



Written Testimony of  
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Before the  
United States Department of Labor  
Employee Benefits Security Administration  
Hearing on  
the Definition of Fiduciary Investment Advice  
March 1, 2011

Assistant Secretary Borzi, Deputy Assistant Secretary Davis, Deputy Assistant Secretary Lebowitz and other members of the panel:

Good morning, and thank you for the opportunity to testify at this hearing.

ERISA's fiduciary provisions are the cornerstone of our voluntary employee benefits system. I commend the Department for holding this hearing as an important first step in a process to fully understand and consider the Proposal's effects on participants and plans.

My name is Charles Nelson, and I am president of Great-West Retirement Services<sup>®</sup>, a business unit of Great-West Life & Annuity Insurance Company. We are the fourth-largest retirement plan record-keeper in the United States,<sup>1</sup> providing 401(k), 401(a), 403(b) and 457 retirement plan services to 24,000 plans representing 4.4 million participant accounts and \$138 billion in assets.<sup>2</sup>

#### Our Concerns:

Let me start by saying that my testimony today is not a defense of the status quo. There are legitimate criticisms of the current regulation, and I think it is appropriate to review a standard established more than 35 years ago. Indeed, there are provisions in the Proposal we support. However, we find many more are ambiguous, and we are deeply concerned that others will set the retirement industry back 25 years by:

- Dramatically increasing costs to 401(k) participants and plan sponsors;
- Eliminating advancements made in providing DC plans with open architecture investment platforms; and
- Substantially curtailing plan distribution communication, education and counseling, reducing the availability of information participants need to make informed decisions about their distribution options.

We believe the Department dramatically underestimated—or, in the case of IRAs, did not estimate at all—the costs of the Proposal and its unintended consequences while overestimating the benefits of the Proposal.

Our formal comment letter raised many issues for your consideration, but in my limited time this morning I will focus on several particular concerns.

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<sup>1</sup> Based on total participant accounts at year-end 2009, as ranked by *Plan Sponsor* magazine in June 2010.

<sup>2</sup> As of September 30, 2010.

### Need to Revise and Repropose:

We believe the Department's intended policies are not clear from the text of the Proposal, preventing thorough public review and comment. Crucial terms—such as the new form of fiduciary “management” advice<sup>3</sup>—are not defined, making it impossible for the regulated community to know with certainty what conduct is intended to be covered. This lack of clarity, combined with the inadequate economic analysis, seem to us to be inconsistent with President Obama's regulatory policies, and with the recent Executive Order requiring more transparency and economic accountability in the regulatory process.<sup>4</sup>

As the testimony received during these hearings has shown, there is significant confusion among members of the regulated community as to the language of the Proposal. Witnesses throughout these hearings, on point after point, both in written testimony and in response to questions from the panel, offer contradictory views as to what conduct the Proposal would make fiduciary in nature and under what circumstances. This contradictory testimony shines a spotlight on the fundamental problem with the Proposal—the disagreements too frequently are not about *whether* a particular provision is “good” or “bad” as a matter of policy, but *what* the provision actually means. We are very concerned that the Department cannot make informed regulatory choices based on the input of the regulated community when the regulated community cannot discern the Department's intent from the text of the Proposal. Our concern is viewpoint neutral, and goes to the adequacy of the regulatory process being employed by the Department.

Revising and reproposing the rule for public review and comment will enable the Department to articulate a clear standard. Rather than speculating on what the rule might mean, commentors will be able to offer more meaningful comments on what the rule would actually do. We believe this is the best way to comply with the requirements of the regulatory process and ensure the rule results in greater protection, not greater litigation.

### Platform Exception:

Despite our concerns about the Proposal as a whole, we commend the Department for including an exception for operating a platform and for providing information about the available investments. We are pleased the Department's Proposal recognizes that offering a platform of investment options is not a fiduciary act under current law, and should not be under any new regulations. However, we believe the language in the exception is too narrow.

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<sup>3</sup> Paragraph (c)(1)(i)(A)(3).

<sup>4</sup> See “Toward a 21-st Century Regulatory System,” President Barack Obama, The Wall Street Journal, January 18, 2011; and Executive Order 13563.

- *"Individualized Needs" Limitation*

A significant issue is that the platform must be made available "without regard to the individualized needs" of the plan.<sup>5</sup> If the intent of this language is to limit the exception to "true" platform providers, we support this intent. Unfortunately, it is all too common to see a DC plan advisor or consultant custom-build a target date or lifecycle fund for a plan but disclaim his or her fiduciary status. These fiduciary service providers should not be able to escape their duty by falsely claiming to be a platform provider. However, the "individualized needs" language is too broad. A legitimate platform operator cannot provide its ordinary services without taking into account the individual and varying needs of its plan clients. We would be pleased to work with the Department to craft language that properly limits the exception to true platform operators.

- *"General Financial Information": Concerns Regarding Diagnostic Tools and Mapping*

We are also concerned that it is not clear what the Department meant by limiting the exception to providing "general financial information" about platform investments.<sup>6</sup> We offer our plan clients diagnostic tools providing comparisons between options using objective data regarding common fund metrics. Unless the rule clarifies that such tools are considered "general financial information," platform providers likely will not offer them, making it harder and more expensive for plans to select and monitor investment options. Similarly, we believe "general financial information" should include information platform providers provide related to plan mapping and conversions, such as assistance in determining which platform options are similar to the prior plan investments.

