiduciaries will not consider a prospective service provider that refuses to provide these services.

Therefore, the Group requests that the Department either clarify that the limitation contained in subsection (c)(2)(ii)(B) would accommodate such requests, or broaden the limitation so that it does. Without a clarification of or a broadening in the scope of this limitation, plan recordkeepers will be reluctant to provide the information requested by their potential customers, and, as a result, plan fiduciaries will be less likely to make informed decisions about investment alternatives and will be more hesitant to change plan recordkeepers, even when they may otherwise deem it most prudent to do so. Additionally, as discussed more fully in Section V, below, the requirement that a person offering a platform of securities to a plan

fiduciary must disclose that he or she is not undertaking to provide impartial investment advice would similarly deter recordkeepers from providing an array of services with respect to offering menus of investment options, resulting in harm to plan fiduciaries and participants.

In further support of this request, the Group notes that the Department has recently finalized significant new disclosure requirements imposed on plan recordkeepers as "covered service providers" for purposes of ERISA section 408(b)(2). The newly-required disclosures are extensive and are designed to ensure that plan fiduciaries have adequate information to assess recordkeeper compensation, as well as any conflicts that the recordkeeper may have in providing services.[13] The Group submits that these disclosure requirements will provide the protection that the Department appears to be seeking to provide by encompassing such recordkeepers within the definition of an advice fiduciary.

V. The Final Regulation should clarify the types and frequency of disclosures that plan service providers must make in order to comply with the "limitations" provided under the Proposed Regulation.

The Proposed Regulation requires that a person acting as a seller (either by marketing recordkeeping, brokerage, or other "platform"-related services, or by providing information to assist in monitoring plan investments) must disclose or ensure that the recipient:

> knows or, under the circumstances, reasonably 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. [14]

This requirement forces the service provider to choose between two options: (1) accepting fiduciary status; or (2) branding itself a conflicted adviser. In particular, the Group is concerned about the term "adverse" and the phrase "not undertaking to provide impartial investment advice." In any business built on relationships, sellers and buyers both benefit when the buyer feels as though she has received good value. As a result, sales relationships are not a "zero-sum game" as implied by the Proposed Regulation, and characterizing the seller as "adverse" is inaccurate. Similarly, if a person is "not undertaking to provide impartial investment advice," the implication is that he or she is in fact providing conflicted advice. ERISA does not support the giving of conflicted advice.

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[13] *See* 75 Fed. Reg. 41600, 41610 (July 16, 2010) ("The Department believes that compliance with [the compensation disclosure] requirements will ensure that fiduciaries have meaningful information with which to assess potential conflicts of interest on the part of their service providers.").

[14] Proposed Regulation, 75 Fed. Reg. at 65277 (proposing new 29 C.F.R. § 2510.3-21(c)(2)(i) (emphasis added)).

It would be far more useful for the seller simply to note that it is not giving "advice," but that it is proposing a sale. If accompanied by the disclosure, described below, this would give the recipient concrete information to inform his or her opinion about whether to purchase the product or service being offered.

Although the Group recognizes and appreciates the Department's desire to ensure that recipients of these services have an accurate understanding of the roles of their service providers, the Group believes that this desire could easily be met without forcing services providers into the difficult position the Proposed Regulation would impose. For this reason, the Group recommends that the Department simply require that, as a condition of the "seller's" limitation in subsection (c)(2)(i), the service provider disclose to the plan, the participant or the plan fiduciary (as applicable) that the seller receives compensation on the products that are sold, and that the compensation received may vary by type of product. In contrast to the broad statement that the service provider "is not undertaking to provide impartial investment advice," this disclosure would provide the service recipient with specific, useful, and understandable information that would serve to apprise the recipient of the sales dynamic of the relationship.

The Group requests that the "seller's" limitation be expanded to cover the "sale" of advisory products. Considering that the Proposal covers the recommendation of investment management services, the Group is concerned that the Proposal could be interpreted to mean that the recommendation of one's own investment advisory services (or those of an affiliate) could constitute a fiduciary act, and therefore the seller's limitation, as modified above, should be applicable in this situation.

