STATE STREET GLOBAL ADVISORS.

One Market Street
Steuart Tower
Suite 1700
San Francisco, CA 94105
USA
T +1 415 836 9800
ssga.com

July 21, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712

U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Via email: e-OED@ dol.gov

Re: RIN 1210–AB32 – Definition of the Term ''Fiduciary'' — Conflict of Interest Rule —Retirement Investment Advice; ZRIN: 1210-ZA25 – Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1

Ladies and Gentlemen:

State Street Global Advisors ("SSGA"), a division of State Street Bank and Trust Company, appreciates the opportunity to provide comments on the Department of Labor's (the "Department") re-proposed regulation ("Proposed Regulation") regarding the definition of ''fiduciary'' under the Employee Retirement Income Security Act of 1974 ("ERISA"). We support the Department's desire to ensure that its regulations interpreting ERISA's fiduciary investment advice definition continue to be relevant in today's dynamic retirement landscape.

SSGA is a global leader in asset management, managing more than $2.44[1] trillion in assets from corporations, endowments and foundations, third-party asset gatherers, pension funds and sovereign wealth funds as of March 31, 2015. SSGA has been providing asset management services for over 30 years and began offering services to 401(k) clients in 1983. As of March 31, 2015, SSGA assets under management for global defined contribution ("DC") and deferred compensation plans totaled $373.74 billion, of which $272.07 billion was DC assets sourced in the United States.

At SSGA, we are focused on ensuring that retirees across America have the tools and advice necessary to achieve a secure retirement. We believe that the key to success for most individuals is high quality, low cost investment products combined with optimal plan design and communication. Importantly, the vast majority of our business is undertaken as an ERISA fiduciary and the fiduciary role is one that we not only accept, but embrace. As such, we have built not only our franchise, but our infrastructure, processes and technology in a way that is consistent with our prevailing status as an ERISA fiduciary. We support the Department's goal to extend the protections offered under ERISA to a wider group of retirement savers and to ensure that protections apply to those who save either in or out of an employer-sponsored plan. At the same time, we feel that such extension should be achieved in a way that does not curtail access of investors to guidance, advice and help.

Against this backdrop, we believe that certain provisions within the proposed regulation are problematic in that they could: 1) lead to a reduction in clarity for providers as to when they are acting

[1] This amount includes the assets of the SPDR Gold Trust (approx. $28.1 billion as of March 31, 2015), for which State Street Global Markets, LLC, an affiliate of State Street Global Advisors, serves as the marketing agent.

in a fiduciary capacity; 2) potentially decrease the information flow to plan fiduciaries of all sizes; and 3) limit the ability of institutional investment managers to offer model-driven advice and other services to smaller plans. We have proposed a set of potential changes to the draft regulation which we believe are in keeping with the Department's intent, but necessary to ensure that smaller plans continue to have access to low-cost, institutionally structured funds and advice, ease the administrative burden associated with large plan compliance and increase *a priori* certainty around when fiduciary status begins and ends.

We underscore that the objective of our letter is to offer our support for the cause of enhancing the quality of investment advice and investment management services offered to all retirement savers in the United States. We have focused our comments primarily on remedies as, like the Department, we believe in the paramount importance of tackling quality and cost issues. We pair our support for the spirit of the regulation with concrete suggestions for improvement because we would like to see this regulation succeed in achieving its objectives without creating unintended inefficiencies, costs and, in some cases, potentially decreasing the quality of services offered as outlined above. Importantly, changes to the definition of "fiduciary" within ERISA impact the current pool of ERISA-advised retirement assets. For each issue that we raise, we have looked to clearly explain our concerns and to suggest specific changes to the drafting. Our hope is that our suggestions will help the Department successfully promulgate changes to ERISA in a way that will further solidify the individually funded retirement system in the United States.

I. Comments Regarding the Proposed Fiduciary Definition and Carve-Outs

The stated purpose of the Proposed Regulation is to replace the current fiduciary advice definition with one that "better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries and IRA owners from conflicts of interest, imprudence and disloyalty." Proposed Regulation at 21929. In order to accomplish its goals, the Proposed Regulation purposely broadens the fiduciary definition. This approach, while supportive of the stated purpose of the Proposed Regulation, could, as the Department notes, "sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." Id. To address this potential over-breadth, the Proposed Regulation includes certain "carve-outs" from the fiduciary definition. In SSGA's view, the Department should consider changes to certain elements of the fiduciary definition included in the Proposed Regulation, as well as to the carve-outs themselves.

a. Fiduciary Definition

The Proposed Regulation defines four different types of "Covered Advice" that could subject a person to fiduciary status: (i) recommendations as to the advisability of acquiring, holding, disposing of, or exchanging securities or other property, including recommendations to receive a distribution of benefits or roll over assets from a plan or an individual retirement account ("IRA"); (ii) recommendations as to the management of securities or other property, including recommendations as to the management of assets to be rolled over to or distributed from an IRA; (iii) appraisals or fairness opinions concerning the value of securities or other property if made in connection with a specific transaction involving the plan or IRA; and (iv) recommendations of a person who will also receive a fee or other compensation for providing any of the three covered advice categories listed above.

Other than the prong of the definition relating to appraisals and fairness opinions, whether a person is providing advice turns on whether he or she is making a *recommendation*. Thus, in addition to activities captured by the current rule, the fiduciary definition in the Proposed Regulation would apply to recommendations regarding:

- IRA rollovers and other distributions;
- hiring an investment manager; and
- hiring an investment advisor.

