NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308

MARK H. AYERS
CHAIRMAN

RANDY G. DEFREHN
EXECUTIVE DIRECTOR
E-MAIL: RDEFREHN@NCCMP.ORG

VIA WWW.REGULATIONS.GOV

February 3, 2011

The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2524
Washington, D.C. 20210

Re: Proposed Rule on Definition of Fiduciary [RIN 1210-AB32]

Dear Ms. Borzi:

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to provide these comments on the proposed rule on the definition of the term "fiduciary" published by the Departments of Labor on October 22, 2010.

As you know, the NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million active and retired American workers and their families who rely on multiemployer plans for retirement, health and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans, and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries.

The purpose of the proposed rule as stated in the Preamble is to "protect beneficiaries of pension plans and individual retirement accounts by more broadly defining 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."[1] Clearly, the current rule is narrower than definition of who is a "fiduciary" by reason of rendering investment as stated in ERISA §3(21). The current rule establishes a five-part test for fiduciary status by reason of rendering investment advice in place of the two-part test in the statute.

[1] 75 Fed. Reg. 65263-65264.

The NCCMP agrees with the need for the Department's re-examination of these rules. We share the Department's concern that changes in types and complexity of investment products available to plans and changes in professionals that plan fiduciaries seek for their impartial assistance and expertise in investment related matters make it vitally important that plan fiduciaries know if advisers rendering investment advice are subject to fiduciary standards and not affected by conflicts of interest that they need not disclose. It is our experience that such non-fiduciary advisers are more likely to be retained by smaller plans (multiemployer plans as well as single employer plans) that may not have access to other plan professionals to advise them on the process and importance of establishing the fiduciary status of investment advisers.

While we agree with the need for re-examination of this rule and the changes proposed by the Department we are concerned that some of the proposed language may have an overly broad reach that may impact service providers unintended by the Department. Based on the proposed language, plan professional advisers performing typical work within the scope of their profession may come within the proposed definition of "fiduciary by reason of rendering investment advice". As a result plan costs will increase if providers believe that they must obtain fiduciary insurance because of the broad provisions in this rule.

Example: During the process of entering into a new investment, at some point plan counsel will review the contract and make a recommendation to the plan fiduciary whether the contract, as a legal matter is acceptable or requires revisions. Counsel may also contact counsel for the investment product and negotiate changes to the contract. If acceptable changes cannot be negotiated, plan counsel may recommend that the contract not be signed. As illustrated below, the proposed rules seem broad enough to consider plan counsel a fiduciary when reviewing the contract of an investment product and making a recommendation regarding its acceptability as a contract—not as an investment product—to a plan fiduciary.

Paragraph (c)(1)(i)(A)(2) provides that a person is a fiduciary if the person "makes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property." As this is written and without clarification in the preamble or an example, plan counsel's advice regarding the acceptability of the contract could be interpreted as meeting this requirement.

The second requirement is that the person provides the advice or recommendation pursuant to an agreement or arrangement that the advice may be "considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary…." If plan counsel advised not to sign an investment contract for legal reasons this advice would be considered in connection with this investment or management decision, which decision was with respect to plan assets. Plan counsel's advice would likely be individualized to the plan, for example, regarding a representation required by the contract.

A similar analysis would apply to the following situations--

- An observation by plan counsel to the plan fiduciary that FDIC limits are $250,000, a welfare plan's checking account exceeds that amount and that some of the assets should be moved to another bank to keep the deposit under FDIC limits.
- A recommendation by plan counsel to the plan fiduciary to retain a fiduciary adviser to render investment advice.

Both of these situations could be interpreted to be advice as to the management of securities or other property (Paragraph (c)(1)(i)(A)(3)) pursuant to an arrangement that such advice may be considered in connection with making management decisions with respect to plan assets individualized to the needs of the plan.

We believe that the examples cited above were never the intended interpretation of the proposed revision to the fiduciary standards. Plan professionals operating within the scope of their profession should not be discouraged from providing their clients with their best advice on the outside chance that they may unwittingly be swept up in this broad net. Rather, the rule should be clarified that plan counsel or other non-investment related plan professional, providing services within the scope of his or her profession does not become a fiduciary rendering investment advice because the advice provided by the professional (e.g., legal advice) affects the decision of a plan fiduciary to enter into an investment for non-investment related reasons. If many plan professionals can be considered fiduciaries rendering investment advice while providing services typically within the scope of their profession, the costs to plans of professional advice will increase as plan professionals are required to obtain fiduciary liability insurance in addition to professional malpractice insurance.

In the Preamble, the Department requested comment on whether the recommendation should encompass recommendations related to taking a distribution. The Department has previously taken the position that such a recommendation is not investment advice even when combined with a recommendation how to invest the distribution. The Department is concerned that this position may leave participants exposed to non-fiduciary advisers who subordinate participants' interests to their own. The NCCMP agrees that this is a concern. Its affiliates are aware that such advisers do provide information to plan participants that may not take into account the various benefits available to the participants and the eligibility conditions for each. Because of this plan participants may be harmed, for example, if an adviser proposes a lump sum distribution and investment from which the adviser will benefit and as a result the participant loses eligibility for another valuable benefit that was available only for those receiving monthly payments.

The NCCMP agrees that a fiduciary standard should be applied to those persons who advise plan participants in connection with a distribution and who are also providing individualized advice concerning specific investments for the distribution. Consistent with its concern that these rules not harm participants by sweeping too broadly, the NCCMP proposes that care must be taken that the rules do not include (among others) the recommendations of a plan office administrator regarding when to apply for a distribution, going over the plan provisions concerning the rollover rules, discussing the inter-relationship of various benefit plans and issues that the participant may wish to consider when taking a distribution. These and other similar issues are typically discussed with participants by the plan office administrators in his or her role to counsel and assist the participant through the distribution process. This kind of advice does not deal with specific investment alternatives although the administrator may obtain annuity information for the participant and then review the proposals with the participant to help the participant understand them. This kind of assistance to plan participants is important and should not be curtailed by an overly broad definition.

Thank you for the opportunity to provide comments on this important proposed rule. We will be pleased to provide any additional information that you might find useful.

Sincerely,

Randy G. DeFrehn

Randy G. DeFrehn
Executive Director