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VIA ELECTRONIC MAIL to e-ORI@dol.gov

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

Ladies and Gentleman:

We appreciate the opportunity to submit supplemental comments to the Department of Labor ("Department") for consideration in connection with its proposed regulation on the definition of "fiduciary" under ERISA and the Code ("Proposal"). As described more fully in our prior comment letter on the proposed regulation, LPL Financial LLC ("LPL") is a leading diversified financial services company dually registered with the Securities and Exchange Commission ("SEC") as both a broker-dealer and an investment adviser.[1]

I. Overview

In this supplemental comment letter, we address for the record certain issues raised during the public hearing on the Proposal, which the Department conducted on March 1-2, 2011. Below is an overview of our primary supplemental comments:

1) Individual retirement accounts ("IRAs") are fundamentally different from ERISA-covered employee benefit plans and should be excluded from coverage under the Proposal. Alternatively, the "sales" limitation, discussed below, should be expanded and clarified in a manner that reflects the broad range of products and services used by IRA accounts.

[1] Please see our original comment letter on the Proposal for additional information. Comment Letter #94, LPL Financial LLC, Michelle M. Kelley, February 3, 2011.

2) Existing prohibited transaction exemptions ("PTEs") should be clarified and harmonized to take into account the full array of services offered to plans and the different compensation arrangements used by broker dealers. Also, new exemptions should be considered as necessary. It is imperative that these changes are made, and any new prohibited transaction exemptions are adopted, *before* any revised regulation relating to the definition of investment advice becomes effective. Extreme disruption to the retirement services market will occur if such changes are not made prior to the effective date.

3) The "sales" limitation should be expanded and clarified to provide greater certainty on its use and coverage. In this connection we provide sample disclosure which we believe should address the concerns underlying the proposed sales limitation.

4) The Department should not change its stated position that providing assistance with respect to rollovers generally is not fiduciary investment advice within the meaning of the Proposal.

We continue to hold, but will not reiterate here, the views expressed in our prior comment letter.

II. Supplemental Comments

A. IRAs should be excluded from coverage under the Proposal

Although the comments in this letter and in our original comment letter apply equally to IRAs and other qualified plans, there are reasons that, if the Proposal is adopted, its applicability to IRAs would be particularly counterproductive. The Department recognized the fundamental differences applicable to IRAs when carving IRAs out from coverage under its recent regulation under section 408(b)(2), stating: "[t]he IRA and employment-based retirement plan markets are very different from one another. In the IRA market, decisions are made by consumers rather than plan sponsors acting in a fiduciary capacity, and the disclosures appropriate for the latter may not be appropriate for the former."[2]

IRAs are tax advantaged, but are otherwise fundamentally the same as other individual investment accounts. They are established and funded by individuals for their own accounts, and they are treated identically to individual investment accounts under the Federal securities laws. IRA owners have access to, and make use of, the whole array of products and services offered by brokers to individuals, and the Proposal, if adopted and applied to IRAs, would have very significant adverse consequences to IRA owners.[3]

We also think it is important for the Department to consider that applying the Proposal to IRAs would not result in the imposition of a fiduciary *standard of care* with respect to IRAs, and it would not provide any additional remedies to IRA owners. Thus, applying the Proposal to

[2] 75 Fed. Reg. 41600, 41620 (July 16, 2010).

[3] See the discussion in our original comment letter of the negative consequences of applying the Proposal to IRAs.

IRAs would not promote the fundamental policy objectives that the Department expressed in the Proposal.[4]

We believe that the best solution would be to exclude IRAs from the scope of any revised regulation adopted pursuant to the Proposal. At the very least, however, the Department should make the changes to the sales limitation, discussed below, in order to avoid severely limiting the range of services available to IRAs.

B. Existing PTEs should be clarified and harmonized prior to the Proposal's issuance.

The existing array of statutory and administrative prohibited transaction exemptions do not provide sufficient relief in cases where brokers would be considered to be acting in a fiduciary capacity in conducting their day-to-day business, and they lead in many cases to anomalous, and seemingly inconsistent, results.

