Southeastern Fiduciary Services, LLC

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Office of Regulations and Interpretations
Employee Benefits Security Administration *Via e-ORI@dol.gov*
U.S. Department of Labor
200 Constitution Avenue NW Room N-5655
Washington, DC 20210

Re: Definition of "Fiduciary" – Proposed Rule as provided in the October 22, 2010 Federal Register

Southeastern Fiduciary Services, LLC ("SFS") forwards the below comments regarding the definition of Fiduciary. The current definition, while adequate in 1975, has become outdated given the increasing sophistication of advisors and service platforms and the decreasing sophistication of plan sponsors….particularly in the small to mid-sized plan markets. We commend the Department for the work to update this important definition.

SFS is an independent consulting firm whose sole practice focuses on qualified retirement plans concentrating on plan governance, fiduciary performance and operational effectiveness. The founder's experience comes from all parts of the industry: investment management, service provider front and back offices, participant education, ERISA compliance and improvement of plan sponsor duties. While SFS serves all plan market segments, it has recently has had assignments in the small-to-mid-sized plan markets where plan asset sizes range up to $100 mm for the midsized and below $10 mm in the small sized segment. This is a market segment known for poor investment selections, high fees, significant potential (and actual) conflicts of interest and where investment advice is often proffered by sales representatives and not by persons trained in fiduciary duties. Moreover, this is a marketplace significantly underserved by qualified fee-for-service independent fiduciary firms.

SFS goes in the opposite direction of many consulting and advisory firms by actively embracing ERISA fiduciary duties. We believe that it is in the best interests of the plan sponsor for a provider to be a fiduciary; it facilitates real ownership and commitment to see that the interests of the participants and beneficiaries are maintained. Too many firms have espoused "fiduciary" words or provide fiduciary related materials but are clear that they do not intend to actually commit to or become a fiduciary.

In reviewing the proposed new definitions to ERISA 3(21), SFS presents the following observations:

In (c)(1)(ii), SFS sees potential loopholes in the direct or indirect actions of an advisor.

- In (A), many broker/advisors may not want to represent or acknowledge that they are fiduciaries and many plan sponsors, particularly in the smaller sized plan markets will not know the difference. This was seen in the *Ellis v. Rycenga Homes, Inc. 1:04-CV-00694-JGS (W. Mich)* case where plan investment advice was readily provided but characterized as "sales pitches" when, as the court found, was clearly fiduciary advice.
- In (B), who is going to know what an ERISA 3(21) fiduciary is? Most small-to mid-sized plan sponsors are only going to know what their broker/advisor tells them. SFS has heard from many brokers that the only agreement they need is a "broker of record"[1] letter and that their services do not need any further contracts or definition of what they are supposed to do.
- In (D), similar to (A), advice can be provided pursuant to an agreement, written or otherwise. Does an advisor or broker-dealer representative who gets a "broker of record" letter from a client sufficient agreement? Certainly so if the broker/advisor wants to get paid. SFS sees often the interesting paradox: If broker/advisors are getting paid – are they providing advice? If yes, then they are de facto fiduciaries regardless of what their compliance departments say otherwise. If they are not providing advice, why are they getting paid? This happens way too much in this industry and the small and mid-sized plan sponsor would never know. SFS views a broker of record letter as tantamount to becoming a fiduciary. SFS rarely sees written service agreements covering services provided and what fees to be paid. Many Registered Investment Advisors and other firms focused on fiduciary excellence view service agreements as a fundamental part of their relationship with a plan sponsor client. However, these arrangements are still in the vast minority of relationships.

In (c)(2)(i), the role of the advice provider is not clear. The larger sized plan sponsor may draw a straightforward distinction between what is advice, recommendations, opinions or comments regarding a security, not leading to fiduciary status….particularly when the advice giver has an adverse position to the interests of the plan. The smaller sized plan sponsor often does not have the level of sophistication and would not know how to make those distinctions. In essence: they do not know what they do not know. What may be non-fiduciary observations to the larger size plan sponsor becomes fiduciary advice to the smaller sized one…regardless how it is packaged.

