



TESTIMONY OF
TOM ROBERT
ON BEHALF OF
THE AMERICAN COUNCIL OF LIFE INSURERS
BEFORE THE
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
U.S. DEPARTMENT OF LABOR

HEARING ON
DEFINITION OF FIDUCIARY – INVESTMENT ADVICE

TUESDAY, MARCH 1, 2011

Introduction

Good morning. My name is Tom Roberts and I am Chief Counsel at ING Insurance U.S., testifying on behalf of the American Council of Life Insurers. ACLI member companies represent more than 90% of the assets and premiums of the US life insurance and annuity industry, and offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a nonqualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

We appreciate this opportunity to offer our views of the proposed rule with the Department. ACLI submitted written comments describing eleven key concerns. Today, I focus on three of them: the importance of the seller's limitation; our suggestions to ensure all interested parties clearly understand when advice is subject to ERISA; and our concerns regarding the proposed rule's applicability to IRAs and the need for further inquiry on the nature of these programs and the products and services offered to support them.

The Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply. It substantially broadens the concept of rendering "investment advice for a fee."

ACLI appreciates the Department's concern that under some circumstances the current rule impinges the Department's ability to bring enforcement actions in situations that are clearly abusive. We share the Department's interest in seeing that plans and participants who seek out and are promised advice that is impartial ultimately receive advice that adheres to the rigorous standards imposed by ERISA. At the same time, we are concerned that the Proposed Rule's pursuit of this objective interferes with investment sales and distribution practices that are customary in the marketplace, well understood, and commonly relied upon by financial services providers, plans and participants alike. We are concerned that these changes will result in plans, plan participants, and IRA owners having less access to investment information and or increased costs. Our comments seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

Seller's Limitation on fiduciary status

In the preamble to the proposed rule, the Department notes that, in the context of selling to a purchaser, communications with the purchaser may involve advice or recommendations and that such communications ordinarily should not result in fiduciary status. This point is critical to the development of a workable rule. Persons engaged in the sale and distribution of investment product and services need to have confidence that ordinary course sales recommendations will not, in hindsight, be subjected to a fiduciary standard that disallows the payment of sales commissions and other traditional forms of distribution-related compensation. Parties engaged in transactions with ERISA plans and IRAs need clear, unambiguous rules by which to determine their duties and obligations.

Financial institutions such as life insurers and their sales representatives should not be treated as fiduciaries under ERISA when they are engaged in selling activities and are clear that they are acting in a sales capacity.

As written, the wording of the seller's limitation, which describes sellers and their agents, raises some uncertainties about the availability of the seller's limitation for other distribution channels, such as independent insurance agents, insurance affiliated and unaffiliated broker-

dealers and registered investment advisers that offer life insurer products, whether exclusively or as one of many other products from a variety of different product manufacturers. These parties must be covered by the limitation.

The seller's limitation is only available when the recipient of the advice knows or has a basis for knowing that the interests of the selling firm and its distributors are "adverse" to the interests of the plan and its participants. We think that the word "adverse" is not right word to explain that a seller is not impartial. While the seller of a financial product has a financial interest in the outcome of a transaction, we think it is inappropriate to describe that financial interest as necessarily entailing broad adversity of interest. As responsible providers, we have an interest in seeing that our customers are well served, are happy with our products and services, and that our customers find them useful to the attainment of their financial goals.

We believe the seller's limitation should make the point that a seller of an investment or an investment product has a financial interest in the transaction it is recommending. So long as purchasers are provided with that information, they will have the requisite basis for evaluating the recommended transaction in light of the seller's financial interest, and will be in a position to understand that the selling firm's recommendation is not impartial.

The rule should provide an example or examples of circumstances in which a person reasonably demonstrates that the recipient of information knows that a recommendation is being made by a "seller." For example, a written representation would suffice if it clearly notes that the person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation for the selection of the product and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected. This type of representation would provide a clear indication to the plan, plan fiduciary or participant that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest.