While not included in the test described in the current regulation, in SSGA's view, there are many instances in which it is appropriate to define advice related to these activities as "Covered Advice" (*i.e.*, activities that, if other elements of the regulatory test are met, would result in fiduciary status). However, SSGA is concerned that the definition of *recommendation* included in the Proposed Regulation is too broad. Moreover, SSGA believes that the Department's stated goal – protecting plans, participants, beneficiaries and IRA owners from conflicts of interest, imprudence and disloyalty – can be accomplished using a narrower test. Further, doing so will avoid what the Department recognized as a consequence of the breadth of the Proposed Regulation – that activities not appropriately regarded as fiduciary and not intended by Congress to fall within the fiduciary definition are nonetheless captured. SSGA suggests that the following specific changes to the Proposed Regulation will better serve the Department's stated goal while avoiding the Proposed Regulation's unintended over-breadth:

i. Clarify Definition of Recommendation

The definition of "recommendation" in the Proposed Regulation is a "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." Proposed Regulation at 21960. We believe this proposed definition of "recommendation" is so broad that almost any communication regarding an investment product or service will be "investment advice," even in situations where no reasonable prospective or current client would expect SSGA to be providing "investment advice." In addition, we do not believe that interpreting the definition of recommendation in accordance with FINRA guidance will resolve this issue. Therefore, we request that the Department change the definition of "recommendation," as described below.

The Department is soliciting comments on "whether it should adopt some or all of the standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA." Proposed Regulation at 21938. We believe there may be aspects of FINRA guidance that would be helpful, including its guidance in FINRA Regulatory Notice 2011-02 (January 2011) that points to the degree to which a communication is "individually tailored" as a key factor in determining a *recommendation*. However, FINRA guidance does not adequately address all of the circumstances involved in providing investment products and services to plans. In fact, the Department acknowledged that the FINRA guidance regarding what constitutes a recommendation was issued in a different context than ERISA. In SSGA's view, these differences are such that the Department should not adopt FINRA standards and should not adopt the FINRA description of a recommendation as a definition within the fiduciary advice regulation.

First, the FINRA guidance is, by definition, limited to recommendations regarding particular *securities*.[2] As noted above, the Proposed Regulation would apply to advice provided in connection not only with securities, but also with respect to other property (including a recommendation to take a distribution of benefits), and recommendations related to investment management and investment advisory services. As a result, available FINRA guidance will not necessarily be helpful in determining whether a communication, outside of the securities context, should be viewed as a recommendation. For example, FINRA guidance does not address whether responses to requests for proposal ("RFPs") are "recommendations." However, as discussed below, SSGA believes that such responses should not be recommendations.

Second, as noted by the Department in the Proposed Regulation, "Under [ERISA's] statutory framework, the determination of who is a "fiduciary" is of central importance. Many of ERISA's and the [Internal Revenue] Code's protections, duties, and liabilities hinge on fiduciary status." Proposed Regulation at 21933. The regulatory consequences of ERISA fiduciary status are far more significant

---

[2] FINRA Rule 2111 is limited to recommendations that could result in the purchase or holding of securities or an investment strategy involving a particular security or securities.

than the consequences of a violation of FINRA's suitability rules. While serving an important regulatory function, those rules only require that the broker have a "reasonable basis to believe" that a recommended investment course of action "is suitable for the customer" based on "reasonable diligence" by the broker. Because the duties and responsibilities imposed on brokers under the suitability rule are relatively modest, the bar to application (*i.e.*, whether or not the broker has in fact, "recommended" a security) is relatively low. In SSGA's view, it is not appropriate to borrow from FINRA guidance when the consequences of fiduciary status are so significant.

We believe the Department should establish a new definition that makes clear that a mere endorsement of a product or service is not the same as a "recommendation" for purposes of determining whether Covered Advice has been provided. While an endorsement denotes approval or support (including of one's own products or services), it does not, by itself, suggest that a particular course of action is superior to other courses of action. This change would be consistent with the Department's existing guidance under ERISA §408(b)(2), in which the Department has made clear that: (1) a fiduciary to a plan is not acting in a fiduciary capacity when he or she proposes to perform additional services to a plan; and (2) a person does not act in a fiduciary capacity when he or she persuades a fiduciary to hire the person to perform services for the plan (including investment advisory services). <u>See</u> 29 C.F.R. 2550.408b-2(c)(3)(f) Examples 1 and 4. In each example, the Department explains that the actors in question have not used any fiduciary authority to cause an act which benefits them (*i.e.*, their own hiring).[3] SSGA strongly urges the Department to make clear in the final rule that an endorsement of oneself or recommendation to hire oneself does *not* make one a fiduciary by reason of providing investment advice. Further, endorsements of products or services provided by others should not be treated as a recommendation for purposes of the Covered Advice definition, provided the person making the endorsement is not being paid in connection with such an endorsement.

Rather than adopt the FINRA standard, we ask that the Department change the definition of "recommendation" as follows (shown below in comparison to the Proposed Regulation):

> (f) *Definitions*. For purposes of this section—
>
> > (1) "Recommendation'' means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. <u>For purposes of this paragraph (f)(1) the following shall not constitute a recommendation: (a) a proposal by a person (either alone or alongside another person or other persons) to perform services for the plan; or (b) a mere endorsement by a person (either alone or alongside another person or other persons) of a product or service, including the person's own products or services.</u>

Without this change, the Proposed Regulation could be viewed as capturing virtually every situation in which a provider of services makes information about its services or products known to existing or potential clients.

As noted above, a significant portion of SSGA's business involves acting as an "investment manager," as that term is defined in §3(38) of ERISA. In this capacity, SSGA acknowledges in writing that it is a fiduciary and is legally bound by ERISA's standards of care and loyalty. As a professional fiduciary, SSGA willingly accepts its fiduciary status (when it is managing client assets). However, under the Proposed Regulation, SSGA could be deemed an investment advice fiduciary in numerous circumstances that are not appropriately considered fiduciary and that we believe Congress never intended to result in fiduciary status. For example, SSGA routinely responds to requests for information regarding its products and services, including responding to RFPs and similar client-generated opportunities. SSGA and other investment managers may also have other opportunities to

[3] The Department recently updated the 408(b)(2) regulations and did not elect to make any changes to the examples cited above. We presume this is because the Department continues to view these examples as correctly describing the contours of fiduciary status and responsibilities.