[1] A Broker of Record letter enables the advisor or broker to receive fund platform fees such as 12b-1, shareholder service, administrative fees or incentive fees on the existing assets or "new money" which could be new contributions into particular investments or new assets on conversion into particular investments. It also entitles the broker or advisor to receive commission or any other transaction remuneration. It is the primary vehicle on how most brokers and advisors get paid.

This remains a high abuse area for the small and mid-sized plan sponsors. Accordingly, we request the Department clarify this section recognizing the smaller plan sponsors often do not possess the ability or opportunity to discern non-fiduciary observations and fiduciary advice.

Regarding (c)(2)(ii)(B) the Department commented (p. 65268 middle column):

> *In some instances, the provider and the plan fiduciary clearly understand that the provider is offering investments as to which the provider has financial or other relationships, and is not purporting to provide impartial investment advice regarding construction of the plan's investment menu.*
>
> *In other instances, the plan fiduciary is relying in the provider's impartial expertise in selecting an investment menu for the plan. Also, to assist……available through the provider.*

This commentary may be applicable to the larger, more sophisticated plan sponsor. Not so to the smaller one. We continuously see the following:

- Advisors/brokers limiting investment options and recommending certain investments to the smaller plan sponsor but eschew any implication of becoming a fiduciary;

- Advisors/brokers or service providers sending out fiduciary compliance and governance related materials but leave the plan sponsor out to dry when any fiduciary and liability issues arise;

- Advisors/brokers or service providers still not interested in providing full fee disclosure. While the Department has taken action in revising the 408(b)(2) regulations, the real issues are:
    - Are plan sponsors getting the proper information from their advisor/broker or provider?
    - Are plan sponsors sophisticated enough to interpret the information they receive with an eye towards loyalty to the participants and beneficiaries?
    - Do they know what is right or wrong in the information they receive?
    - Are they sophisticated enough to challenge fee and service disclosures if they suspect their information is incorrect or misleading?

We believe that regardless of the implementation date (be it on July 11th or now effective January 1, 2012), the 408(b)(2) regulations will not improve disclosure: The smaller sized plan sponsors will not know what questions to ask and continue to not understand what their duties are. One would think that given all the advance notices of the new disclosure rules broker/advisors and service providers would be quick to tout their transparent disclosure products and processes. We are not optimistic that fee disclosure will significantly improve plan sponsor's visibility over fees and improve governance. Even when disclosure is provided, opportunity for abuse remains high when the smaller sized sponsor asks if the disclosed fees are OK. The broker/advisor controls the flow of information to the plan sponsor and can easily manipulate any benchmark/baseline comparisons so that a smaller plan sponsor paying 500 basis points overall is shown that this is an industry norm for plans of that size. We see continued opaqueness and dancing around fee disclosure issues and related conflicts of interest regardless of the implementation of the new regulations. The question remains: how will the small to mid-sized plan sponsor know what is sufficient and what is not?

Providers offering sub-advised funds and change the investment sub-advisor and notify the plan sponsor afterwards, a common practice; are they fiduciaries? SFS thinks they should be. Does the absence of proper disclosure (fee, investment descriptions) affect the operations and investment management of the plan? We think it does and that steps into the scope of fiduciary duties.

In (c)(iii)(5), SFS believes that this should be clarified. The distinction between investment advice for a fee with respect to those options a broker/advisor controls versus those investment options not controlled by a broker/advisor visor is vague. In the small and mid-sized market segments there is little distinction between the two. Actions (and revenue) will favor the former but any dispute or disagreement will see broker/advisors running towards the latter…regardless of the reality…that in many/most cases they are controlling both and getting paid for it. This clause should be re-considered given the perspective of the small to midsized plan sponsor.

SFS thanks the Department for extending the comment period and appreciates your consideration of these comments. We look forward to further conversations on these issues.

Sincerely,

Bert M. Carmody

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