Center On Executive Compensation

February 9, 2011

<u>By Electronic Mail to e-ORI@dol.gov</u>

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

Re: <u>Written Request to be Heard and Outline of Proposed Testimony on Proposed Definition of the Term, Fiduciary</u>

Ladies and Gentlemen:

In response to the Notice of Public Hearing on Definition of "Fiduciary," published in the Federal Register on January 12, 2011, the Center On Executive Compensation (the "Center") submits this written request to testify at the public hearing to be held on March 1, 2011. Charles G. Tharp, the Center's Executive Vice President for Policy, will present testimony on behalf of the Center.

The Center is a research and advocacy organization that seeks to provide a principles-based approach to executive compensation policy from the perspective of the senior human resource officers of leading companies. The Center is a division of HR Policy Association, which represents the chief human resources officers of over 300 large companies, and the Center's more than 70 subscribing companies are HR Policy members that represent a broad cross-section of industries. Because senior human resource officers play a unique role in serving on or supporting ERISA plan committees and also in advising compensation committees on compensation and related governance issues, we believe the Center's views can be particularly helpful in understanding the implications of the Proposed Regulations on the proxy voting process for ERISA plans and other investors.

As indicated in the Notice of Public Hearing, we expect the testimony to take 10 minutes and we will be prepared to answer the Department's questions. We may remark upon any of the issues discussed in our comment letter, although time permitting, we expect to specifically address the points below.

Outline of Testimony

I. Scope of the Regulation (1 minute)

- The proposed definition of fiduciary is too broad and should not be adopted as currently drafted.
- The Center is concerned that the proposed regulation could potentially cover as fiduciaries numerous individuals and entities that provide basic services to plans that have not traditionally been considered fiduciary in nature.
- Proxy advisory firms play an important role in the proxy voting process and have a significant impact on proxy voting. Therefore, while we do not advocate adoption of the rule, additional investigation and analysis of the role of proxy advisors is appropriate.

II. Background on Proxy Advisory Firms (3 minutes)

- The Center believes that the voting of proxies is an important fiduciary activity.
- The Center further believes that retirement plans and other institutional investors responsible for voting proxies need to have access to accurate, unbiased information, provided free from conflicts of interest.
- The growth of the proxy advisory firm industry was fueled by a dramatic increase in the volume of proxy votes and the growth of institutional investor share ownership.
- Proxy advisory firms are scarcely regulated through a patchwork of regulations. Where regulations do exist, it is not clear that the regulations are effective in ensuring that proxy advisory firms provide accurate and unbiased information.

III. Problems with Proxy Advisory Firms (4 minutes)

- The most important problem facing the proxy advisory industry is the existence of serious conflicts of interest.
    - The predominant proxy advisory firm engages in the worst form of conflict by providing so-called independent analyses of company practices while also offering consulting services to the same companies.

  - o Each proxy advisory firm has conflicts of interest in its ownership structure.

- Proxy advisory firms are not accountable for material inaccuracies. These inaccuracies are prevalent in final reports and, according to Center data, are usually related to improper use of peer groups or peer group data, erroneous analysis of long-term incentive plans and discussions of provisions that were no longer in effect.

IV. Request for Comprehensive Review of Proxy Advisory Firms (2 minutes)

- The Center urges DOL to undertake a comprehensive review of proxy advisory firms.

- As part of the review, the Center also urges DOL to hold proxy advisory firms accountable under existing regulations for eliminating conflicts of interest in services provided, ownership structures and lack of transparency over analytical methodologies.

- The Center seeks consistent treatment for those firms providing proxy advisory services. Currently, regulatory oversight differs for those firms that have registered as investment advisers with the SEC.

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We appreciate the opportunity to testify on this important proposal.

Best regards,

Timothy J. Bartl
Senior Vice President and General Counsel
Center On Executive Compensation
tbartl@execcomp.org