STATE STREET GLOBAL ADVISORS.

communicate with existing or potential clients regarding services and products that are available. These situations are much like those described in the examples under the ERISA §408(b)(2) regulations – SSGA is not using its authority as a fiduciary to cause itself to receive a benefit. Yet, without changes to, or clarifications of, the Proposed Regulation, SSGA would be unable, in many cases, to continue these activities.

In addition, SSGA and other investment managers conduct meetings and provide materials to intermediaries, such as investment advisors, recordkeepers and consultants, about SSGA's products and services. Those intermediaries are responsible for advising the plan fiduciary regarding whether SSGA (or another manager) should be selected. SSGA has no control over or knowledge regarding what information and materials are ultimately sent to the deciding plan fiduciary by the intermediary, and SSGA does not engage the plan directly. SSGA asks that the Department provide guidance that communications through intermediaries as described in this section do not result in an investment manager, such as SSGA, becoming a fiduciary to the ultimate recipients of that advice or to the intermediary, to the extent that the intermediary acts as a fiduciary.

Similarly, SSGA also maintains a line of business where it provides to unaffiliated investment advisors limited, non-exclusive, non-transferable licenses to use investment management models for the purpose of providing asset allocation services to such advisors' clients, some of which are plans, plan fiduciaries, participants or beneficiaries, IRAs or IRA holders. Under these arrangements, the advisors generally agree that they will obtain information about each of their client's financial situations and investment objectives (including any reasonable restrictions) at the time the client's account is opened with the advisor, and will make recommendations on the basis of such information. SSGA does not engage with such clients directly, collect any identifying information about the clients or enter into agreements with the clients. In fact, SSGA generally has no control over, or knowledge of, whether the models or strategies, or allocation of assets to particular investment vehicles pursuant to those models or strategies that are generated by its services are in fact implemented by the unaffiliated advisor. SSGA asks that the Department specifically indicate in the final regulation that arrangements such as those described in this section do not result in an investment manager, such as SSGA, becoming a fiduciary to the ultimate recipients of that advice or to the intermediary, to the extent he or she acts as a fiduciary.

ii. Clarify Circumstances under which Covered Advice Is Deemed Fiduciary Advice

SSGA is concerned that the Proposed Regulation establishes as "investment advice" activities that no reasonable person would construe as a communication made in accordance with ERISA's fiduciary standard. In addition, SSGA believes that Congress never intended such activities to be subject to a fiduciary standard when it enacted ERISA. The Proposed Regulation includes a two-part functional test such that providing Covered Advice will be a fiduciary act under the rule if either: (1) the Covered Advice provider has acknowledged fiduciary status with respect to the Covered Advice; or (2) the Covered Advice is "rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA." Proposed Regulation at 21957. The preamble to the Proposed Regulation indicates that the "understanding" between the parties is limited to a meeting of the minds by the parties that the advice is individualized or specifically directed and that no such meeting of the minds is required with respect to the "extent to which the advice recipient will actually rely on the advice." Proposed Regulation at 21940. Notably, this functional test will not include the "regular basis" requirement under the current regulatory definition. Additionally, the Department proposes a "specifically directed to" requirement as an alternative to the "individualized" standard, which is in the current regulation.

SSGA agrees with the Department that a person who has acknowledged fiduciary status with respect to a particular piece of advice should not then be able to disclaim such status. However, we are concerned that the Proposed Regulation, due to the above-highlighted provisions, will lead to SSGA being deemed a fiduciary in situations where it should simply not be expected to act in the "best interest" of the plan. For example, as noted above, SSGA frequently responds to RFPs that may include examples of specific investment products and services offered by SSGA. The RFP process is an opportunity for SSGA to describe the products and services it makes available to investors, its philosophy of investment management, and the characteristics of its investment processes. This information will allow the plan fiduciary to decide which of the numerous products and services available to the plan are best-suited to the needs of the plan. During this process, the plan is typically represented by a fiduciary investment advisor, such as a consultant specializing in assisting plan fiduciaries in selecting and monitoring plan investments. In such circumstances, while a plan should reasonably expect all statements made in a RFP response to be true, the plan is not interested in relying on SSGA to evaluate the various RFP responses, or even to evaluate SSGA's own services in light of the particular needs of the plan.[4] Rather, the plan fiduciary, together with its investment advisor or consultant, have taken on that responsibility – and are in a markedly better position to perform this evaluation than SSGA, where SSGA knows only the information about the plan that is contained in the RFP (which may be none at all, as many RFPs are issued directly from consultants and contain little or no information about the plan itself).

Yet, under the Proposed Regulation, the RFP response in which SSGA provides information could be deemed fiduciary investment advice. This outcome, which is significant, is the result of the breadth of the Proposed Regulation, including the elimination of the "regular basis" requirement and the addition of the "specifically directed to" language, and the fact that the Proposed Regulation treats as fiduciary investment advice covered advice provided to another plan fiduciary – including another investment advice fiduciary. In addition, because there is no "meeting of the minds" requirement related to the use of the information in the RFP by the plan fiduciary, investment managers or advisors will not have sufficient certainty as to how recipients intend to use the Covered Advice. In summary, particularly in the context of the RFP process and other sales activities, SSGA could be deemed a fiduciary for the "advice" provided during the RFP process even though it is evident based on the mutual expectations of the parties that the information provided in connection with a response to an RFP should not be treated as anything other than a sales presentation.[5]

In this case, an unintended consequence of SSGA's fiduciary status is that SSGA and other investment managers could be forced to forego the opportunity to provide information about services and products in order to avoid being deemed a fiduciary prior to entering into an investment management arrangement with a plan. The result may be a less effective selection process, which does not benefit the plan or participants and beneficiaries.

