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April 12, 2011

BY ELECTRONIC TRANSMISSION: E-ORI@DOL.GOV

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Definition of Fiduciary Proposed Rule

Dear Sir or Madam:

I am pleased to submit The Florida Bar Tax Section's attached comments with respect to the Employee Benefits Security Administration's proposed, modified definition of "Fiduciary," as reflected and articulated in the Notice of Proposed Rule published in the Federal Register on October 22, 2010 (i.e., beginning at 75 F.R. 65263) (the "Proposed Rule").

Principal responsibility for these comments was exercised by Robert S. Forman and Lowell J. Walters. The comments were reviewed by D. Michael O'Leary and Guy E. Whitesman. Although the members of The Florida Bar Tax Section (the "Tax Section") who participated in preparing these comments may have clients who would be affected by the Proposed Rule, no such member has been engaged by a client to make a governmental submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments. These materials were prepared by the Comment Projects Subcommittee of the Tax Section.

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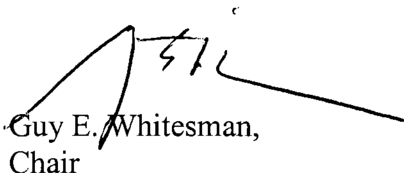
The Tax Section is comprised of approximately 2,000 members of The Florida Bar. The membership of the Tax Section engages in a broad spectrum of the practice of tax law, including (but not necessarily limited to) federal, individual, corporate and partnership income tax; federal estate and gift tax, international tax, state and local tax, as well as employee benefits law.

As always, we will be pleased to provide additional commentary as requested. If the Employee Benefits Security Administration has any questions regarding our comments, please do not hesitate to contact us.

Sincerely,



Guy E. Whitesman,
Chair

Attachment as stated.

cc: Via e-mail only -
Paul Hill, Esq., The Florida Bar
Robert S. Forman, Esq.
Lowell J. Walters, Esq.
D. Michael O'Leary, Esq.
James H. Barrett, Esq.

COMMENTS OF THE FLORIDA BAR TAX SECTION DEFINITION OF FIDUCIARY UNDER PROPOSED RULE

We appreciate the opportunity to provide written comments on the Employee Benefits Security Administration's Proposed Rule modifying the definition of the term "Fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA"). We are aware of the public hearings with respect to this proposed rule on March 1 and March 2 of this year; and one of The Florida Bar Tax Section ("Tax Section") members who participated in the preparation of these comments has reviewed the transcripts from these hearings. Thus, we are cognizant of the time and effort expended by the Employee Benefits Security Administration ("EBSA") on the Proposed Rule, as well as the concerns articulated by the EBSA during the course of the public hearings that prompted the issuance of the Proposed Rule.

We wish to begin by making several preliminary notations. First, in keeping with the request by the EBSA as reflected on 75 F.R. 65264, we are submitting these comments only by electronic means; and will not be submitting a paper copy. Second, in preparing these comments, we have intentionally narrowed the focus of our comments to specific areas of interest which we feel are or may be applicable to attorneys who are members of the Tax Section. Obviously, based on the review of the transcript of the public hearings, we are aware that a great range of issues have been brought to the attention of the EBSA. The fact that the Tax Section's comments do not address some issues brought to the attention of the EBSA during the course of the public hearings on March 1 and March 2, does not necessarily mean that individual Tax Section members do not have any opinions on the subject matters discussed during the course of the public hearings but omitted from these comments. Instead, we wished to focus these comments on several specific issues that we believe are most directly applicable to Tax Section members.

With those preliminary notes in mind, under the Proposed Rule as currently drafted, our concern is that situations may arise where an attorney drafts plan document items or provides legal advice regarding plan compliance issues (i.e., pursuant to ERISA or the Internal Revenue Code of 1986 (the "Code")) in which references to plan investments or assets are involved, and such plan document items and/or advice may be construed as constituting a form of investment advice, thus arguably rendering the attorney in question a "Fiduciary" under the Proposed Rule. We do not believe such a result is intended by the Proposed Rule. The following are several examples which we believe illustrate our concern; followed by suggested language that we request the EBSA consider as it proceeds with issuing the Final Rule.

1. Preparation of Investment Policy Statement(s) and Participant Direction of Investment Agreement(s). Typically speaking, an Investment Policy Statement ("IPS") will provide a broad overview of investment goals and a Participant Direction of Investment Agreement ("PDIA") (assuming all or a portion of a qualified retirement plan's assets are subject to investment direction by the participants) will, inter alia, set forth the specific investment options available to

the participants. These or related documents may describe the establishment and operations of an investment committee (which will usually include individuals who are employees of the plan sponsor as well as outside financial advisors), including procedures for periodically reviewing the performance of plan investments, and the overall investment objectives of the applicable plan.

