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SUBMITTED ELECTRONICALLY

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

Re: Definition of Fiduciary Proposed Rule

Ladies and Gentlemen:

The U.S. Department of Labor ("Department") published a proposed rule relating to the definition of investment advice ("Proposal") in the Federal Register on October 22, 2010 (75 FR 65263). The proposal would redefine the circumstances under which a person is considered to be a "fiduciary" by reason of giving investment advice to an employee benefit plan, a plan's participants, or an individual retirement account ("IRA") owner.

This response to the Proposal is submitted on behalf of the group of financial service companies for which FMR LLC is the parent company and which is known as Fidelity Investments (collectively, "Fidelity Investments"). Fidelity Investments provides record keeping, investment management, brokerage, and trustee or custodial services to thousands of Internal Revenue Code ("Code") Section 401(k), 403(b) and other retirement plans covering millions of employees and their beneficiaries and over 8.5 million IRAs.

We appreciate the Department's recent actions to ensure the development of a complete record for any revisions to this long-established regulation, including the notice of a public hearing and the extension of the deadline for the submission of written comments to February 3, 2011. However, as discussed in Section I below, we are concerned that given the breadth and timing of the proposed changes, the regulatory process has not been sufficiently coordinated with other regulatory projects that have a substantial bearing on the matters addressed by the Proposal. In addition, as discussed in Section II below, we have a number of serious substantive concerns with the Proposal itself.

- I. The Department should coordinate with the SEC on development of a fiduciary standard and related rules governing investment advice.

The Securities and Exchange Commission (“SEC”) has been charged under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) with the responsibility to study the standards of care applicable to broker-dealers and investment advisers with respect to the provision of personalized investment advice to retail customers. In addition, the SEC is authorized to issue regulations that would subject broker-dealers to the fiduciary duty standard currently applicable to investment advisers. The study mandated by the Dodd-Frank Act was released by the SEC staff on January 21, 2011, less than two weeks before the extended deadline for comments on the Proposal. The Dodd-Frank Act study recommends that the SEC initiate a regulatory project to establish a uniform fiduciary standard for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.

As currently structured, the definition of investment advice in the Proposal is the same whether the advice is provided to a plan fiduciary or to participants or IRA owners, including participants or IRA owners who may be receiving the advice from an entity potentially subject to the fiduciary standards contemplated by the Dodd-Frank Act. In fact, individuals seeking personalized investment advice typically want investment solutions that are appropriate for the range of assets they own whether held in non-retirement retail accounts, IRAs or employer retirement plan accounts such as 401(k) accounts. Without coordination, individuals and their advisors will be faced with potentially different and/or overlapping fiduciary standards and other rules governing advice services.

Having chosen to reconsider its long-standing regulation on investment advice at the same time that the SEC was mandated by Congress to review and possibly regulate the same conduct, the Department has an unprecedented opportunity to coordinate with the SEC to create a coherent regulatory structure that would result in consistent rules across account types. This coherent regulatory structure would, as the SEC study contemplates, provide for investor access to varied investment products and compensation arrangements that would maximize investor choice and protection and minimize confusion, complexity and cost for both investors and advisers. Section 3 of Presidential Executive Order 13563 issued on January 18, 2011, on improving regulation and regulatory review, states in part:

...some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory

actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization.

Both the Department and the SEC should seize this opportunity to coordinate, simplify and harmonize the fiduciary standard and related rules to be applied to broker-dealers and investment advisers.

By the same token, failure to do so will almost certainly result in redundant, inconsistent, and overlapping requirements. While not entirely clear, it appears that the recommended SEC regulation would apply to personalized investment advice about securities held in non-retirement retail accounts and IRAs. The Department's Proposal applies to IRAs and 401(k) and other plan accounts. Absent coordination and standardization by the agencies, therefore, it appears that broker-dealers and investment advisers would be subject to the SEC's rules with respect to non-retirement retail accounts, the Department's rules with respect to 401(k) accounts, and both the SEC's and Department's rules with respect to IRAs.