As noted above, SSGA routinely acts as a discretionary fiduciary investment manager with respect to plans and plan asset vehicles and has no objection to providing such services free of impermissible conflicts and in conformance with ERISA requirements. However, the effect of the Proposed Regulation would be to put SSGA and other investment managers in the untenable position of being deemed to provide fiduciary investment advice when selling their fiduciary services and products - not a situation we believe was intended by Congress to be covered as fiduciary investment advice. In order to address this problem, the Department should consider requiring that an advice recipient act "reasonably" when deciding to rely on Covered Advice. Thus, the functional test (shown below in comparison to the Proposed Regulation) could require that:

(2) Such person, either directly or indirectly (*e.g.*, through or together with any affiliate), –

---

[4] Under the Department's regulations interpreting the prudence requirement as applied to plan investment decisions, a fiduciary must give "appropriate consideration" to the facts and circumstances that the fiduciary knows or should know are relevant to the particular investment, including the role that the investment plays in the plan's investment portfolio. 29 C.F.R. § 2550.404a-1(b)(1).

[5] As discussed later in this letter, the sales "carve-out" included in the Proposed Regulation would not effectively shield RFP responses from fiduciary status, if, for instance, the RFP provides that by responding to the request, providers are acknowledging fiduciary status with respect to information provided in the RFP response. While SSGA would likely decide not to respond to such an RFP, it is certainly possible that some service providers, perhaps not appreciating the import of the requirement, would do so.

STATE STREET GLOBAL ADVISORS.

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section; or

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient ~~for consideration in making~~, and where a reasonable recipient would view the advice as being provided for the purpose of enabling investment or management decisions with respect to securities or other property of the plan or IRA. Under this paragraph (2), advice reasonably viewed as being provided by a person (either alone or alongside another person or other persons) in an educational, marketing or sales capacity is presumed not to be provided for the purpose of enabling an investment determination, unless circumstances dictate otherwise. Also under this paragraph (2), a disclaimer of fiduciary status, or an affirmative statement that information is provided for educational, marketing or sales purposes will not result in a presumption that the advice is not provided for the purpose of enabling an investment or management decision.

We believe this approach would provide a more objective "reasonableness" standard than the Proposed Regulation while still addressing the Department's expressed concerns. In the discussion in section I.b., below, we also request that the Department consider specific changes to the seller's carve-out that will address common sales situations, including RFPs and sales to professional advice fiduciaries. It is SSGA's belief that changes to both the fiduciary definition and the carve-outs are necessary to make the regulation workable.

iii. Clarify Definition of Fee or Other Compensation

The Proposed Regulation broadly defines the circumstances under which advice will be deemed to be provided for a "fee or other compensation, direct or indirect," as "any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered." While SSGA agrees that a fee received directly or indirectly (*e.g.*, by an affiliate) *for the advice* should be relevant in determining fiduciary status, we are concerned that "compensation incident to" a transaction in which advice has been rendered is too broad. As with other aspects of the Proposed Regulation discussed above, this definition is likely to have the effect of sweeping into the advice definition sales activities – including activities in which the "incident" compensation is that received for providing discretionary investment management services. The following example illustrates the basis for this concern:

- SSGA provides Covered Advice in the form of information regarding SSGA's services as an ERISA §3(38) investment manager to a plan's investment consultant (who has agreed to act as a fiduciary). SSGA is then selected by the plan to provide investment management services. SSGA then executes a management agreement with the plan and, pursuant to the terms of the agreement, is paid an asset- based management fee for the services.

In SSGA's view, the compensation definition should not be broad enough to sweep in the management fee it ultimately receives for investment management services, yet we are concerned that the management fee could be viewed as "incident to" the initial "transaction" (the hiring of SSGA to provide investment management services) about which SSGA arguably provided Covered Advice.

We are also concerned that the compensation definition, which covers "any fee or other compensation for the advice received by the person (or by an affiliate) from any source"[6] may sweep in fees with no intrinsic connection to advice provided by an affiliate. The following example illustrates the basis for this concern:

[6] Proposed Regulation at 21960.

STATE STREET GLOBAL ADVISORS.

- An affiliate of SSGA provides transition management services to an ERISA plan and agrees to act as an "investment manager" for purposes of the transition. SSGA responds to an RFP for ongoing investment management services in connection with the plan's search for a manager to exercise discretionary authority over the assets being transitioned. The plan fiduciary does not select SSGA to provide those services, but instead selects another investment manager, unaffiliated with SSGA.

SSGA is concerned that, in this scenario, both SSGA and its affiliated transition manager could be viewed as investment advice fiduciaries, even though SSGA would never receive any compensation for the "advice" it provided in its RFP response. Specifically, SSGA, in the RFP process, could be viewed as providing "covered advice" directly to a plan fiduciary (including the plan's consultant), while SSGA's transition manager affiliate could be viewed as receiving a fee or other compensation "for the advice" because both SSGA and its affiliate could be viewed by the Department as providing advice regarding the same transition.[7]

While the Proposed Regulation includes a seller's "carve-out" that could apply in some situations, it is SSGA's view that the definition of compensation should be changed in order to ensure that compensation ultimately received by a fiduciary who acknowledges fiduciary status, and is subject to the fiduciary responsibility provisions of ERISA (and the prohibited transaction provisions of ERISA and the Internal Revenue Code), is not viewed as "incident to" the initial hiring transaction. We believe such an approach should be viewed as substantially furthering the consumer protection goals articulated in the Proposed Regulation, as from the standpoint of the advice recipient, the only effect of the Proposed Regulation would be to move up in time the point at which the investment manager is deemed a fiduciary. Rather than becoming a fiduciary upon undertaking its investment management responsibilities, the manager would be viewed as an investment advice fiduciary for purposes of the pre-hiring discussions, and then a discretionary fiduciary after that. But from the point of view of the investment manager (SSGA, in our example) the difference is significant. SSGA would be placed in the untenable position of not knowing whether it would be deemed a fiduciary for purposes of the pre-hiring discussions until it is ultimately hired and receives compensation. Further, SSGA would be required to identify an exemption to relieve the "conflict" it would be deemed to have by reason of its advice.