It is not unusual for an attorney to prepare these documents, or to approve these documents if prepared by another service provider. Normally, the specific references to the underlying investment options will have already been selected by the plan sponsor (or other plan fiduciary) [1] after consultation with the plan's financial advisors. Consequently, at the stage of preparing these ancillary documents, the attorney will be preparing (or reviewing, as the case may be), these ancillary documents for purposes of completeness and compliance with applicable law (e.g., ERISA Section 404(c)) without analyzing the selection of the underlying investment features reflected in these documents.

Nonetheless, our concern is that because the attorney is preparing or reviewing items reflecting certain investment features or options, that legal work may be interpreted under either Proposed Rule Section 2510.3-21(c)(1)(i)(A)(2) or (A)(3) as an implicit recommendation as to the advisability of holding or managing such investment options by the applicable plan, potentially conferring "fiduciary" status on the attorney involved with the case. We believe the intention of the Proposed Rule is to confer fiduciary status on a service provider only when the service provider is undertaking affirmative actions with regard to rendering investment advice, and that the Proposed Rule is not intended to encompass situations where a service provider is merely documenting investment decisions a plan sponsor has already made. This intention under the Proposed Rule can be made explicit by adding appropriate limitation language in the Final Rule, as we discuss below.

2. Preparation of Qualified Default Investment Alternative ("QDIA") and Blackout Notices. Our comments here are analogous to the comments in item 1, discussed immediately-above. ERISA Section 404(c)(5), as enacted by the Pension Protection Act of 2006, and pursuant to regulations promulgated by the Department of Labor, created the QDIA concept to protect plan sponsors from fiduciary liability when a participant has the ability to direct the investment of the participant's account balance in a plan, but declines to do so, by allowing a plan sponsor to be treated as satisfying certain investment responsibilities by investing the non-responsive participant's account balance in a "default" investment option or alternative, provided that the QDIA requirements are met. These requirements include, in part, that the default investment alternative constitutes a permissible QDIA and that certain advance notice requirements are satisfied.

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[1] Please note that, for purposes of these comments, in the interests of brevity, when the term "plan sponsor" is used, such term should also be interpreted as including other plan fiduciaries.

Similarly, a "Blackout Notice" under ERISA Section 101(i) and DOL Regulations Section 2520.101-3 is required whenever there is a restriction on a participant's ability to direct or diversify assets for more than three (3) consecutive business days. In the case of investments affected, the notice must include a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets in their accounts during the blackout period. Furthermore, when the blackout is related to a change in investment options (e.g., a change in investment providers for a plan), the plan sponsor may decide to "map investments," meaning that investments in a discontinued option are transferred to a similar, new option, chosen by the plan sponsor, normally with input from the investment advisor.

Just as is the case with IPS/PDIA documents, it will not be unusual for an attorney to prepare, or review if prepared by another service provider, a QDIA or Blackout Notice for the applicable plan, after the plan sponsor's financial advisor has made recommendations concerning investments. For example, with respect to QDIAs, many financial services providers have developed a sequence of "target date" mutual funds available as a QDIA, with each, respective, target date fund geared towards a participant's current age and expected retirement age. Generally speaking, such a platform of "target date" funds is permissible to serve as QDIAs under the applicable regulations. If a plan sponsor's financial advisor believes that a platform of such "target date" funds is a viable QDIA platform for the plan sponsor (i.e., from an investment standpoint), the attorney will proceed with the preparation of the QDIA notice, reflecting, in part, information applicable to the target date fund platform. Although the attorney at that point in time is preparing the QDIA notice after discussions between the plan sponsor's financial advisor and the plan sponsor, and is thus not rendering investment advice per se, our concern is that as investment alternatives are reflected in the QDIA the attorney's legal services may be considered to confer fiduciary status on the attorney either under Proposed Rule Section 2510.3-21(c)(1)(i)(A)(2) or (A)(3) as the Proposed Rule is currently drafted.

A similar concern is applicable to the preparation of Blackout Notices. Attorneys may be called upon to prepare or review for compliance purposes the incorporation in a Blackout Notice of the required, cautionary language to participants regarding consideration of their existing investment options in light of the impending Blackout period, or the inclusion of language or attachments pertaining to mapping of investment options that merely reflects a plan sponsor's decisions after consultations with the applicable investment provider(s) or advisor(s). This type of Blackout Notice review or preparation should not be treated as conferring fiduciary status on the attorney involved with the Blackout Notice project.

3. Preliminary Legal Advice on the Above Items. Additionally, with respect to items 1 and 2, above, it is not unusual for an attorney to advise the plan sponsor on the need or the benefit of utilizing or establishing an IPS, a QDIA, or to advise the plan sponsor of the requirement of a

Blackout Notice (as applicable). Many plan sponsors seek legal counsel on the advantages and disadvantages of allowing participant direction of investments and/or utilizing QDIAs. In providing that advice, an attorney will discuss plan investments in a general sense, and may use examples to describe the relevant concepts involved.

