WELLS FARGO

Wells Fargo Retirement
MAC D1050-140
Three Wachovia Center
401 S. Tryon Street, 14th Floor
Charlotte, NC 28288-1156
wellsfargo.com/retirement

February 3, 2011

Via Email: *e-ORI@dol.gov*

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

Re: *RIN 1210-AB32*
Attention: Definition of Fiduciary Proposed Rule

Dear Ladies and Gentlemen:

On behalf of all of its affiliates, Wells Fargo & Company ("Wells Fargo") appreciates the opportunity to provide comments to the Department of Labor (the "Department") on the proposed regulation, published on October 22, 2010, which would substantially amend the current and longstanding regulatory interpretation of fiduciary status under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Wells Fargo is a financial services company that provides a number of trust, recordkeeping, administrative, and investment services to retirement plans covered by ERISA, as well as individual retirement accounts ("IRAs").[1] Wells Fargo holds over $245 billion in IRA assets, $221 billion in institutional retirement plan assets, $261 billion in custody assets, and provides services for over 3.6 million retirement plan participants, making Wells Fargo the 5th largest IRA provider and 6th largest institutional retirement plan recordkeeper (based on assets) in the United States.[2] Wells Fargo also provides a broad array of clearing, brokerage, and other investment and transaction-related services to ERISA-covered plans and IRAs.[3] As such, the proposed regulation significantly impacts not only Wells Fargo but also a great number of the customers to whom we provide financial services.

---

[1] Any reference to an IRA should be taken to apply to Education Savings Accounts, Health Savings Accounts, and similar tax-deferred accounts subject to Internal Revenue Code §4975, but frequently not subject to ERISA.
[2] Source: Cerulli Associates (based on 1Q10 assets), September 2010. Sources: PLANSPONSOR Magazine (based on sales), July 2010; and Cerulli Associates, July 2010.
[3] Wells Fargo is a financial services company employing almost 280,000 team members. Its businesses include Wells Fargo Funds Management which serves as the investment adviser to the *Wells Fargo Advantage Funds*, with over $250 billion in assets under management across fourteen different share classes, each with its own arrangement for the payment of distribution costs and related shareholder services. Wells Fargo's broker dealer subsidiaries include Wells Fargo Advisors, LLC ("WFA"), which administers almost $1 trillion in client assets through 15,100 full-service financial advisors in 1,100 branch offices in all 50 states and 5,900 licensed financial specialists in 6,610 retail bank branches in 39 states and HD Vest Financial Services with 5,100 independent advisors. WFA also includes First Clearing LLC which provides clearing services to 107 correspondent clients and WFA.

In the proposed rule, the Department expands the interpretation of fiduciary status under ERISA §3(21)(A) by redefining the activities that constitute the provision of "investment advice for a fee or other compensation." We understand that the Department hopes thereby to reach individuals and entities that it believes should appropriately be held liable as fiduciaries, either for activities or guidance that reasonably appears to the client to be fiduciary in nature or for activities that are in and of themselves fiduciary in scope. However, we believe that the proposed regulation as it is currently drafted may have specific impacts that the Department did not intend and we hope that our comments may provide valuable information to the Department as it considers the language of the proposed regulation.

I. The Department should clarify that the exemption for certain general reports and statements includes reports and statements required by other laws or regulations.

The proposed regulation includes in "investment advice" the provision of advice or an appraisal or fairness opinion concerning the value of securities or other property.[4] It goes on to exclude from these activities "the preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements of the Act [ERISA], the Internal Revenue Code, and the regulations, forms and schedules issued thereunder, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries."[5] While we applaud the Department for recognizing that plan and IRA custodians and trustees must include certain valuations on statements required under ERISA or the Internal Revenue Code[6], the exclusion does not address the other typical ways in which valuations must be provided. Broker-dealers, broker-dealers who act as clearing firms, and banks have an independent requirement to provide regular statements of accounts to their customers, beyond the requirements of ERISA or Internal Revenue Code. Generally, such statements are subject to other regulatory requirements regarding content and format and may be required more frequently. Customers are unlikely to notice or distinguish between a statement that may be required by the Internal Revenue Code or ERISA, as opposed to other law or regulation. In addition, such statements may serve to comply with the requirements of several regulators (for example, an end of year statement may function as a broker-dealer's required statement and as a substitute Form 5498). Applying a different standard to general statements provided to customers depending on the nature of the law or regulation requiring such statement provides no additional protection to customers and puts an undue liability on statement providers who must provide the statements as a compliance matter. Therefore, we respectfully request that the exclusion for general reports or statements be expanded to include reports or statements required under other laws or regulations.