SSGA requests that the Department revise the definition of "fee or other compensation, direct or indirect" such that compensation received by a fiduciary or its affiliate for *services* provided under a subsequent contract for services would not be deemed "incident to the transaction in which the investment advice has been rendered or will be rendered." SSGA's suggested approach would be consistent with the examples contained in the current Department regulations under ERISA §408(b)(2), which indicate that neither a current service provider, nor a non-party-in-interest seeking to provide services to a plan, will be viewed as acting in a fiduciary capacity when it presents information about its own services to a plan fiduciary (including information intended to "persuade" a fiduciary to hire it). <u>See</u> 29 C.F.R. 2550.408b-2(c)(3)(f) Examples 1 and 4.

It is also our view that the final regulation should make clear that an entity will not be deemed to be a fiduciary unless it or an affiliate receives a fee "for the advice provided in paragraph (a)(1)" of the rule.

---

[7] Alternatively, the Department (or a Plan) could take the position that SSGA's transition management affiliate is receiving compensation "incident to" the advice provided by SSGA in connection with its RFP response. We note that in discussions with Department personnel during the comment period, the Department took the view that compensation provided to an entity would generally not have the effect of causing an affiliated entity to become a fiduciary. Rather, we understand it to be the Department's position that the references in section (a)(2) of the Proposed Regulation and in the definition of compensation to actions of affiliates are intended only to cover a situation where, *for the purpose* of avoiding fiduciary status, an entity arranged to have an affiliate provide a representation regarding fiduciary status, deliver some or a portion of covered advice, or receive the fee intended as compensation for specific advice provided. If this is the Department's view, we request that it provide clarification on this point by making changes to the Proposed Regulation as suggested herein. To the extent the Department does not make the requested changes to the Proposed Regulation, we ask that the Department clarify its position as to the instances in which an entity could be viewed as a fiduciary by reason of the acts of an affiliate.

STATE STREET GLOBAL ADVISORS.

This clarification is necessary to ensure that a fee received by an affiliate for separate advice that may be provided in a related context does not sweep in activities not intended by the regulation to result in fiduciary status (e.g., a response to a RFP for which no compensation is ever received by the RFP respondent).

One approach to addressing these concerns, and harmonizing the rule with the Department's existing 408(b)(2) regulations, would be to revise the definition of "fee or other compensation, direct or indirect" (shown below in comparison to the Proposed Regulation) as follows:

> (6) "Fee or other compensation, direct or indirect'' for purposes of this section and section 3(21)(A)(ii) of the Act, means any fee or compensation for the advice provided in paragraph (a)(1) received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The term fee or other compensation includes, for example, brokerage fees, mutual fund and insurance sales commissions. For purposes of this paragraph (6) consideration received by a person (or by an affiliate) pursuant to a reasonable contract or arrangement as described in ERISA section 408(b)(2) or Internal Revenue Code section 4975(d)(2) will not be viewed as "incident to" a transaction involving the hiring of the person to provide the services described in the contract or arrangement.

b. Carve-Outs from Fiduciary Definition

The Proposed Regulation contains certain "carve-outs" to the fiduciary definition that are intended to permit, as non-fiduciary activities, those which, according to the Department, "are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." Proposed Regulation at 21929. SSGA recognizes that, should the Department make certain changes to the fiduciary definition, such as those identified in section I.a., above, the Department may determine that certain of the carve-outs should also be changed, or are not necessary at all. However, SSGA requests that the Department utilize the carve-outs to provide additional certainty as to whether certain activities may be undertaken as non-fiduciary activities. In order to accomplish this, SSGA requests that the Department make clear that the carve-outs included within the final regulation are "safe harbors," such that fiduciary status will not apply to a person in compliance with the requirements of a carve-out, but that the carve-outs are not an exclusive means of avoiding fiduciary status. Below, we discuss specific changes requested to the seller's carve-out and the education carve-out.

i. Comments regarding the Seller's Carve-Out

The "seller's carve-out" is a critical component of the Proposed Regulation, and the Department invited comments on its scope. This exception is available with respect to transactions with plans represented by a fiduciary with responsibility for managing at least $100 million in employee benefit plan assets (provided that the advisor/counterparty confirms the fiduciary's "size" qualification either by relying on the plan's most recently filed Form 5500 or by obtaining a written representation from the fiduciary regarding its assets under management). For transactions with plans represented by fiduciaries having less than $100 million in assets under management, the advisor counterparty must obtain a written representation from the plan fiduciary that: (i) it exercises authority and control with respect to the management and disposition of plan assets; (ii) the plan has 100 or more participants; and (iii) the fiduciary will not rely on the person to act in the best interest of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity. Regardless of the size of the plan or its assets, the fiduciary must be independent of the seller, and the seller must inform the fiduciary of the "existence and nature of the person's financial interests in the transaction" and must not receive a fee for the provision of investment advice.

As discussed in section I.a., above, while SSGA has agreed to serve as a fiduciary with respect to the management of plan assets once it is chosen to provide investment management services, historically managers, such as SSGA, have not served in a fiduciary capacity during the RFP or sales process, and SSGA believes that the Department should amend the fiduciary definition within the Proposed

STATE STREET GLOBAL ADVISORS

Regulation to address this issue. It is particularly important that the Department provide clarification of the seller's carve-out with respect to sales practices whereby a manager, such as SSGA, offers services to retirement plans, often through responses to RFPs. On average, SSGA responds to more than 400 RFPs each year. In the vast majority of cases, the RFP is issued by an investment consultant hired by the plan sponsor to act as an investment advice fiduciary. Even where the consultant does not issue the RFP, it is usually heavily involved in advising the plan sponsor on the investment manager selection. The consultants use RFPs and similar information collection techniques as a way to gain an understanding of the types of services and products available to plans and to assess reasonableness of fees in order to provide advice to the plan sponsor on the selection. If there is too much uncertainty and risk involved in responding to such requests for information, SSGA and other service providers will not be able to continue to do so. In many instances, SSGA is not privy to information regarding the prospective client, including information regarding plan asset size or number of covered participants. In addition, the requests often include hard-coded questions, wherein the investment manager may not have the opportunity to explain that it is not a fiduciary and not providing investment advice during the RFP process, nor is there generally an opportunity to obtain representations back from the prospective client. In SSGA's view, the seller's carve-out should still be available where the "acknowledgement of fiduciary status" was not made by affirmative act of the advice provider.