For example, an attorney may advise a plan sponsor that the use of target date funds will normally qualify as a QDIA and, thus, reduce the plan sponsor's potential fiduciary liability. It is foreseeable that a plan sponsor would rely on this advice and investigate the use of target date funds. Nevertheless, this circumstance should not result in the attorney constituting a fiduciary for the purposes of the Proposed Rule, provided that the attorney does not discuss the specific investment components of different alternative target date funds and the factors that might render a series of target date funds attractive as investment options (as opposed to meeting the requirements of the substantive QDIA rules).

With respect to Blackout Notices, prior to the actual preparation of the Blackout Notice, the attorney may discuss with the plan sponsor the fiduciary liability implications of whether or not to map investment alternatives to a parallel group of investment alternatives (i.e., upon a change in investment platform providers). Again, to the extent legal advice is provided regarding the mapping of investments in such investment platform transitions, and provided that the attorney does not make recommendations or suggestions with respect to the selection of a particular investment option as a recipient fund under a mapping program (i.e., those specific recommendations are reserved to the plan sponsor's investment provider or advisor), such legal advice should not result in the attorney constituting a fiduciary under the Proposed Rule.

4. <u>Reviewing and Approving Contracts and Agreements Between Plan Sponsors and Investment Providers</u>. Service providers generally require a contract between the service provider and the plan sponsor. When the service provider's services include the provision of investment options, the identification of those investment options are often included in the contract. Since the contract imposes legal obligations on the plan sponsor, the plan sponsor will often retain an attorney to review the contract. In this circumstance, the opinion that a contract, in general, is appropriate should not be treated as providing investment advice, absent some evidence that the attorney specifically analyzed the investment options, compared those options to other possible investments, and expressed an opinion on which investments were most appropriate.

5. <u>"Benefits, Rights and Features" Non-Discrimination Testing</u>. The principle of non-discrimination testing with respect to qualified retirement plans is derived from the Code Section 401(a)(4), and the regulations promulgated thereunder. Basically, under the Treasury Department's Section 401(a)(4) regulations, certain "benefits, rights and features" must be available on a non-discriminatory basis. Whether or not a particular "benefit, right or feature" is available on a non-discriminatory basis depends, in large part, on mathematical tests comparing

the availability of a particular benefit, right or feature for non-highly compensated employees to the availability of that benefit, right or feature for highly compensated employees (i.e., in order to satisfy these mathematical tests, certain thresholds of non-highly compensated employees must have access to the benefit, right or feature in question in order for the plan to meet the plan qualification requirements under the Code).

The Code Section 401(a)(4) regulations include, in the definition of "rights and features," the right to a particular form of investment (e.g., a class of employer securities). Unfortunately, these regulations do not provide any elaboration on what constitutes a "particular form of investment" (other than references to different attributes of employer securities, such as voting and liquidation rights). Nonetheless, we would like to submit an example of where we think an attorney may need to analyze various investment features under a qualified plan arrangement for purposes of compliance with Code Section 401(a)(4), and suggest a change to the underlying investment arrangements, but for Code Section 401(a)(4) compliance purposes and <u>not</u> for reasons pertaining to the advisability of a particular series of investment options from a pure investment performance standpoint. The following is such an example.

Let us assume that 401(k) Plan Q is sponsored by Employer Q. Employer Q has two (2) divisions, one division located in Lakeland, Florida; and the other division located in Melbourne, Florida. An attorney in Orlando, Florida is asked by Employer Q to review Q's 401(k) Plan documents. In doing so, the attorney notes that Employer Q has worked with a particular financial planner based in Lakeland who has structured a mutual fund platform from the ABC Family of Mutual Funds for the participants in the Lakeland division; and that Employer Q has worked with a separate financial planner based in Melbourne who has structured a mutual fund platform from the DEF Family of Mutual Funds for the participants in the Melbourne division. There was no particular reason for the variation in the selection of mutual fund families, other than a particular preference by the respective, local financial planners for different families of mutual funds. Let us also assume that the Lakeland participants have a higher concentration of highly-compensated employees of Employer Q than do the Melbourne participants.

As the Orlando attorney reviews the various mutual funds available to the respective Lakeland and Melbourne participants, the attorney notes that each of the ABC and DEF families of mutual fund platforms has equivalent categories of mutual funds available. For example, the ABC Family of Mutual Fund has an international equity fund available for the Lakeland division participants, and the DEF Family of Mutual Fund also has an international equity fund available for the Melbourne division participants; the ABC Family of Mutual Funds has a large cap value fund available for the Lakeland division participants; and the DEF Family of Mutual Funds also has a large cap value fund available for the Melbourne division participants, and so on and so forth.