II. The Department should remove the limitations on the exemption for general reports and statements.

Although the proposed rule does broadly exclude general statements and reports required under ERISA or the Internal Revenue Code, it limits the exclusion to valuations that are determined on a "generally recognized market," unless the valuation will not serve as the basis for a distribution. Since benefits due

---

[4] Proposed §2510.3-21(c)(1)(i)(A)(1).
[5] Proposed §2510.3-21(c)(2)(iii).
[6] See EBSA Reg. §2520.103-5 and IRS Interpretive Letter EP:R:9 regarding valuation of IRA assets, dated February 24, 1993.

to an individual from an IRA or individual account plan are determined by account balance, the statement for an IRA or individual account plan account may always serve as the basis for a distribution. Therefore, as written, any valuation that is not determined by a "generally recognized market" may fall out of the exclusion. However, there are a number of instances in which such a valuation might be required to be made for a statement. For instance, securities prices reflected on client statements may not reflect values derived from a "generally recognized market" when securities are thinly-traded or are illiquid. In those instances, broker-dealers and clearing firms typically rely on outside quotation services, computerized pricing services, or on methodology based on the most recent "bid-price" or last reported transactions. For certain investments, the investment's value is determined by a third party and merely reported on the statement. For instance, the values of many unregistered investment funds are determined by the fund manager. For limited partnership holdings or other hard-to-value assets, the client may also direct the bank or broker-dealer to accept valuations from a third party or an investment may be held at par. In some instances, statement providers do not serve as custodian or trustee for the IRA or ERISA plan. Even when the statement provider is also a custodian, most custodians would not view themselves as a fiduciary to the plan or IRA merely by providing a value received from a third party on a legally required statement. The imposition of fiduciary status will most likely be in conflict with the contractual arrangement between the parties. To compensate for the increased responsibility that comes with fiduciary status, banks, broker-dealers, and other financial service providers will likely charge more for their services, which in the end increases the costs borne by plan participants and IRA owners. Additionally, providers may refuse to accept assets that are not clearly covered under the exclusion, leading to fewer investment choices for plan participants and IRA owners. For these reasons, we suggest that the limitations on this exemption should be removed.

III. The Department should clarify that custodians and directed trustees for Employee Stock Ownership Plans holding non-publicly traded stock are not fiduciaries with respect to third party appraisals.

For ESOPs holding employer stock that is not publicly traded, the proposed change will have a substantial impact on the availability of custodial and trust services. A custodian of an ESOP holding non-publicly traded stock would not expect to be a fiduciary by virtue of including a valuation for the stock on required statements, particularly since the valuation comes from another party in many cases. Plan trustees serving in a directed capacity have a heightened concern. At the encouragement of other areas of the Department outside of the Office of Regulations and Interpretations, directed trustees will often review appraisals provided by an appraiser to verify if the appraisal meets certain minimum standards commonly used in the appraisal industry. Such standards are typically referred to as "Uniform Standards of Professional Appraisal Practice." This type of review and verification is often considered by directed trustees as a requirement for taking "proper" direction under ERISA §403(a), as discussed in Field Assistance Bulletin 2004-03. However, under the proposed regulation, such activity could constitute investment advice, giving a directed trustee fiduciary and discretionary authority over the appraisal, clearly contrary to the parties' intentions. Such a broad interpretation could have a significant impact on the fee arrangements for such plans, as fees may increase to address enhanced responsibility. Many professional service providers may no longer be willing to become involved with plans holding non-publicly traded stock (or other non-publicly traded assets), which would mean that individuals, rather than professional service providers, may end up operating and administering such plans. The use of non-professional service providers may result in a significant detriment to plan participants.

If the verification of appraisal standards does constitute "investment advice" under the proposed regulation, a related question is whether an asset based fee would then be prohibited under ERISA §406(b), as the directed trustee's "advice" over the value of the assets could affect the fee they collect. If so, the proposed changes would have a significant impact on one of the most common fee arrangements used by plan providers. So that plan providers, and the clients and participants they serve, have clarity around this issue, the Department should determine whether such verification of appraisal work would constitute investment advice under its proposed regulation, and if so, revise the regulation to remove such a practice from being "investment advice" to avoid the detrimental effects noted above.