SSGA also requests that the Department consider additional changes and clarifications to the seller's carve-out. As currently drafted, the seller's carve-out covers only advice provided by a person acting in a counterparty capacity or as a representative of a counterparty and relates solely to an "arm's length" transaction involving a "sale, purchase, loan or bilateral contract." Proposed Regulation at 21957. Because most services agreements are bi-lateral agreements, SSGA understands that the Department intended for the carve-out to be available for services arrangements. However, we request that the Department clarify this in the final rule to ensure that the carve-out is workable for sales of services to plans.

SSGA also requests that the Department consider a change to the seller's carve-out to include within the carve-out instances in which the plan is represented by a fiduciary investment advisor. As currently drafted, the seller's carve-out under the Proposed Regulation applies only to advice provided to the plan fiduciary with authority or control with respect to the management or disposition of the plan's assets. In SSGA's view, this language is more narrow than necessary because there may well be cases in which advice meeting the requirements of the carve-out is provided to other plan fiduciaries, including the plan administrator or other fiduciary responsible for approving the payment by the plan of fees to service providers, and, importantly, a consultant or investment advisor acting in a fiduciary capacity with respect to the hiring of the service provider or counterparty for a transaction. There is no reason that the carve-out should apply only to the plan's discretionary investment fiduciary.

Finally, SSGA suggests that the information requirements included in the seller's carve-out should apply before the time the contract or transaction is entered into, not before the time the advice is given.

The modifications suggested above would result in the following revisions to paragraphs (b)(1)(i)(A), (B)(1) and (C)(1) (shown below in comparison to the Proposed Regulation):

> (A) In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act), the person provides advice to a plan fiduciary who is independent of such person and~~ who exercises authority or control with respect to the management or disposition of the plan's assets~~, with respect to an arm's length sale, purchase, loan or bilateral contract <u>(including, without limitation, a contract for services)</u> between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract, if ~~prior to providing any recommendation with respect to the transaction,~~ <u>reasonably in advance of the date such sale, purchase loan or contract is executed</u>, such person satisfies the requirements of either paragraph (b)(1)(i)(B) or (C) of this section.
>
> (B) Such person—

(1) Obtains a written representation from the independent plan fiduciary ~~that the independent fiduciary exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act),~~ that the employee benefit plan has 100 or more participants covered under the plan, and that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

(C) Such person –

(1) Knows or reasonably believes that the independent plan fiduciary has fiduciary responsibility relating to employee benefit plans with assets, in the aggregate, of ~~for managing~~ at least $100 million in employee benefit plan assets (for purposes of this paragraph (b)(1)(i)(C), when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed for the plan to determine the value and, in the case of an independent fiduciary acting with respect to ~~as an asset manager for~~ multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the aggregate value of employee benefit plan assets under advisement ~~under management~~);

SSGA also requests that the Department clarify the requirement to "fairly inform" the fiduciary receiving advice of the "nature of the person's financial interests in the transaction." In the context of services to be provided to a plan, we believe the provision of information required by the regulations under ERISA §408(b)(2) should be sufficient to meet this requirement. Thus, paragraphs (B)(2) could be modified as follows (shown below in comparison to the Proposed Regulation):

(2) Fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction. For purposes of this Paragraph (2), any disclosure required to be provided under ERISA section 408(b)(2) and applicable regulations with respect to the provision of services or a proposal to deliver such services shall be sufficient to "fairly inform" the independent fiduciary;

While SSGA understands that the Department has reservations regarding the appropriateness of a sales carve-out with respect to products and services offered to individual participants, beneficiaries and IRA owners, it is SSGA's view that unless a carve-out is included for smaller plans, such smaller plans will be unable to receive information from sophisticated providers who will limit interaction with such plans. SSGA currently provides services to over 700 plans with assets between $10 and $100 million. In many instances, these smaller plans are part of an institutional client that has multiple plans, many of which are significantly over the $100 million asset threshold. These smaller plans are also typically represented by an independent fiduciary who acts as a consultant or investment advisor for purposes of helping with selection and monitoring of plan investments. We believe this market would be better served if institutional investment managers such as SSGA continued to provide to services to these plans.

In the Proposed Regulation, the Department sought comment on whether it would be appropriate to utilize other conditions or tests as proxies "for identifying persons with sufficient investment-related expertise to be included in a seller's carve-out." Proposed Regulation at 21942. SSGA believes that plans represented by a fiduciary independent of SSGA should qualify for the seller's carve-out so long as the independent fiduciary's responsibilities (whether as an investment advice fiduciary, discretionary investment fiduciary or fiduciary by reason of having responsibility for plan administration) relate to one or more plans which, in the aggregate, have at least 100 participants or more than $100 million in assets.

