American Federation of Labor and Congress of Industrial Organizations

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February 3, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

Re: Definition of Fiduciary Proposed Rule
Docket ID EBSA-2010-0050-0001 (RIN 1210-AB32)

Ladies and Gentlemen:

On behalf of the more than 12 million working men and women of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and Working America, its community affiliate, we offer our comments on the proposed rule on the Definition of the Term "Fiduciary" issued on October 22, 2010 by the Department of Labor ("Department").[1]

The proposal updates the rule issued more than thirty-five years ago and is designed, as the Department explains, to "… more broadly defin[e] the circumstances under which a person is considered to be a 'fiduciary' by reason of giving investment advice to an employee benefit plan or a plan's participants."[2] It does so by expanding both the scope of advice and recommendations that may result in fiduciary status and the categories of advice providers.

The AFL-CIO commends the Department's decision to re-examine the current rule which is, in our view, too narrow. Plan fiduciaries and participants must be able to determine when

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1 The proposed rule is published at 75 Fed. Reg. 65263-65278.

2 75 Fed. Reg. at 65263

advisers rendering investment advice are subject to ERISA's fiduciary standards and whether the advice they receive may be affected by undisclosed conflicts of interest. We support the proposed rule and its more expansive interpretation and provide suggested clarifications.

The most significant change made by the proposed rule is the modification of the current five-part test as reflected in paragraph (c)(1)(ii)(D). The elimination of the existing requirements that advice be provided on a regular basis and that it be the primary basis for investment decisions appropriately recognizes that fiduciary status should not depend on these fine distinctions. The proposed rule, in our view, more closely reflects the expectations of plan fiduciaries in retaining investment advice providers.

As discussed below, we have two concerns that we suggest the Department clarify in the final regulations. First, the proposed rule may unintentionally treat professionals who provide services to the plan and plan fiduciaries within the scope of their professions as providing investment advice. Second, the limitation in paragraph (c)(2)(i) may expose participants to conflicted investment advice.

Taken together, proposed paragraphs (c)(1)(i) and (ii)(D) may result in considering other professionals, such as plan counsel, to be fiduciaries rendering investment advice as they perform work within the scope of their profession. For example, plan counsel may be asked to provide an opinion about whether a particular investment is permitted under the plan's investment policy or other governing documents. The response could be considered, under the language in paragraph (c)(1)(i)(A)(2), as a recommendation on the advisability of the particular investment. Similarly, if plan counsel advised plan fiduciaries to retain an independent fiduciary to manage a particular plan asset to satisfy their fiduciary obligations under ERISA, this legal advice could be viewed as advice or a recommendation with respect to the management of securities or other property under proposed paragraph (c)(1)(i)(A)(3).

The rule should be clarified so that plan counsel or other non-investment related professionals that provide services within the scope of their professions are not deemed to be fiduciaries rendering investment advice.

We are concerned about the apparent scope of the limitation set forth in paragraph (c)(2)(i) involving advice and recommendations made in the selling of investments. The limitation permits the provision of conflicted investment advice if the person does not represent or acknowledge that he or she is acting as a fiduciary <u>and</u> demonstrates that the recipient of the advice knows or reasonably should know, that: (1) the advice or recommendation is made in the person's capacity as a purchaser or seller (or as an agent of, or appraiser for, the purchaser or seller); (2) the interests of the person are adverse to the plan or its participants; and (3) the person does not undertake to provide impartial advice.

Even if this exclusion is appropriate with respect to plan fiduciaries, it is certainly not appropriate for participants. In our view, individuals providing advice to plan participants should and must always be fiduciaries, and they should be truly independent advisers.

The proposed limitation, as applied to participants, undermines the already inadequate protections afforded by the statutory investment advice prohibited transaction exemption set forth in Sections 408(b)(14) and 408(g) of ERISA.[3] While fiduciary advisers complying with the statutory exemption's requirements fall outside the proposed limitation,[4] other advice providers may choose not to comply with those requirements and rely instead on the new exception provided under the proposed rule.

In the preamble to the proposed rule, the Department solicits comments "... on whether and to what extent the final regulation should define the provision of investment advice to encompass recommendations related to taking a plan distribution."[5] As the Department acknowledges, its Advisory Opinion 2005-23A concluded that advising a participant to take a distribution, even combined with a recommendation on the future investment of that distribution, was not "investment advice" under the current rule. The Department notes its position raised concerns about whether participants were adequately protected from advisers providing recommendations that subordinate participants' interests to their own.[6]

The AFL-CIO urges the Department to include recommendations related to a plan distribution as investment advice under the final regulation. A recommendation to take a distribution and invest the assets reflects an opinion about the options available under the plan compared to investments available in the market In addition, taking a distribution will impact a participant's retirement security whether through its impact on future investment returns or its affect on the availability of payment options available under the plan, including lifetime income options Treating those who make distribution recommendations as fiduciaries will afford additional protections to participants, especially by making the participant aware of any financial interest the adviser may have in making an investment recommendation for the distribution.

We appreciate the opportunity to provide comments on the proposed rule, and we hope our comments are helpful to the Department as it prepares the final rule. Should there be any questions about these or comments or if we can provide additional information, please do not hesitate to contact me at (202) 637-5169.

Sincerely,

Karin S. Feldman
Benefits and Social Insurance Policy Specialist

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3 The investment advice exemption was added by Section 601 of the Pension Protection Act of 2006, Public Law 109-280, 120 Stat. 780 (Aug. 17, 2006).

4 Fiduciary advisers must acknowledge their fiduciary status in order to avail themselves of the exemption. *See* ERISA Section 408(g)(6).

5 75 Fed. Reg. at 65266.

6 *Id.*