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April 12, 2011

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

Dear Sir or Madam:

We are writing on behalf of a wide range of financial institutions, including mutual funds, insurance companies, and brokerage firms, with respect to the Department's proposed definition of a fiduciary. More specifically, we are concerned about the effect of the proposed definition on plan participants and IRA owners served by broker/dealers.

We very much appreciated the opportunities to comment on the proposed definition and to testify at the hearing. We applaud the Department's openness to all perspectives.

In brief, however, we believe that the proposed regulation would dramatically restrict the availability of investment information to middle-income investors by raising the cost very significantly for many such investors and simply making such information unavailable to other such investors. We know that this was not the Department's intent. We would like to work with you to avoid this very adverse result.

Under current arrangements, broker/dealers provide investment information to IRA owners, plans, and plan participants. For middle-income investors, this is generally done under a commission-based structure, under which the broker/dealer is compensated through commissions, 12b-1 fees, recordkeeping fees, etc. This is a very efficient system for middle-income investors, especially those who generally buy and hold securities.

Under the proposed regulation, the communication of almost any investment information would make a broker/dealer a fiduciary unless the seller exception applies. We would certainly urge you to clarify that, consistent with the theory underlying the exception, the seller exception permits broker/dealers to remain non-fiduciaries by fully disclosing their business model and compensation structure to their customers.

To the extent that the seller exception is not applicable, and broker/dealers become fiduciaries, the commission-based business model is no longer workable with respect to IRAs and plans. This will mean that investors using this model will need to be shifted to an advisory model, under which annual fees are set based on assets under management.

The advisory model requires greater service support and thus is more expensive. Moreover, the compensation would all come from the investor, rather than from partially from third parties, such as the funds. This means that for the middle-income “buy and hold” investor, the total increase in cost compared to the commission-based model will be dramatic. In fact, it may be so dramatic that it will not even be offered to some such investors, such as through the application of minimum account balances. Such minimums would have the additional adverse effect of rendering it very difficult to set up a new contributory IRA.

In addition, the cost of transition will exacerbate this problem greatly. What does a financial institution do with a $19,000 IRA that can no longer operate under the commission-based model? It is likely too small to be shifted to an advisory model. So instead, such IRA may be “orphaned”—it may be cut off from all investment information.

If the proposed regulation is finalized in its current form, there could be countless orphaned IRAs across the country, all of whose owners would be cut off from investment information. The financial institutions would be stuck with huge numbers of these non-revenue producing accounts, creating enormous costs. It is almost inevitable that the pain of these costs would be spread throughout the financial community, creating even higher fees for advisory model clients.

These are the results of the proposed regulation. Vast numbers of middle-income individuals will lose access to investment information. Other middle-income investors will pay far more for investment information. And for far higher fees, the investors will generally receive their investment information from the same firms and research departments that provided their investment information under the commission-based model. Thus, the system suffers enormous pain, with very few advantages.

We urge you to modify the regulation to avoid these devastating results by allowing broker/dealers to remain non-fiduciaries through full and fair disclosure. If the definition of a fiduciary is expanded in any material manner with respect to broker/dealers, it is critical that, in order to prevent the above results, comprehensive prohibited transaction class exemptions be provided that enable investors ongoing access to information. In this regard, the exemptions need to be finalized contemporaneously with the finalization of the regulations in order to avoid a devastating cessation of investment information.

Thank you for your consideration of our views.

Sincerely,

Kent A. Mason

Randolf H. Hardock

James M. Delaplane