For plans not represented by an independent fiduciary that is also a "covered service provider" as defined in ERISA section 408(b)(2), SSGA asks the Department to consider utilizing the threshold for meeting the definition of an "eligible contract participant" found in Section 1(a)(18)(A) of the Commodity Exchange Act (the "CEA"). In this regard, the CEA (as modified by Title VII of the Dodd-Frank Act and interpreted by the Commodity Futures Trading Commission), restricts the types of market participants that are permitted to enter into or provide guarantees with respect to a "swap," a term defined by the CEA to include, for instance, any interest rate swap used by a borrower to protect itself against increased borrowing costs under a loan. Thus, every entity, including an employee benefit plan, seeking to enter into a swap for purposes of hedging interest rate risk under a loan must qualify as an eligible contract participant. In SSGA's view, this measure of sophistication is appropriate, consistent with the Department's desire to avoid a seller's carve out in the "retail" retirement space, and will avoid the odd result that a plan large enough to enter into a swap transaction is nonetheless prevented from receiving a sales presentation regarding selecting as a plan investment a bank collective investment fund or mutual fund designed to replicate the performance of the S&P 500 index.

ii. Comments regarding the Education Carve-Out

SSGA supports the Department's decision to expand the guidance first offered in IB 96-1 to cover, as part of the education carve-out within the Proposed Regulation, communications not just between plan sponsors and participants, but also communications from others (including plan service providers and potential service providers) to plans, fiduciaries, participants, beneficiaries and IRA owners. SSGA also appreciates that the Proposed Regulation includes in the education carve-out information related to retirement income needs past retirement and associated risks (including longevity risks and health care and other expenses in retirement). Like the Department, SSGA is particularly focused on ensuring that retirees have available solutions to address income needs in retirement. In particular, SSGA asks the Department to further clarify the implications of the Proposed Regulation on lifetime income issues.

On October 24, 2014, the Department of Treasury provided guidance (Notice 2014-66) that allows, among other things, a plan to incorporate into its fund lineup a series of age-restricted target date funds without violating the non-discrimination rules of ERISA if the series of funds incorporates unallocated deferred annuities, even if certain of the funds within the series would have not otherwise met the non-discrimination requirements. The guidance also provided an example regarding how an investment manager could manage such a series of target date funds by making purchases of unallocated deferred annuities starting at age 55 on behalf of the target participants in the plan's fund. The example suggested that the target date fund would "dissolve" once the target participants reached "normal retirement age", with income payments commencing at that point. The Department issued corresponding guidance via a letter to the Department of Treasury, dated October 23, 2014, indicating that such a series of funds could serve as a qualified default investment alternative under certain circumstances and clarifying the fiduciary liability of plan sponsors making the decision to hire investment managers in providing such a series of funds.

The Proposed Regulation makes clear that advice regarding the management of securities or other property, including IRA rollovers, is covered advice. SSGA is concerned about the implications of the Proposed Regulation with respect to the development of lifetime income products that may seek to employ the joint guidance from October 2014. A fund such as that described in the joint guidance may necessitate the rolling over of plan assets into an IRA or distributed to another vehicle offered by an insurance company for the orderly administration of the income payments commencing at the participant's "normal retirement age". SSGA seeks clarity with respect to the fiduciary status of parties that may be involved in the resultant rollover. Lifetime income marketplace development is vital to ensure that the participants in today's defined contribution plans have an opportunity to secure their future the way defined benefit plan participants were afforded such security through defined benefit plans in the past. The joint guidance from the Department and the Department of Treasury makes it clear that retirement income in the defined contribution plan market is critically important. SSGA believes that insurance companies, recordkeepers and other parties that would not otherwise serve in fiduciary capacities may be unnecessarily deemed fiduciaries if the clarification of this point is not addressed. The Proposed Regulation may have an unintended negative impact on the development of a lifetime income product for defined contribution plan participants.

II. Comments Regarding Amendments to Certain Prohibited Transaction Exemptions

a. Amendments to PTE 77-4

As an investment manager with discretionary investment responsibility for ERISA plan assets, SSGA utilizes PTE 77-4 for investments by separately managed account clients and pooled vehicles into SSGA registered funds. The Department has proposed to amend PTE 77-4 to include as new conditions certain "Impartial Conduct Standards." These standards require: (1) the fiduciary to act under a "best Interest" standard of care which seems to roughly equate to ERISA fiduciary duty standards of prudence and loyalty; (2) that the fiduciary receive no more than reasonable compensation in relation to the services provided; and (3) that the fiduciary's statements regarding investments, fees, any "material conflict of interest" and "any other matters relevant" to an investment decision not be misleading. Proposed Regulation at 22035, 22041. Further, the proposal provides that a failure to disclose a material conflict of interest "relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement." Id.

With respect to ERISA plans and plan assets vehicles, ERISA §404 already applies to transactions that comply with PTE 77-4. In order to satisfy these standards, a fiduciary is already under a duty not to charge unreasonable fees and not to mislead clients. In addition, PTE 77-4 already includes conditions relating to the types of compensation that a fiduciary may receive and still utilize the exemption, and conditions relating to disclosures that must be provided by the fiduciary in connection with the exemption. Furthermore, because PTE 77-4 is designed to provide relief for compensation received by a plan fiduciary where such fiduciary has an interest that could affect its judgment as a fiduciary, every transaction relying on the exemption will necessarily involve a "material conflict of interest" (defined as a circumstance under which a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary). Thus, the requirement to disclose any "material conflict of interest" embedded requirement is effectively a change to the existing disclosure requirements of PTE 77-4. The change is concerning because it does not give guidance regarding the extent or type of disclosure necessary to avoid a "misleading" statement.

The Department rejected a similar approach in its final 408(b)(2) regulations, in part due to concerns raised by commenters about the lack of specificity in required disclosures regarding conflicts of interest leading to inconsistent disclosures and "over – disclosing" (See Preamble to Interim Final 408(b)(2) Regulation, 75 Fed Reg. 41600, 41610). For the same reasons, SSGA urges the Department to reconsider this element of the proposal as well.

SSGA is also concerned by another statement in the preamble describing the amendments to PTE 77-4. Specifically, the Department notes that "significant violations of applicable federal or state law could amount to violations of the Impartial Conduct Standards, such as the best interest standard, in which case these exemptions would be deemed unavailable for transactions occurring in connection with such violations." The Department should clarify this statement and should provide specific guidance regarding its application.

b. Request for Comments Regarding Proposed Low Fee Streamlined Exemption

The Department requested comments on whether to issue an additional streamlined exemption for compensation received in connection with investments by plans or IRAs in high quality, low fee investment products. The Department noted that such a low fee streamlined exemption would be premised on a fee comparison and would require the product to be the lowest fee option.