Currently, many broker-dealers that provide non-fiduciary advice incident to their brokerage services are compensated for their services through commissions paid by the retirement customer directly through payments such as so-called "trail commissions" and service fees paid by third-parties, or a combination of both. This compensation structure typically is permissible under the necessary services exception of section 408(b)(2) of ERISA and section 4975(d)(2) of the Code. In addition, brokers perform a wide variety of additional services and receive compensation for those services through many different structures. For example, brokers may sweep cash in brokerage accounts into an insured bank sweep program. This benefits retirement customers by providing them with interest and FDIC insurance coverage on the cash in their accounts, while the broker is compensated for the service based on a sharing of the interest rate spread with the depository banks.

However, if the broker-dealer were deemed to be providing fiduciary advice under the Proposal, then receipt of third-party compensation for any of these services presents potential prohibited transaction concerns under section 406(b) of ERISA and section 4975(c)(1)(E) and (F) of the Code, for which section 408(b)(2) of ERISA and section 4975(d)(4) of the Code provide no exemption. Furthermore, other statutory exceptions do not apply if the person involved in the transaction with the plan is a fiduciary with respect to the transaction.

Certain exemptions also contain other anomalies that would be amplified under the Proposal. For example, in the cash sweep situation, the statutory exemption under ERISA section 408(b)(4) allows brokers and other fiduciary advisers to make such deposits with affiliated banks. Where a broker or other fiduciary adviser sweeps cash to an unaffiliated bank, such relief is not available, even though the potential for abuse is greater when dealing within an affiliated group as opposed to negotiating at arm's-length with an unaffiliated entity.

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[4] See the Preamble to the Proposal, 75 Fed. Reg. 65263, 65272 (Oct. 22, 2010) discussing the objective of the Proposal to "enhance the Department's ability to redress service provider abuses." The Proposal would not provide the Department with any additional ability to redress violations against IRAs.

While, in general, PTE 86-128 and PTE 84-24 might be available to permit a broker-dealer that provides fiduciary advice to receive commissions in certain circumstances, the Department has not provided guidance that commissions, for purposes of these exemptions, include third-party payments that are the functional equivalents of commissions, but are not direct transaction charges. Further, PTE 86-128 applies only with respect to securities transactions and, thus, would not cover transactions in other investment products typically offered by broker-dealers or their affiliates (such as futures contracts or bank deposits).

Further, although PTE 75-1 does include relief from both sections 406(a) and 406(b) of ERISA for purchases of mutual fund shares, the scope of PTE 75-1 could be construed to apply only to transactions in mutual fund shares effected on a principal basis and does not specifically address the types of compensation that may be received. Therefore it is unclear whether PTE 75-1 would be available if a broker-dealer is deemed to have rendered fiduciary advice as to a transaction. If PTE 75-1 is inapplicable and the broker-dealer fails outside of the sales limitation in the Proposal, the broker-dealer may be unable to engage in even agency trades on behalf of a retirement customer.

Prior to implementation of any regulation that expands the application of fiduciary status under ERISA and the Code, we believe that the Department should expressly address the scope of the statutory and administrative PTEs. Such certainty is important not only for the broker-dealer but for all plan fiduciaries and service providers so that all parties know whether they can rely on any particular exemption in connection with existing services and compensation arrangements. Without this guidance many risk-adverse broker-dealers currently providing advice incidental to their brokerage services, as well as other additional services, may simply cease to offer services to retirement customers, to avoid any ERISA violations.