In addition, the Department should make clear that the provision of general information incidental to a sale of an advisory product or service would be permissible under the "seller's" exception. This clarification is necessary to ensure a free flow of information in the context of a sales presentation.

Finally, the Group requests that the Department revise the limitation so that it is not limited to a situation where the adviser is acting "as a seller, agent or appraiser for a seller." Specifically, a securities broker making trades technically acts as an agent for the buyer, not the seller. The Group understands that the Department intends this limitation to apply to brokers and therefore requests this change so that brokers would not be technically ineligible for the limitation. We also ask the Department to clarify that a person is not barred from utilizing the seller's limitation merely because, in another and separate context, the person (or an affiliate) acts in a fiduciary capacity, and therefore has acknowledged his or her fiduciary status.

VI. To the extent that the Department is concerned about valuation, it should study the issue in light of the comments received in connection with the Proposed Regulation, and, if necessary, should engage in a separate rulemaking process specifically addressing valuation. In any event, the "limitation" contained in subsection (c)(2)(iii) of the Proposed Regulation should not operate to broaden the scope of fiduciary status with respect to valuation of plan assets.

The Group respectfully recommends that the Department reserve the portion of the proposed regulation on appraisal and valuation of assets as constituting "investment advice" giving rise to fiduciary status. The Group is concerned that under the Proposed Regulation, imposing fiduciary status on persons providing an appraisal, fairness opinion or information as to the value of plan securities or property, is overly broad. In addition, the Group does not believe that the "limitation" contained in subsection (c)(2)(iii) of the Proposed Regulation effectively narrows this broad scope.

As written, the "limitation" contained in subsection (c)(2)(iii) of the Proposed Regulation is confusing because it operates to expand rather than limit the scope of the fiduciary definition. That is, by providing that "the preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary" does not constitute investment advice *if* it is provided for purposes of complying with reporting and disclosure requirements, the subsection means that preparing such reports or statements for purposes *other than* reporting and disclosure *is* a fiduciary act. To say that every statement not made for reporting and disclosure purposes that reflects the value of a plan investment constitutes investment advice would be an incredible—and, the Group believes, unjustified—expansion of the term "investment advice" as set forth in ERISA section 3(21)(A)(ii). Moreover, it would be an exceptionally broad reading of the Proposed Regulation's subsection (c)(1)(i)(A)(1).

The Group is concerned that by including within the scope of what may be considered fiduciary activities the preparation of a statement as to the value of an investment, the Proposed Regulation inadvertently includes a number of activities that simply should not be fiduciary in nature. It would cause many parties, such as appraisers and sub-custodians, to become ERISA fiduciaries to plans when the parties have no direct contractual arrangement with the ERISA plans, and indeed limited or no ability even to identify the ERISA plans to which they would owe fiduciary duties. These include:

- Valuations performed by a sub-custodian or other sub-contractor of an account holding ERISA plan assets, or, so long as the value is eventually provided to an ERISA plan, valuations even of accounts that do not hold plan assets (*i.e.*, private funds in which benefit plan investors hold less than 25% of the fund);

- Valuations performed by an insurance company using Revenue Procedure 2005-25 safe harbor formulas to determine the fair market value of an insurance contract distributed or transferred from a qualified plan for purposes of Code section 402; and

- Valuations performed for the purpose of setting unit values (for insurance company pooled separate accounts or bank collective trusts, for example) that will dictate purchase and sale prices (including in connection with a unitized account holding only publicly-traded stock and cash).

These examples illustrate why it is important for the Department to reconsider even including appraisal and valuation activities within the scope of the Proposed Rule. If the Department decides to retain subsections (c)(1)(i)(A)(1), the Group suggests that the Final Regulation should eliminate the last clause of section (c)(2)(iii), which denies the limitation to issuers of reports involving assets for which there is not a generally recognized market that serve as a basis for plan distributions.

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The Group appreciates the opportunity to comment on this important Proposal. We would appreciate the opportunity to testify at the March 1, 2011 hearing on the Proposal, and we would be happy to meet with the Department to discuss these comments or to provide additional input as you work to finalize the Proposal.

Best regards,

Stephen M. Saxon

Jennifer E. Eller