IV. The Department should clarify what constitutes a "generally recognized market."

We would encourage the Department to provide additional guidance on what may constitute a "generally recognized market" for different types of assets. For example, most understand that there is a market for real estate, but the characteristics of that market are quite different from those of the market for stocks traded on the New York Stock Exchange. If the Department believes a "generally recognized market" requires the equivalent of a stock exchange, a large number of plan and IRA assets will be at issue, either because of liquidity issues or because the investment does not trade through an exchange-type market. Absent greater clarity and a broader exclusion for general statements and reports required by other regulatory authority, we are concerned that IRA custodians and other parties who provide investment account services for IRAs and ERISA-covered plans may substantially limit the types of investments that IRAs and ERISA-covered plans may hold in their accounts or substantially increase the cost of holding such assets, which ultimately will negatively impact plan participants and IRA owners.

V. The Department should clarify that the valuation activity of certain funds is not the provision of advice, an appraisal, or a fairness opinion.

The Department should consider clarifying when advice, etc. is provided "to a plan, a plan fiduciary, or a plan participant or beneficiary" as required in proposed §2510.3-21 (c)(1)(i)(B). For example, many investment advisors provide valuations for funds they advise. Investments within registered investment companies are not considered plan assets, nor are investments in unregistered investment funds unless certain threshold levels of plan investors are met.[7] Such values are provided for the fund itself, and then passed on to the investors of the fund, including retirement plans. If such valuations were considered fiduciary activity under the proposed regulation, the regulation would circumvent specific ERISA statutory requirements which exclude such funds as plan assets. New concerns could arise over the manager's compensation (typically expressed as a certain percentage of the funds' assets) if the manager is the party valuing the fund. The Department should clarify that these valuation activities of funds which are not considered plan assets are not being provided to plans, etc. under paragraph (B) or otherwise not be considered investment advice.

VI. The Department should make clear that "investment education" includes information about distributions.

[7] ERISA §401(b)(1) and Labor Reg. §2510.3-101. In practice, our experience shows that most managers of unregistered funds maintain plan investors at a low level so as to not trigger the plan asset rules.

We applaud the Department's clear exclusion from fiduciary activity for "investment education," as described in 29 C.F.R. §2509.96-1(d), provided in connection with an individual account plan.[8] However, in order to make sure individuals are getting the help they need, we encourage the Department to consider expanding the scope of information that would be considered "investment education" beyond the definition included in current regulations. Specifically, while 29 C.F.R. §2509.96-1(d) describes many important types of educational information, it does not clearly include certain information that we think is objective in nature and important for plan participants. For instance, current guidance clearly includes information regarding plan investment and contribution and retention of assets within the plan prior to retirement. However, most participants eventually reach retirement age or terminate employment and must make critical decisions about their plan balances. At that time, participants benefit from an objective explanation of all of their options under the plan, including whether to take a distribution, roll over the account to an IRA or subsequent employer's plan, or to leave their account within the same plan.

In that regard, the Department specifically requested comments on whether providing educational information to participants taking a distribution from a retirement plan should be treated as investment advice. For the reasons set forth herein, we strongly believe that this type of information should constitute investment education, which is consistent with the Department's earlier guidance under Advisory Opinion 2005-23A. Generally, plan sponsors and plan administrators rely on financial institutions to help operate the retirement plans they sponsor. Part of the services provided typically include call centers that provide information to plan participants regarding the plans. Since plan administrators generally have an interest in ensuring participants are well educated, this information often includes education about the distribution options available to participants. Upon terminating their employment, many participants call because they are unsure about their options and what the various financial/tax implications may be. Service provider call centers often provide critical information to such participants, including whether the participant can leave the funds in the plan, take a cash distribution, or rollover the funds to another retirement plan or IRA. As recognized by the Department,[9] rolling over the account balance is often the best option for participants as it preserves the tax-deferred nature of their retirement benefits. Our experience has shown that participants who are more informed of their distribution options are more likely to roll over their retirement benefits instead of cashing them out, which, as the Department has noted, is generally in the participants' best interest.

If this type of distribution education is elevated to the level of fiduciary investment advice, the additional responsibilities that would be imposed on financial institutions may cause financial institutions to stop providing this service to participants. This would create a void in participant education that would further exacerbate the retirement crisis that exists today. For these reasons, the proposal should not be extended to cover discussions about plan distributions.

VII. The Department should expand the class of persons who may receive "investment education."

We also encourage the Department to consider expanding the class of persons who may receive non-fiduciary investment education. IRA owners, for instance, would benefit from the same sorts of investment education materials described in the current guidance. There does not seem to be any reason why the types of educational information listed in 29 C.F.R. §2590.96-1(d) should not be considered investment advice when provided to a participant in an individual account plan, but could be investment

---

[8] Proposed §2510.3-21(c)(2)(ii)(A).
[9] See Field Assistance Bulletin 2004-2.

advice if provided to an IRA owner. To the extent that it is unclear whether information is included in the "investment education" exclusion, plan and IRA service providers may restrict the information provided to plan participants, plan fiduciaries, and IRA owners, to the detriment of all of these parties.