C. The "sales limitation" should be expanded and clarified to provide greater certainty on its use and coverage.

At the hearing, the Department expressed a willingness to consider a number of important, suggested changes to paragraph (c)(2)(i) of the Proposal, the "sales limitation."[5]

As currently written, the sales limitation only covers "securities transactions." We join with other commenters in support of revisions to the sales limitation to explicitly cover a broader range of investment-related products and services as well as ongoing aspects of a service provider's relationship to a retirement customer. In particular, we strongly urge the Department to make clear that advice or recommendations made in connection with the offer and sale of

[5] See, for example, the discussion between Mr. Hauser and Mr. Nelson regarding appropriate language and disclosure in the sales limitation (Hearing Transcript Day 1, pp. 112-114); the discussion between Mr. Hauser and Mr. Roberts regarding potential changes to the sales limitation (Hearing Transcript Day 1, pp. 314, et. al) and the discussion between Mr. Davis, Mr. Smith, and Mr. Tate regarding the sales limitation in which Mr. Davis invites comment on alternate language (Hearing Transcript Day 2, pp. 218-220).

securities or other investments or property, and of investment-related services to these, do not constitute fiduciary advice under the regulation.[6]

At the hearing, the Department expressed interest in how a service provider might more effectively communicate to a retirement customer that the service provider has a conflict of interest that may affect the impartiality of the service provider's advice.[7] Although we understand the Department's emphasis during the hearing that ERISA is more than a disclosure regime, as the Department, as well as Congress has recognized in other contexts, disclosure can be a key component of exclusions from fiduciary status.[8] Accordingly, attached as Exhibit A to this comment letter, we respectfully offer sample disclosure for consideration by the Department, which we believe would enable a participant to understand that the service provider has a conflict and why.

We also noted that certain of the testimony at the hearing suggested that the sales limitation should not be available with respect to advice to individual retirement plan participants and IRA owners.[9] We respectfully disagree. This suggestion seems to ignore the long-standing approach which the Department has followed elsewhere (as in Interpretive Bulletin 96-1) with respect to non-fiduciary advice and which Congress recently incorporated into the exemption for eligible investment advice arrangements. If IRAs are covered under the Proposal, it is in fact particularly important that the sales limitation be available in connection with marketing to IRA-owners. As discussed above, because IRAs are essentially individual investment accounts like any other type of individual investment account, IRAs should have access to the full range of products and services available to other types of investment accounts.

This suggestion also seems to reflect an underlying assumption that a higher standard should apply with respect to advice to individual participants because participants cannot understand and act appropriately on disclosure provided to them. As noted elsewhere, both the Department in other exemptions and, indeed, Congress in the eligible investment advice arrangement provisions have recognized the important and effective role of disclosure to participants.[10]

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[6] We also reiterate our previous comment, echoed by many at the hearing, that the concept underlying the sales limitation should not be that the service provider's interest are "adverse" to those of the retirement customer but rather that the service provider has a financial interest that poses a conflict.

[7] Hearing Transcript Day 2, p. 220.

[8] See, for example, the statements required to accompany model asset allocations and interactive investment materials as non-fiduciary participant education pursuant to Interpretative Bulletin 96-1 and section 408(g)(6) of ERISA regarding advice to participants under an eligible investment advice arrangement.

[9] See, for example, the testimony of Mr. Stein (Hearing Transcript Day 1, p. 18).

[10] For example, the underlying assumption in the 404(c) regulations is that, with enough information, individual participants can effectively direct their own accounts. See also the Department's regulation on disclosure to participant-directed individual account plans, 75 Fed. Reg. 64910 (Oct. 20, 2010).

D. Advice with respect to rollovers should not be considered fiduciary investment advice within the meaning of the Proposal.

There seemed to be a presumption underlying certain of the questions and comments at the hearing that it is inappropriate for a current plan service provider to offer its (or its affiliate's) rollover services to a plan participant and that, accordingly, treating distribution-related information and recommendations that currently do not give rise to fiduciary status as fiduciary advice is necessary to protect participants from conflicts of interest that the service provider may have. This presumption rests on the view, which was expressed by some at the hearing, that, if a provider of rollover services has a conflict, then it should be viewed as a fiduciary.[11] We respectfully disagree with this logic. As discussed in our original comment letter, such logic fails to take into account the longstanding position that a person may serve a plan and its participants in different roles. In this connection, the Department should make it clear that rollover assistance is not fiduciary investment advice, even where there is a prior fiduciary relationship.