Moreover, the recommended SEC rules and the Department's proposed rules do not align in significant ways. For example, as noted on page 88 of the SEC staff study, ERISA imposes certain absolute prohibitions on certain dealings absent a statutory or administrative exemption while the Dodd-Frank Act expressly provides that the receipt of commission-based compensation, or other standard compensation, for the sale of securities does not, in and of itself, violate the uniform fiduciary standard as applied to a broker-dealer. In addition, Dodd-Frank Act Section 913 provides that offering only proprietary products by a broker-dealer shall not, in and of itself, violate the uniform fiduciary standard, but may be subject to disclosure and consent requirements.

There does not appear to be any substantive basis for defining fiduciary status and its potential consequences differently based solely upon the type of account in which the individual receiving the advice happens to hold his or her investments. Put simply, the type of individual account should not determine the status of that individual's adviser or the consequences of that status. Yet, there is a high likelihood that this would be precisely the result if the SEC's and the Department's current regulatory efforts are not coordinated.¹

¹ In its Proposal, the Department has specifically asked for comment on whether it should expand the Proposal to include recommendations with respect to plan distributions. We are submitting a separate letter commenting on that issue. However, the question would be moot if the same fiduciary rules applied to 401(k) accounts, IRAs and non-retirement retail accounts. Concerns about the application of the ERISA framework to plan distributions thus appear to have more to do with the consequences of a conflicting and uncoordinated regulatory structure than with the semantic question of whether distribution decisions constitute investment decisions.

In sum, therefore, we respectfully request that the Department withdraw the Proposal and coordinate with the SEC to ensure that broker-dealers and registered investment advisers are subject to a coherent regulatory framework that imposes uniform and coordinated rules on investment advice services to retirement plans, IRAs and non-retirement retail accounts and that provides investors wide choice in investment options and compensation arrangements.²

II. The Department should make significant substantive changes if it proceeds with the Proposal in its current form.

(1) The New Basic Definition

The approach set forth in the Proposal would replace the current rule with a much more expansive definition accompanied by several limitations (exceptions) to the new definition. Although the Department identified several relatively narrow concerns in the Proposal preamble as the reason for revisiting the investment advice definition, the Proposal makes sweeping changes that would impose fiduciary consequences in a wide range of circumstances unrelated to the identified concerns. For example, the concerns expressed in the Proposal preamble focus primarily on services and information provided to plan fiduciaries but the Proposal itself applies to a much broader set of services and information, including that provided to plan participants and IRA owners. We respectfully question whether the magnitude of the Proposal would be beneficial for plans, plan participants or IRA owners given its impact and additional costs.

The current definition of investment advice in Regulation Section 2510.3-21(c) covers both discretionary authority to make and implement investment decisions without further direction from a plan fiduciary, as well as advice that requires implementation by the plan or another plan fiduciary. This juxtaposition of discretionary management with non-discretionary advice services in the current regulation speaks to the high degree of reliance on the advice provider that is required for fiduciary status. The law treats a non-discretionary investment advice fiduciary as the equivalent of a discretionary manager. Therefore, the relationship between the non-discretionary advice provider and the recipient should reflect the expectations of the parties that there is a degree of reliance similar to that present in a discretionary management relationship. Accordingly, the current regulation appropriately imposes several conditions that attempt to assess the expectations of the parties before applying the fiduciary standards of ERISA and prohibited transaction provisions of ERISA and the Internal Revenue Code apply.

² In the event the Department determines not to coordinate with the SEC in regulating the same subject matter, we request that the Department extend the Proposal comment period further to allow the submission of comments after we have had sufficient time to analyze the results of the SEC study and the SEC response.

However formulated, the investment advice definition should require a reasonable expectation on the part of both parties that the advice or recommendations are subject to a high level of reliance by the advice recipient. The Proposal preamble discusses the ability of a consultant to claim fiduciary status but avoid such responsibility under the current definition (75 FR 65271). We agree that a representation of fiduciary status in providing the advice or recommendation should always create such a reasonable expectation. In other cases, the reasonable expectations of the parties should be determined by the context in which services are provided.