As a threshold matter, although SSGA believes that cost is a critical factor to be considered by plan fiduciaries, it should not by itself be the determining factor in the selection of funds for the plan. Further, although SSGA believes that this issue is worthy of further analysis, we urge the Department to consider this low fee exemption separate from the Proposed Regulation, as the complexities of drafting/revising such an exemption could prove unduly burdensome considering the ongoing work to implement the Proposed Regulation among other Department priorities.

STATE STREET GLOBAL ADVISORS.

When the Department does consider this issue further, SSGA suggests that an alternative method for developing such an exemption be considered, based on a threshold set by the Department rather than a comparison to determine the very lowest fee option in a given asset class. This would continue to permit plans and IRAs to have options while also managing the same material conflict of interest concerns the Department is seeking to address.

III. Conclusion

SSGA appreciates this opportunity to provide comments to the Department on this important initiative. Further, SSGA would be pleased to make representatives available to the Department to further discuss any of the comments provided herein. We look forward to working closely with the Department to ensure that both proper protections and proper regulatory certainty are in place to best serve the retirement needs of American workers.

Sincerely,

Kristi Mitchem
Executive Vice President
Head of Institutional Client Group for the Americas, State Street Global Advisors

STATE STREET GLOBAL ADVISORS

Redline of § 2510.3-21(a)(2)(ii), § 2510.3-21(b)(1)(i), § 2510.3-21(f)(1), § 2510.3-21(f)(6)

Subchapter B—Definitions and Coverage under the Employee Retirement Income Security Act of 1974

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

3. The authority citation for part 2510 is revised to read as follows:

AUTHORITY: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1-2011, 77 FR 1088; Secs. 2510.3-21, 2510.3-101 and 2510.3-102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237. Section 2510.3-38 also issued under Pub. L. 105-72, Sec. 1(b), 111 Stat. 1457 (1997).

4. Revise § 2510.3-21 to read as follows:

§ **2510.3-21 Definition of "Fiduciary."**

(a) *Investment advice*. For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (b) of this section, a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if—

(1) Such person provides, directly to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner the following types of advice in exchange for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(ii) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(iii) An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA;

(iv) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (i) through (iii); and

(2) Such person, either directly or indirectly (e.g., through or together with any affiliate),—

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section; or

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient ~~for consideration in making~~, and where a reasonable recipient would view the advice as being provided for the purpose of enabling investment or management decisions with respect to securities or other property of the plan or IRA. Under this paragraph (2) advice reasonably viewed as being provided by a person (either alone or alongside another person or other persons) in an educational, marketing or sales capacity is presumed not to be provided for the purpose of enabling an investment determination, unless circumstances dictate otherwise. Also under this paragraph (2), a disclaimer of fiduciary status, or an affirmative statement that information is provided for educational, marketing or sales purposes will not result in a presumption that the advice is not provided for the purpose of enabling an investment or management decision.

(b) *Carve-outs – investment advice.* Except for persons described in paragraph (a)(2)(i) of this section, the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (6) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section.

(1) *Counterparties to the plan*— (i) *Counterparty transaction with plan fiduciary with financial expertise.* (A) In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act), the person provides advice to a plan fiduciary who is independent of such person and, ~~who exercises authority or control with respect to the management or disposition of the plan's assets,~~ with respect to an arm's length sale, purchase, loan or bilateral contract (including, without limitation, a contract for services) between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract, ~~if,~~ reasonably in advance of the date such sale, purchase

loan or contract is executed ~~prior to providing any recommendation with respect to the transaction~~, such person satisfies the requirements of either paragraph (b)(1)(i)(B) or (C) of this section.

(B) Such person—

(1) Obtains a written representation from the independent plan fiduciary ~~that the independent fiduciary exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act),~~ that the employee benefit plan has 100 or more participants covered under the plan, and that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

2) Fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction. For purposes of this Paragraph (2), any disclosure required to be provided under ERISA section 408(b)(2) and applicable regulations with respect to the provision of services or a proposal to deliver such services shall be sufficient to "fairly inform" the independent fiduciary;

(C) Such person –

(1) Knows or reasonably believes that the independent plan fiduciary has fiduciary responsibility relating to employee benefit plans with assets, in the aggregate, of ~~for managing~~ at least $100 million in employee benefit plan assets (for purposes of this paragraph (b)(1)(i)(C), when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed for the plan to determine the value and, in the case of an independent fiduciary acting with respect to ~~as an asset manager for~~ multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the aggregate value of employee benefit plan assets under advisement ~~under management~~);

(f) *Definitions*. For purposes of this section—

(1) "Recommendation" means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or

refrain from taking a particular course of action. For purposes of this paragraph (f)(1) the following shall not constitute a recommendation: (a) a proposal by a person (either alone or alongside another person or other persons) to perform services for the plan; or (b) a mere endorsement by a person (either alone or alongside another person or other persons) of a product or service including the person's own products or services.

(2)(i) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code, and

(ii) "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(3) "Plan participant" means for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(4) "IRA owner" means with respect to an IRA either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) "Plan fiduciary" means a person described in section (3)(21) of the Act and 4975(e)(3) of the Code.

(6) "Fee or other compensation, direct or indirect" for purposes of this section and section 3(21)(A)(ii) of the Act, means any fee or compensation for the advice provided in paragraph (a)(1) received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The term fee or other compensation includes, for example, brokerage fees, mutual fund and insurance sales commissions. For purposes of this paragraph (6), consideration received by a person (or by an affiliate) pursuant to a reasonable contract or arrangement as described in ERISA section 408(b)(2) or Code section 4975(d)(2) will not be viewed as "incident to" a transaction involving the hiring of the person to provide the services described in the contract or arrangement.

(7) "Affiliate" includes: Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such

person; and any corporation or partnership of which such person is an officer, director or partner.

(8) “Control” for purposes of paragraph (f)(7) of this section means the power to exercise a controlling influence over the management or policies of a person other than an individual.