- *Clarify Application of Aetna Advisory Opinion 97-16A*

Finally, the platform exception should expressly state that platform operators complying with the process outlined in Aetna Advisory Opinion 97-16A for removing and replacing investment funds are not providing investment advice.

#### Sales Exception:

The sales exception is also vital to platform operators, and we commend the Department for its inclusion. However, we are concerned that the exception as written does not work in practice.

First, the Proposal should expressly recognize that the sales exception is not limited to a specific point at the beginning of the relationship. Information related to sales is exchanged on an ongoing basis as plans make changes to fund lineups or implement new design features months or years later. It is this aspect which will eliminate open architecture fund choices by plan sponsors as providers will set fund line ups and not be able to change them without risking becoming an investment fiduciary.

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<sup>5</sup> Paragraph (c)(2)(ii)(B).

<sup>6</sup> Paragraph (c)(2)(ii)(C).

Second, we do not believe it is legally accurate to use the term “adverse” to describe the service provider-plan relationship during a sale. Financial service providers are not engaged in *caveat emptor* transactions with their clients—Federal and state laws require financial service providers to take into account the needs of their clients under the prevailing duty of care. As a result of these legal duties, a regulated service provider cannot properly be considered “adverse” to his or her client.

We believe the Department’s intention can be achieved by using a better-suited phrase such as “the adviser has a financial interest” rather than an “adverse” interest.

#### General Valuation Exceptions:

The exception for certain valuations for reporting and disclosure properly recognizes that not all valuations should be subject to fiduciary status, but it does not go far enough. We recommend exceptions not conditioned on reporting and disclosure.

First, we urge the Department to clarify that passing-through a valuation performed by another is not itself a fiduciary act.

Second, clarify that fair value pricing effected in connection with underlying open-end registered investment company funds, for example, is not a fiduciary act.

Third, we believe the Proposal needs a general exception for valuations associated with insurance products. The concerns in the preamble appear to focus on hard-to-value assets, like closely-held employer stock, or certain pieces of real estate. By contrast, group annuity insurance products and other insurance investment contracts are readily valued but are not traded. We don’t believe insurance companies and their employees should be fiduciaries for mechanically calculating a value of a contract for the purpose of a participants’ minimum distribution requirement.

#### Fiduciary Status of Bundled Service Providers:

Another important issue is that the Proposal may have inadvertently created ambiguity regarding the fiduciary status of bundled service providers.

Aetna Advisory Opinion 97-16A expresses the Department’s view that a record-keeper is not a fiduciary to the plan merely because one of its affiliates is a fiduciary. We urge the Department to clarify in the Proposal that a record-keeper in a bundled service arrangement will not be considered a fiduciary itself merely as a result of its affiliation with a person who is a fiduciary. Bundled service providers offer a very valuable and cost-effective service to plans, and without clarification of this paragraph investment managers who also perform recordkeeping will likely stop performing recordkeeping. This will result in drastically reduced recordkeeping competition with a corresponding increase in recordkeeping prices to plans and participants.

### Application to IRAs and Distribution Advice:

Finally, we are very concerned about the future of advice to IRA-holders and distribution counseling for participants.

IRAs are inherently different—they are not ERISA plans. IRAs have no fiduciary making decisions on behalf of participants, and thus no need for the highly protective structure of ERISA's fiduciary provisions.

The Department chose to not apply the Interim Final 408(b)(2) rule to IRAs due to concerns about disjointed regulation across retirement products, and should do so again in this Proposal.

We are concerned that if 401(k) plan distribution counseling becomes fiduciary investment advice, it will be even more difficult for participants to get the information they need to make informed decisions. Non-fiduciary service providers provide valuable information to workers, and preventing them from discussing distribution options or providing IRA rollover services serve to limit the choices of individual workers.

As it has in the past, the Department should use its discretion over the interpretation of the prohibited transaction provisions in §4975 of the Tax Code to avoid making it difficult to roll-over assets from one type of account to another. For example, requiring Code 457 plan sponsors and service providers—who are not covered by ERISA in the 457 plan—to potentially be subject to these proposed regulations simply because a 457 plan participant seeks to rollover assets to an IRA will cause significant confusion and tax compliance problems.

### Current Disclosure Regulations and the Timing of the Proposal:

At the heart of the Proposal is the question of how best to protect participants, and the Department's need to balance the cost and availability of benefits with the means used to provide protection. Just last year, the Department issued two new disclosure-based rules, the 408(b)(2) service provider and 404(a) participant disclosure regulations, that will fundamentally change the operation of plans. These new disclosure rules are imposing significant costs on the regulated community as we prepare for compliance, and go into effect at the end of the year. The Department promulgated these rules because it concluded that disclosure would prevent many of the problems it perceives in the current system.

We support a disclosure-based system to address concerns regarding business relationships. However, we are very concerned that the Department is moving beyond disclosure in the Proposal even before the new disclosure rules take effect. In our view, the Proposal and disclosure rules are intended to address essentially the same concerns, and therefore the Department should assess the effectiveness of the disclosure rules before imposing a broad fiduciary conduct standard on market participants. Disclosure is a very powerful tool, and we believe it will be effective in addressing the Department's concerns. Fiduciary status under the Proposal would be a very broad and inflexible legal

standard causing significant transitional and ongoing costs to plans and participants—we believe DOL should wait until it is clear that such an additional step is necessary before taking it.

Conclusion:

We believe the Department has identified some valid concerns with the existing regulation, but we also believe that the very broad Proposal as written does not work. We should not create new problems while trying to solve old ones. I appreciate the opportunity to help you work through this process, and I am happy to answer any questions you may have.