The Proposal would eliminate the requirement that there be a “mutual understanding” that the advice will serve as a primary basis for investment decisions. This condition was added in response to comments when the current regulation was originally proposed, and we think it still serves today the important purpose of tying fiduciary status to expectations of the parties. The Proposal replaces this standard with a requirement that the parties understand (without any mutuality) that the advice may be considered in connection with a decision relating to plan assets. This criteria in no way distinguishes investment advice from investment education – presumably any investment information is intended to be of some use in investment decision-making. Just describing the benefits and risks of different investment options, or even discussing the compensation to be received by a service provider from the investment options, could cross this low threshold. We think that a more rigorous standard is warranted before the information should be deemed to constitute fiduciary activity.

We note that a more rigorous standard based upon the parties’ reasonable expectations would be consistent with the Department’s new interim fee disclosure requirements for service providers. Among other things, those requirements include an acknowledgement of fiduciary status for any such services furnished to the plan. The narrative states that the Department continues to believe that it is important for plan fiduciaries to know whether a party will be providing or reasonably expects to provide services to the plan as an ERISA fiduciary (75 FR 41605). The new fee disclosure rules also require a description of the services provided in return for the fees or other compensation received by the service provider. Absent an acknowledgement or similar representation of fiduciary status by the provider, a mutual understanding should be required for fiduciary status.³

The Limitation set forth in Proposed Regulation Section 2510.3-21(c)(2)(i) (the “Seller Limitation”) could, with certain important modifications, provide a mechanism for appropriately

³ Moreover, where no such mutual understanding that investment recommendations be provided to the plan or its participants exists, there should be no obligation for investment advice or education to be disclosed as a service under the Section 408(b)(2) regulation.
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defining the scope of the new basic definition of investment advice. In particular, the Seller Limitation as proposed would limit the investment advice definition for a person who can demonstrate that the recipient reasonably should know that the advice or recommendation was provided in the person's capacity as a purchaser or seller (or as agent of the purchase or seller) of securities or other property "whose interests are adverse to the interests of the plan or its participants or beneficiaries," and was not intended as impartial investment advice. However, the terms "purchaser" and "seller" are undefined and could be interpreted too narrowly to refer only to a person acting as, or as an agent for, the legal owner of a security or other property. In addition, the "adverse interest" requirement would not generally square with the plan fiduciary's or participant's, or IRA owner's view of his or her relationship with the provider.

There are many situations in which an adviser may not be acting strictly in the capacity of a legal owner or its agent but would not reasonably be expected to be acting in a fiduciary capacity by an advice recipient. For example, if a 401(k) plan service provider's phone representative provides assistance to a plan participant or beneficiary who is reviewing his or her plan investments, the participant should know whether the phone representative's organization or its affiliate makes investment options available to the plan and whether the provider earns compensation from the investment options offered under the plan. The Department's recent fee disclosure rules require such disclosure in any event. Assuming that the provider makes it clear that the assistance is not intended as fiduciary investment advice, a reasonable understanding of that point would be mutual. There is no reason why the Seller Limitation should not be available to the service provider under these circumstances merely because the service provider is not acting as, or as an agent for, the legal owner of the investment options in question.

Similarly, we believe that the Seller Limitation's "adverse interest" requirement is misplaced. In the development of a revised regulation under Section 408(b)(2) of ERISA, the Department considered a requirement that service providers disclose whether there are any "potential" conflicts in the provider's role vis-à-vis the plan. In response to numerous comments, however, the Department concluded instead that full disclosure of the circumstances of the provider's receipt of compensation from third parties would best address the issue (75 FR 41601). Following a similar approach here would allow plan fiduciaries, participants and IRA owners to adequately assess the potential for conflict without the need for a specific (and potentially incorrect) characterization that may simply confuse the recipient.

It may well be that a service provider or its affiliate will benefit more from one investment than another. In terms of common interests, however, the provider should want (and need) the recipient or customer to benefit from its assistance. Notwithstanding concerns about whether advice is provided on a "regular" basis, most providers want to maintain a long-term relationship. The need for the provider to establish and maintain an understanding of adversity

of interest with the recipient of its services runs contrary to that theme. The critical point is that the recipient understands the provider's role, including the range of its services and the manner in which it will be compensated, and receives specific disclosure on whether provider compensation may vary based on the investments or products the recipient selects.