The Section 401(a)(4) regulations do not articulate any meaningful detail on what exactly is a "particular form of investment option." Accordingly, the Orlando attorney is concerned that because the mutual funds offered are not exactly the same at each location (i.e., different mutual fund families exist at each location), the safest course of action is to advise Employer Q to meet with Employer Q's financial planners, and select one mutual fund family for both the Melbourne and Lakeland divisions. The Orlando attorney is not recommending which mutual fund family is selected, just that the same mutual fund platform is applicable across both the Lakeland and Orlando divisions. Thus, there is no risk that the Employer Q plan may violate the Code Section 401(a)(4) requirements with respect to this particular aspect of Plan Q.

Under the example we have just provided, the Orlando attorney is rendering advice and making recommendations pertaining to investment options, but that advice is rendered in the context of compliance with the non-discrimination requirements of the Code. The Orlando attorney is not rendering advice or making recommendations with respect to the investment options of Employer Q's plan as investment options (i.e., the advisability of selecting a particular investment alternative above another investment alternative). The attorney is completely neutral on which mutual fund family Employer Q selects. Despite this neutrality, again, under our reading of the Proposed Rule, the Orlando attorney could be considered a fiduciary under either Section 2510.3-21(c)(1)(i)(A)(2) or (A)(3) of the Proposed Rule.

Recommendations for EBSA Consideration.

1. Suggested Language for Final Rule. The common theme of our concern regarding the Proposed Rule is that there may be circumstances when an attorney (or, for that matter, other retirement plan compliance consultant or advisor) may be engaged in qualified plan compliance projects, including advising on general fiduciary liability concepts, or document preparation (or review) projects involving, directly or tangentially, plan investments, investment options, or investment procedures, but is neither rendering actual investment advice nor making recommendations with respect to the investment or management of plan assets. Under the current text of the Proposed Rule, an attorney performing these legal and/or compliance functions (or other compliance advisor, for that matter) may arguably be considered to be a "fiduciary" under the Proposed Rule. Our suggestion, in order to clarify the scope of when an attorney or compliance advisor will not be treated as a "fiduciary" under the Proposed Rule, is for the EBSA to add an additional category under the "Limitations" provisions of Section 2510.3-21(c)(2) that would specify the following:

(a) the preparation of plan document materials that pertain to or involve references to plan investments or investment features does not confer or establish fiduciary status on the document preparer, unless the document preparer originates a specific provision, component, or concept that provides investment advice or investment recommendations and is intended to guide

the plan sponsor or a plan participant towards a specific investment, as part of the preparation of such plan document materials;

(b) an analysis, discussion, or inquiry of plan investment features for purposes of evaluating compliance with the Code or with ERISA does not, in and of itself, confer or establish fiduciary status on the service provider performing the evaluation, even if the compliance service provider makes a determination that a change in the investment options or alternatives of the plan in question is advisable, provided that such a determination does not recommend any one particular type of investment feature in favor of another (i.e., that the determination is neutral with respect to varying investment options or alternatives); and

(c) in light of the publication by the Department of Labor and the Internal Revenue Service of "model" amendments or notices (including the EBSA's model Blackout Notice) that may contain information and cautionary suggestions regarding plan investments and investment options, the inclusion of investment-related information through use of a model amendment or notice is specifically excepted from activities which create fiduciary status upon the preparer.

2. Plan Distributions. Lastly, we note that on 75 F.R. 65266, the EBSA invites comments on whether, under the Final Rule, "investment advice" should be defined to encompass situations where recommendations are made by a service provider involving plan distributions. We also note that this issue was addressed on several occasions by various panelists appearing at the public hearings on March 1 and March 2. At this point in time, consistent with our overall focus on issues specifically germane to members of the Tax Section, we take no position on whether, in general, recommendations attendant to plan distributions should or should not establish status as a "fiduciary" under the Final Rule.

We do, however, consistent with our prior comments and drafting suggestions as articulated above, request that, if the EBSA incorporates language in the Final Rule specifically addressing plan distributions, the EBSA should also draft a specific exception under the "Limitations" provisions of Section 2510.3-21(c)(2) for tax advice furnished to a participant with respect to the participant's distribution options, as long as such tax advice does not also incorporate a component of investment advice (e.g., suggesting a particular investment to receive the proceeds of a plan distribution). For example, it is common for attorneys to advise participants about rollover distributions, either directly or indirectly, such as by preparing or approving distribution forms and tax notices, such as those required by Code Section 402(f). We suggest that these activities should be beyond the scope of the Final Rule, in so far as these activities pertain only to tax issues, and not to advice with respect to specific investment options.

We thank the EBSA for its consideration of these comments, as well as the suggested additional limitations for the purposes of drafting the Final Rule.