We also reject the notion that a plan participant or IRA owner is inherently incapable of using information provided by a plan service provider to make an independent judgment with respect to rollovers. As discussed above, the premise of the Department's regulations under section 404(c) of ERISA is that, with appropriate information about the available investment options, a plan participant is fully capable of exercising independent control with respect to his or her investment decisions.

Instead, as the Department has recognized in other aspects of services to retirement customers, as discussed above, what is needed is clear and complete disclosure that describes the nature of the service provider's conflicts of interest in language that is easy for a plan participant to understand. Rather than imposing fiduciary status in this area, and as a result potentially denying individuals information at a time when it is most essential, we would ask that the Department provide guidance as to the type of disclosure that would provide a plan participant the information needed to make an informed decision about what service provider to use and investment products to select. For the Department's consideration, we have attached as Exhibit B, a sample disclosure form that could be used to provide an individual with such necessary information.[12] As Congress has recognized through rules encouraging rollovers, IRA rollovers

[11] See, for example, the testimony of Mr. Certner (Hearing Transcript Day 1, p. 137).

[12] We also think the Department should apply the same standards for determining whether rollover assistance constitutes fiduciary investment advice whether or not there is an existing fiduciary relationship with the plan. It is well established in both the Department's regulations and in the caselaw, that a person can interact with a plan or a participant in some cases in a fiduciary capacity and in other cases in a non-fiduciary capacity. See e.g., Pegram v. Herdrich, 530 U.S. 211 (2000); Amato v. Western Union Int'l. Inc., 773 F.2d 1402, 1417 (2d Cir. 1985); In re Mut. Funds Inv. Litig., 403 F. Supp. 2d 434 (D. Md. 2005); Advisory Opinion 97-16A (May 22, 1997); Information Letter to Mr. John N. Erlenborn (March 13, 1986). Further, a fiduciary under ERISA § 3(21)(A)(ii) is only a fiduciary "to the extent" he or she renders covered investment advice to a plan or participant client or has the authority or responsibility to do so.

play a key role in asset preservation when cashing out of a plan upon a separation event would otherwise diminish the assets available for retirement and subject such assets to penalty taxes.[13]

III. Conclusion

In addition to the above comments, and without reiterating everything we said in our original comment letter, we want to highlight the following additional points.

As we and others have stated during the hearing and in comment letters, a significant number of broker-dealers would cease to offer advice incident to their brokerage services and, instead, offer advice only through their (or their advisory affiliates') investment advisory programs, which are typically more expensive. In addition, as stated in our original comment letter, due to account minimum requirements a significant number of would-be retirement customers, particularly IRAs, may not have access to any advice services at all.

We also wanted to briefly address certain of the testimony that may have created an inaccurate impression that the current regulatory structure applicable to broker-dealers that provide investment-related advice incident to their brokerage services is inadequate to provide retirement customers with effective protection.[14] Broker-dealers are subject to a regulatory structure of substance and rigor that, in many cases, is even higher than that applicable to investment advisors. In the comments previously submitted to the Department, we (and others) noted certain of the obligations currently imposed on broker-dealers under the federal securities laws and the corresponding protections they afford to all broker-dealer customers, not only retirement customers.[15]

We respectfully request that the Department take these and our other comments into account before finalizing the Proposal and thank the Department again for the opportunity to provide these supplemental comments.

Sincerely,

Michelle M. Kelley

Michelle M. Kelley

[13] See the discussion in the Investment Company Institute's report, The IRA Investor Profile, Traditional IRA Investors' Rollover Activity, 2007 and 2008 at 10 (2010), *available at* http://www.ici.org/pdf/rpt_10_ira_rollovers.pdf.

[14] See testimony of Mr. Graff, describing the IRA market as the wild west. (Hearing Transcript Day 1, p. 334).