As mentioned above, the Proposal would require an understanding that the investment information or education is not intended as impartial investment advice. This understanding, combined with disclosure on whether the provider's compensation may vary based on the investments or products selected, should ensure that Proposed Regulation 2510.3-21(c)(2)(i) fulfills its purpose. Accordingly, we ask that the Department change the framework of the Proposal to address the reasonable reliance issue directly by modifying the Seller Limitation as described herein as well as making the additional changes below.

(2) Fiduciary Status for Other Reasons

Proposed Regulation section 2510.3-21(c)(1)(i)(B) would provide that a recommendation regarding the purchase or sale of securities would constitute investment advice if provided by a person who is a fiduciary for a reason other than providing investment advice. This would contradict the basic analytical framework in ERISA §3(21)(A) that a person is subject to the fiduciary standards of ERISA only to the extent that he or she is acting in his or her fiduciary role. The Department has followed this functional approach in prior regulatory guidance. For example, see Regulation Section 2550.408b-2(e)(2). The Proposal would confer fiduciary responsibility on services that would not otherwise be treated as such solely because of the person's fiduciary role for other purposes.

One example is that of a financial institution that serves as the plan's directed trustee. The Department has taken the position that a directed trustee serves as a fiduciary to the plan, notwithstanding its narrow set of fiduciary responsibilities in the role. For example, see Field Assistance Bulletin 2004-03. Where an employee or agent of the trustee (or of an affiliate) provides participants with investment information, the Proposal could subject the directed trustee to fiduciary status for providing investment advice, notwithstanding the lack of any meaningful connection between the directed trustee role and the information provided to participants.

We ask that the Department remove this aspect of the Proposal as an inappropriate alteration of the current analytical framework for fiduciary responsibility. Otherwise, investment information could be provided by one service provider as investment education while a second provider may not provide that investment information, purely because the second provider is affiliated with an entity serving in an unrelated fiduciary role.

(3) The Application of Interpretive Bulletin 96-1

Proposed Regulation Section 2510.3-21(c)(2)(ii)(A) would retain current rules that permit the provision of investment education information and materials within the meaning of 29 CFR 2509.96-1(d) in connection with individual account plans as defined in Section 3(34) of ERISA without giving rise to fiduciary status. Proposed Regulation Section 2510.3-21(c)(4) states that the provisions of paragraph (c) shall also apply for purposes of the application of Code Section 4975 with respect to any plan described in Code Section 4975(e)(1). Although preservation of these rules is welcome, the Proposal would still fundamentally change the landscape for educational services. Interpretive Bulletin 96-1 (the "Bulletin") is specifically formulated as a safe harbor provision so that other educational services not contemplated by the Bulletin could be provided and not constitute investment advice. With the broad sweep of the new basic definition, any activity that goes beyond that contemplated by the Bulletin would likely constitute investment advice when provided by a party identified in Proposed Regulation Section 2510.3-21(c)(1)(ii). Instead of a safe harbor, the Bulletin will become the sole means of providing investment education.

We have read the Proposal to mean that the provision of investment information to an IRA account holder within the categories defined as investment education in the Bulletin would not constitute fiduciary investment advice. Indeed, the Proposal preamble states that the proposed amendments to the regulation apply for purpose of Code Section 4975 regardless of whether such plan is an employee benefit plan. Nevertheless, concerns have been expressed whether the Proposal would apply the Bulletin to IRAs.

The original regulation defining a fiduciary for purposes of the relevant Code provisions was issued by the U.S. Treasury Department pursuant to the statutory division of authority in effect at the time. Following implementation of the Reorganization Plan No.4 of 1978, however, the Department now exercises interpretive authority for the Code prohibited transaction rules in addition to the applicable provisions of ERISA. The Proposal attempts to incorporate the Treasury guidance in a manner that appears to support a consistent framework.

The Bulletin makes the point that its safe harbors apply regardless of who provides the information (e.g. plan sponsor, fiduciary, or service provider), so it does not impose limits inappropriate for an IRA not subject to Title I. We ask that the Department confirm the application of the Bulletin to IRA interactions to avoid any uncertainty on this issue.