VIII. The Department should expand the exclusion for marketing and objective information.

As part of the proposed regulation, the Department has excluded from fiduciary activity the provision of general financial information and data used to assist a plan fiduciary's selection or monitoring of investments, as well as certain marketing and platform activity, if certain requirements are met.[10] We agree that these activities should not be considered fiduciary in nature and respectfully suggest that the exclusion should not be limited to individual account plans. These activities are just as important to other types of retirement plans and IRAs. In order to make informed decisions, plan fiduciaries and IRA owners and beneficiaries need information. Expansion of the exclusion to other types of plans and accounts will enhance the types of information available to these plans and accounts, while still meeting the Department's objective of making sure that the recipient of information understands the role of the provider.

For example, once a participant has selected an IRA provider, the participant may ask the IRA provider about investment options. Depending upon the financial institution servicing the IRA, the participant may have various options – certificates of deposit of varying rates and terms, savings accounts, stocks, bonds, mutual funds, and other investments. An IRA owner may face a bewildering number of choices if the universe of possible investments is not somehow reduced. For instance, IRA owners may choose from among over 8,000 mutual funds[11] for investment of an IRA's assets. Some IRA providers may attempt to explain the investment options available to individuals. Brokers in particular may discuss with the new IRA owner what their objectives are, time horizons, risk tolerance, etc. to get some idea of which investments could be suitable for the IRA owner, to meet their legal requirement to offer investments that are suitable for their client. If IRA providers are considered to be giving investment advice through this practice, it would be a radical departure from the current state of affairs and could require significant changes in fee structures, as in general IRA providers or their affiliates often earn some compensation from the investments selected by the IRA owner. If IRA providers are unable to give this type of guidance due to prohibited transaction concerns if they are fiduciaries, they may not give any at all, further reducing information available to IRA owners on their investments, leading to poorer returns.[12] Or they may have to change to an investment advisor model where participants are charged a flat basis point fee instead of commissions or other compensation. While such an arrangement is not necessarily better or worse than the alternatives, IRA owners will end up with fewer choices – either an investment advisory model or no assistance at all – and many would likely benefit from something in between but which will be much less available.

---

[10] Proposed §2510.3-21(c)(2)(ii)(B)-(C).

[11] As of year end 2009, 2010 Investment Company Factbook.

[12] The Department has previously noted the benefit to participants of having adequate investment information (see the supplementary information to the participant disclosure final regulation at 75 Fed. Reg. 64910), and the benefit of having retirement assets invested appropriately (see the supplementary information to the qualified default investment alternative regulation at 72 Fed. Reg. 60452).

IX. The Department should clarify the limitation in Proposed §2510.3-21 (c)(2)(i).

In section (c)(2)(i) of the proposed regulation, a person is not considered to be giving investment advice if the recipient knows or should know the person is acting as a buyer/seller of the property in question. The Department should clarify that this exception is available in situations where the recipient knows or should know that the person has an interest, regardless of the specific transaction or whether the interest is "adverse."

For example, as discussed previously, participants receiving distributions and IRA owners choosing investments from a financial institution should know that the financial institution or its affiliates may benefit from the participant/IRA owner selecting the IRA/investment associated with the financial institution. An IRA owner selecting a mutual fund from a distributor of that fund should know that the distributor or an affiliate may gain financially from the transaction, even though the transaction may not be considered a buyer/seller type of transaction as the proposed regulation contemplates. A similar situation may arise from a manager valuing an unregistered investment fund that "sells" the fund to a plan/IRA. Furthermore, in these and many other situations, the interest is not necessarily "adverse."

In these situations, even though the transaction is not a quintessential buyer/seller transaction, under the facts and circumstances the recipient of any "advice" should be able to determine that the person has a financial interest in the transaction and should be covered by the limitation in (c)(2)(i). The Department should delete the requirement to be "adverse" as in many transactions, the financial interest is not necessarily adverse. The Department could also consider allowing the person to give a disclosure of some kind similar to those in (c)(2)(ii)(B) & (C) so that the parties are clear that one is not intending to provide fiduciary investment advice, although we suggest that the requirement of written disclosure may not be appropriate in all instances. Since most service providers will seek to satisfy (c)(2)(i) in instances where they believe they do not act as a fiduciary, we request that the Department thoughtfully consider and clarify the information required for an appropriate disclosure under (c)(2)(i).