The Department should clarify that the seller's limitation covers all aspects of both an initial sale and the subsequent ongoing relationship between a plan, plan fiduciary or individual and an investment provider or any agent, broker, and/or registered investment adviser involved with the sale of the investment provider's products and services. This would include information and recommendations regarding the use of a product, for example, advice regarding the choice of investments available under a product's menu of investments. It is common for defined contribution plans to request of potential investment providers a sample menu of investments from among a provider's available investments which, in the opinion of the provider, best match the plan's current investment options. There should be no expectation that any such recommendation is impartial or that the plan seeks advice upon which it will rely for its investment decisions. The nature of this relationship should not change after a sale. A product provider, agent, broker, and/or registered investment adviser may continue to make recommendations regarding products and services. There should be no expectation that these recommendations differ in nature following the initial sale.

Written Representations

In its preamble, the Department expresses the belief that explicitly claiming ERISA fiduciary status, orally or in writing, enhances the adviser's influence and forms a basis for the advice recipient's expectation that the advice rendered will be impartial. The Proposed Rule reflects that view by applying fiduciary status to all persons affording those acknowledgments and disallowing the availability of the seller's limitation to such persons.

We think prudence dictates that where a plan, plan participant or individual seeks out impartial, disinterested advice delivered in a manner consistent with ERISA's fiduciary standard of conduct, then the plan, plan participant or individual should obtain the appropriate acknowledgment in writing in order to secure the acknowledgement in a permanent form. We are concerned about the potential proof issues inherent in claims that an adviser provided oral representations of fiduciary status. Advisers may be hard put to dispute erroneous or otherwise fictitious claims that oral assurances of fiduciary status were provided.

For these reasons, we request that the rule be modified to apply only to persons who represent or acknowledge *in writing*, electronic or otherwise, that they are acting as a fiduciary within the meaning of ERISA with respect to the advice they are providing to the person or persons for whom they are so acting. This concept is consistent with the recently promulgated section 408(b)(2) regulations that require that a service provider acting in a fiduciary capacity acknowledge such in writing.

Separately Consider Rule for IRAs

ACLI requests that the Department take additional time to study the IRA and self-employed plan markets and carefully consider the economic impact of the Proposed Rule on both individuals and providers of products and services. The Department is separately considering welfare benefit plans under the recently issued 408(b)(2) regulations. We ask the Department to do likewise for IRAs and self-employed plans and hold them apart from the scope of a final rule. The Department should take time to consider the IRA and Keogh market place, and the economic impact a change to the current rules would have on this retail marketplace.

In addition, the Department should consider changes in the regulatory environment affecting retail products. In particular, there are regulatory efforts underway by the Securities and Exchange Commission regarding the standard of care under the securities laws for broker-dealers and investment advisers that provide personalized investment advice about securities to retail customers. On January 21, 2011, the SEC issued a study on broker-dealers and investment advisers. It is important that the SEC and DOL efforts lead to rules that are complimentary in nature. We urge the Department to provide the public sufficient opportunity to consider the SEC's regulatory efforts and offer additional comments on the Proposed Rule.

The Department should consider a meaningful investment education safe harbor tailored to this marketplace. The Department should also clarify the application of existing exemptions and/or issued new exemptions tailored to this marketplace.

As we read the proposed regulation, the seller's limitation applies to IRAs. It is common for advisors and agents to engage customers and prospective customers on their particular goals and objectives to better understand their product and service needs. Based on these conversations, an advisor might explain the pros and cons of various investment vehicles including variable annuities, mutual funds, brokerage accounts, banking products, fixed annuities, alternative investments and several types of advisory accounts. Within each of these types of securities and property, advisors/agents can usually recommend several different specific securities that may have different features. The compensation paid by product and service will vary. For instance, compensation charged for executing a stock trade will differ from compensation received for selling an annuity. The seller's limitation, with an appropriate indication of the seller's interest, makes it possible to recommend products and services to customers.

I want to thank the Department again for holding this hearing, and for inviting ACLI to testify. I am happy to answer any questions you may have.