(4) Appraisal or Fairness Opinion

The Proposal would expand the definition of what constitutes investment advice to include “an appraisal or fairness opinion, concerning the value of securities or other property.” The Proposal excludes preparation of reports or statements that include the value of an investment to a plan or a participant that is provided in accordance with reporting and disclosure requirements under ERISA or the Internal Revenue Code. However, the definition does not exclude valuations of assets for which there is no recognized market which will serve as a basis on which a plan or IRA may make a distribution.

Under the current regulation, the valuation of such “hard to value” assets is not considered a fiduciary function and is considered an administrative activity performed by a custodian or its agent. However, under the Proposal, service providers that provide such valuations to plans and IRAs would become fiduciaries. This will effectively require these providers to conduct a much more extensive and presumably costly valuation process. Plan and IRA providers that hire vendors to perform these services will need to review and potentially increase their initial and ongoing due diligence and oversight to ensure that such valuation practices satisfy the fiduciary standards of ERISA.

There are two likely outcomes from this proposed change: First, plan and IRA service providers that continue to custody such hard to value assets may need to significantly increase fees in order to cover the additional costs; and second, other providers will decide to limit plan and IRA investments to only assets for which there is a generally recognized market. In the latter case, the Proposal could effectively force a participant or IRA owner to accept a sale at unfavorable prices or a distribution of a hard to value asset to the extent it is unable to be sold and another plan or IRA custodian can't be found, triggering an unwanted taxable distribution. These results would not benefit plan participants or IRA owners.

Another peculiar consequence of the Proposal is that providers could end up applying different sets of fees and/or asset acceptability rules for IRAs and plan accounts versus taxable accounts. For example, brokerage IRAs, apart from applicable contribution limits and taxation of distribution rules, operate much like taxable brokerage accounts where the account owner is permitted to select from a broad universe of investments offered on the broker-dealer's platform. Differing sets of fees and/or rules would lead to confusion and disruption for customers who may wish to structure common or joint investment strategies across their tax-advantaged and taxable accounts.

We ask that the Department consider the additional costs and disruption to plans and IRAs that may result from the proposed rule being made final in its current form. Given those

costs and disruptions, we ask the Department to construct a more narrowly tailored response to the concerns raised in the Proposal preamble.

(5) Investment Advice Exemption Under PPA

Section 601 of the Pension Protection Act of 2006 amended ERISA and the Internal Revenue Code to provide a prohibited transaction exemption for the provision of investment advice to participants and their beneficiaries under individual account plans and IRAs. Although the Department issued final rules under the PPA exemption on January 21, 2009, those rules were first deferred and then ultimately withdrawn later in the year. The Department published new proposed guidance on March 2, 2010. Fidelity Investments submitted comments regarding the new proposed regulation in a letter dated May 5, 2010.

We urge the Department to finish its work on guidance to confirm the application of the PPA exemption. It is particularly important that persons that may be affected by the Proposal have sufficient time to take the conditions of the PPA exemption into account in determining how to proceed under any new definition of investment advice under ERISA. Final guidance under the PPA exemption is necessary in order to make that determination.

(6) Effective Date

The Proposal provides that the revised definition would take effect 180 days after publication in the Federal Register (75 FR 65269). We ask that the Department extend the effective date to at least one year following publication in the Federal Register. In consideration of the extremely adverse consequences of providing a fiduciary service inadvertently, service providers will need a substantial period of time for analysis and preparation.

The Proposal in its current form would substantially alter the manner in which service providers deal with plan sponsors and other fiduciaries, plan participants and beneficiaries and IRA account holders. Such changes would require new training of personnel, the revision of a variety of disclosure materials and substantial modifications to the systems that support investment education services. Some roles would be characterized as fiduciary in nature for the first time. Finally, services providers need to determine whether use of the PPA exemption discussed in (5) above would be warranted by the regulatory changes.

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We appreciate the opportunity to submit these comments for your consideration. Please let me know if any additional information would be helpful in your deliberations.

Respectfully,



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