April 12, 2011

Employee Benefits Security Administration
Office of Regulations and Interpretations
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, D.C 20210

Attn: Public Hearing on Definition of Fiduciary

I write on behalf of the National Employment Lawyer's Association (NELA) to supplement my testimony on the second panel of the hearings on the proposed rule defining "fiduciary" in order to address more fully certain aspects of the comment submitted by SIFMA on the proposed regulation.

SIFMA asks that an advisor not be deemed a fiduciary in the absence of an "agreement, arrangement or mutual understanding," pursuant to which the advice giving rise to fiduciary status has been provided. In SIFMA's view it is unreasonable to treat advice as subject to ERISA's fiduciary standards merely because the person giving that advice is a fiduciary under some other provision of § 3(21) of ERISA or because the individual is an advisor under the Investment Advisors Act of 1940. SIFMA appears to acknowledge that it is fair to treat persons as fiduciaries who agree to be treated as such. At first blush, this portion of SIFMA's critique is appealing. Why should a plan fiduciary having a casual conversation with the named fiduciary who appointed him about a portion of the portfolio over which the plan fiduciary has no control be subjected to fiduciary standards; he has not agreed to provide advice, but instead functions as a Good Samaritan.

The Department's proposal on this point, however, is reasonable, and SIFMA has misread the proposal. In order for the advice at issue to give rise to fiduciary responsibility, the volunteer must, under (c)(3) of the regulation, be paid a fee for providing the advice in question, although that fee may be paid by a third party. Under these circumstances the plan fiduciary or Investment Advisor under the 1940 Act is not providing helpful insights as a volunteer, but is instead taking advantage of his status to sell something to the plan, plan fiduciary or plan participant. Importantly, such a person may easily avoid fiduciary status under the seller exemption.[1] If he does not declare himself for what he is, a paid salesman, it is not unfair to hold him to a fiduciary standard. Where the individual avails himself of his privileged status as a plan fiduciary to make his sale, it would be unfair to demand less. While it is less clear that status as an Investment Advisor presents plans with the same peril, that status too comes with a presumption of trustworthiness; if such person is speaking as a salesman, it is not unreasonable to require him to say so. Requiring salesmen to declare themselves to be salesmen or be held to a fiduciary standard will not disrupt the capital markets and is much more likely to save plans money than cost them (because of the helpful "free" advice they may have to forego).

[1] As noted in our joint comment with the Pension Rights Center, the application of the seller exemption to advice given to plan participants and beneficiaries should be revisited.

Outside of these status based grounds for regulation, SIFMA is correct that fiduciary liability should be based on the existence of a relationship and that an understanding, to be an understanding, must be mutual. But SIFMA's lament that under the new regulation, "no longer must the parties agree that the relationship is a fiduciary relationship," reflects a misunderstanding of the current regulation and the importance of making the new regulation clear-agreement to be a fiduciary is not the sina qua non of fiduciary status. It has seemed so to those who advise plans, however. By agreeing to provide advice, but not agreeing that the advice would be individualized or the primary basis on which decisions would be made, any advisor, no matter how meticulous and intimate his relationship with a plan fiduciary as a matter of plain fact, could provide himself with a colorable defense. He must merely assert that he had not agreed to do the very thing that he in fact did--provide investment advice that was individualized and the primary basis for fiduciary decision making. But not even the original regulation, flawed as it was and is, ever meant that a defense based on a written agreement less robust than the relationship that it memorialized could serve as a complete defense to fiduciary status. The Department would always have insisted that an informal unwritten understanding could give rise to a fiduciary relationship notwithstanding a written agreement that did not repeat the magic language of the regulation or even one which explicitly renounced an intent to meet the regulatory test.

Decades after the original regulation, the Department has acknowledged that its original regulatory approach has not worked out. SIFMA's reading of the old regulation may not be technically correct, but the existence of a written agreement drafted to avoid fiduciary status presents anyone who would enforce ERISA with a substantial hurdle to overcome. So the Department has taken action, or at least promises to do so.

It will be a rare agreement to provide investment advice where it is not at least implicit that the advice to be provided "may be considered." It is still true under the proposal that the agreement must provide for individualized advice, and NELA has suggested that insisting on an agreement to provide individualized advice rather than simply a provision of individualized advice pursuant to an agreement to provide advice creates some of the same impediments to enforcement as exist in the old regulation. But the proposal heads in the right direction; it can be improved. All that should be required is an agreement to provide advice that may be considered and the provision of individualized advice. "Individualized advice" should be defined broadly to include advice that is specific, actionable and directed at the recipient rather than the world at large. A research report that says IBM is a buy is not individualized advice. "You should buy IBM stock for your common and collective trust fund" is individualized advice. The analytical process of the advisor is not the key, but the specificity of the advice and the directing of that advice to a person or entity in a way that suggests that the advisor believes the recipient should act on the advice. The drafters of the original regulation may have envisioned that advice would most commonly be given to particular plans, but in today's world the advice is just as likely to be given to a plan participant in a 401(k) plan or the fiduciary in charge of investing an enormous pooled vehicle.

SIFMA, however, is blunt. It asserts that brokers should simply be allowed to put enforceable disclaimers of fiduciary status in their agreements and the Department should recognize the disclaimer.

See page 11 of SIFMA's comment. Here our disagreement with SIFMA is so fundamental that we would seem to have little to discuss should we find ourselves again on the same panel. It boils down to this-- DOL believes that ERISA regulates relationships that are subject to abuse. SIFMA believes that ERISA regulates only those who chose to be regulated and choose to wear the badge of fiduciary status as a kind of good housekeeping seal of approval for those willing to say, "I'm so trustworthy, I'm willing to be regulated as an ERISA fiduciary." In SIFMA's world the DOL's role is to serve as the enforcer that gives credibility to a marketing claim for that small subset of the advice community that wants to wear the fiduciary emblem. In times where budgets are tight, this mission is a poor use indeed of taxpayer dollars. I urge the Department to reject it and insist that its fundamental mission is to protect plans, plan fiduciaries and plan participants from advice that is not prudent and disinterested.

SIFMA is not content that brokers and advisors should be able to slough off fiduciary status based on advice with a simple disclaimer. As an additional approach, SIFMA requests that there be no fiduciary status where the advice is provided to a professional fiduciary. Even professionals hire advisors for the purpose of acquiring expertise that they do not have themselves. It is odd indeed to suggest that a professional is less in need of prudent and disinterested advice because of his professionalism. The Department is in a position to allow fiduciaries with conflicts to provide advice that meets the standards of 404 of ERISA and the appropriate conditions of an exemption. The ability to provide such exemptions should provide professionals who can cope with advice from conflicted fiduciaries with the access they need to brokerage and related advice.

NELA appreciates the Department's efforts to overhaul a regulation that has for too long been held up as a shield against all attempts to hold investment advisors to fiduciary standards. We regret that the brokerage and advice industry believes that the Department should seek to diminish its role as the watchdog for plan participants and beneficiaries deferring instead to the SEC, CFTC and FINRA as the only regulators that count.

Sincerely,

/s/

Marc I. Machiz