X. The Department should make clear that certain recordkeeping practices fall within the exceptions in Proposed §2510.3-21 (c)(2)(ii)(B) and (C).

Recordkeepers of individual account plans frequently provide assistance to plan fiduciaries selecting investment options. For example, recordkeepers may provide information to fiduciaries regarding the performance of investment options, investment style, etc. when the fiduciary is reviewing the investment options in its plan. A recordkeeper may also provide sample fund line-ups to fiduciaries in order to give plan fiduciaries introductory information regarding cost and other factors. These types of practices are common in the industry, and provide plan fiduciaries with critical information, but are not intended by either party to constitute investment advice for a fee. The Department should clarify that such practices are not considered investment advice under its proposal. For example, paragraph (B) requires that making available a platform not take into account "the individualized needs of the plan," and (C) cross references back to (B). However, both of the practices mentioned above may be viewed as taking into account the plan's individualized needs. For example, if a plan fiduciary wants to replace an international fund, recordkeepers will provide the fiduciary with international fund information, which would seem to take into account the plan's individualized needs. A sample fund line-up could have the same concern. Given that the exceptions each provide for a disclosure noting impartial investment advice is not being provided, the plan fiduciary should already be aware that the assistance is not meant to be investment advice. For these reasons, the Department should clarify that these exceptions apply to the general recordkeeping practices of providing general information to plan fiduciaries.

XI. The Department should clarify that a mutual understanding over the advice should be required in order to be considered "investment advice."

Section (c)(1)(i)(D) as proposed allows all statements made to be considered "advice" if the advice *may be considered* in connection with the investment or management decisions over plan assets. In addition, the Department has removed the requirement that the understanding between the parties be mutual; presumably under the proposal, only the opinion of the recipient is relevant in determining whether certain statements should be construed as advice.

"May be considered" is an extremely broad term that could perceivably cover any statement made, no matter how informal. Further, without a mutual understanding, individuals and entities could easily become fiduciaries unknowingly. Given the heightened standard of care placed on fiduciaries, the Department should consider whether it is fair and equitable to put individuals in such a position without their knowledge. For example, a financial entity may hire a real estate appraiser or broker to appraise various properties for the financial institution's various accounts. Some accounts could be subject to the proposed regulation while others (e.g., personal trust accounts) may not. The appraiser may never know which accounts, if any, are subject to the Department's proposal; he or she may just have a list of properties to appraise for the financial institution, and concerns over privacy may limit the financial institution's disclosures to the appraiser. Presumably, under the proposal, the appraiser would become a fiduciary providing investment advice for a fee, and may not have any idea of his or her heightened responsibility. A similar concern could arise with a manager of an unregistered investment fund where the manager values the fund; such a manager may not know the exact identity of underlying investors, such as where the fund is comprised of other commingled funds. Without a mutual understanding, the Department should consider whether it is equitable to impose fiduciary status on individuals without their knowledge, especially when altering long-standing practice.

For these reasons, the Department should require the understanding between the parties be mutual, and require a higher standard than just allowing the advice to "may be considered;" better would be to have a materiality threshold of some sort along with the mutual understanding.

XII. The Department should limit affiliates which become fiduciaries "indirectly" under Proposed §2510.3-21 (c)(1)(ii)

The proposed regulation contains categories of individuals and entities that may become fiduciaries indirectly under paragraph (c)(ii), giving the example of "through or together with any affiliate." While it is acceptable that the individual or entity giving advice may become a discretionary fiduciary because of that, "indirectly" sweeps much more broadly. For example, many financial institutions have a number of investment advisors within the meaning of section 202(a)(11) of the Advisors Act. Under the proposed regulation as written, all of them would meet this requirement even though they had nothing to do with a particular plan. Directed trustees would also be included under section (c)(1)(ii)(B)[13] yet would not be offering any advice under what are generally understood to be the duties of a directed trustee. There is

---

[13] The Department noted this in Field Assistance Bulletin 2004-3 that directed trustees are fiduciaries under ERISA §3(21)(A)(iii).

no apparent rationale for including affiliates this broadly – while the entity offering advice may become a fiduciary because of that advice, related entities should not be viewed as offering the advice just because they are affiliated. For these reasons, "indirectly" should be removed from this requirement. Indeed, the Department should consider removing paragraphs (B) and (C) altogether as entities that meet those definitions would also come under (A) or (D) if they are offering investment advice; what (B) and (C) add is unclear in the context of investment advice.

We hope these comments have been helpful and we hope that the Department will consider them while determining the proposed regulation's scope and form.

Best regards,

Joseph Ready
Executive Vice President
Wells Fargo Institutional Retirement and Trust