[15] Our original comment letter provided some examples of obligations imposed on broker-dealers. The federal securities laws provide many other protections to broker-dealer customers. *See, e.g.*, Securities Exchange Act of 1934 ("Exchange Act") Rule 17a-5(f) (brokers must be audited annually by an independent public accountant registered with the PCAOB and must file audited financial statements with the SEC); Exchange Act Rule 15c3-2 (brokers must segregate net capital for the net amount of monies owed to customers); and Securities Investor Protection Act of 1970 (brokers must join SIPC, which protects customers of failed brokers).

cc: Phyllis C. Borzi, Assistant Secretary
Employee Benefits Security Administration

Stephanie L. Brown
LPL Financial LLC
Managing Director and General Counsel

Mark S. Casady
LPL Financial LLC
Chairman and Chief Executive Officer

Exhibit A

Sample Disclosure of Financial Interest

We are acting for you as a broker-dealer and not as an investment adviser under the Investment Advisers Act of 1940 or under state investment adviser laws.

In providing brokerage and related services to you, we are not providing services as a "fiduciary" under section 3(21) of the Employee Retirement Income Security Act (ERISA).

We have a financial interest in the investment decisions you make, because we receive compensation with respect to investments in your plan account. For this reason, our interests may not always be the same as your interests and our investment-related recommendations and information may not be impartial.

We are paid in different ways, as described generally below. Some of our compensation relates to specific transactions or investments for your account. This compensation comes from you as well as from third parties that may provide investment options for your plan, such as mutual fund or variable annuity sponsors. We also receive compensation from these third parties for other services we provide, such as marketing support and investor servicing.

We may charge your account directly for commissions on securities transactions in the account. This means that the more transactions you enter into, the more commissions we receive.

We may also buy from you or sell to you a security as principal, and earn a mark-up or mark-down in the transaction instead of a commission. This means, for example, that, if we sell you a security at a price higher than what we paid for the security, we will earn a mark-up.

We also are often paid by third parties rather than or in addition to being paid directly by you. For example, a mutual fund or variable annuity sponsor may pay us an amount upfront and also may pay us an ongoing amount that is based on the value of our customers' assets, including your assets that are invested with that sponsor. As another example, we offer a service to sweep cash held in customer accounts into an interest-bearing FDIC insured bank account. We are compensated for this service by a third party based on the sharing of the interest rate spread with the depository banks.

We may receive more or less compensation depending on which investment you make. This presents a conflict of interest, because we have a financial incentive to recommend one investment over another.

Exhibit B

Sample Rollover Disclosure

Below is important information that you should understand when considering a distribution of your Plan account assets, the transfer of those assets to an IRA account, and/or the engagement of a financial professional to provide you advisory or brokerage services with respect to the IRA account.

- If you are terminating or have terminated your employment with the employer sponsoring the Plan, you have options with respect to your Plan account investments, including that you may:
    - remain invested under the Plan;
    - transfer your Plan account assets to a defined contribution plan of a new employer (if applicable); or
    - transfer your Plan account assets to an IRA with another financial institution.
- If you transfer your Plan account assets out of the Plan and into an IRA:
    - Those assets will no longer be subject to the protections of ERISA
    - You alone will be making decisions about those assets and you will not be able to rely on a plan sponsor or other person with fiduciary responsibilities
    - Depending on the investments and services you select for your IRA, you may pay more in investment costs than you do when the assets are in the Plan
- If you decide to transfer your Plan assets into an IRA, and to engage a financial professional to provide services with respect to your IRA account, your financial professional:
    - Will provide you services that are different from the services you receive as a participant in the Plan
    - May receive more compensation for the services to your IRA account than he or she does in connection with any services he or she provides to the Plan
    - Will receive more or less compensation depending on which investments you make in your IRA account. This may present a conflict of interest, because your financial professional has an incentive to recommend one investment over another.
- Before deciding to open an IRA account and engaging a financial professional, you should carefully review all client agreements and disclosure forms related to the IRA and your financial professional's services