

Office of Regulations and Interpretations

Employee Benefits Security Administration

Attn: Conflict of Interest Rule, Room N-5655

U.S. Department of Labor

200 Constitution Avenue NW.

Washington, DC 20210

RE: Proposed DOL Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice

To Whom It May Concern:

Francis Investment Counsel LLC welcomes the broadening of the definition of ERISA fiduciary and proposed conflict of interest rule. We have witnessed first-hand the significant harm done to the retirement prospects of too many American workers as a direct result of conflicted investment advice. The past forty years have clearly demonstrated the willingness of certain members of the financial services industry to spend millions on advertising its role as trusted advisor, make repeated verbal assurances to that affect, only to then sell retirement plan participants overpriced products to maximize profits. As justification for their actions, they hide behind indecipherable multi-page conflict of interest disclaimers that allow it to claim the customer made an informed decision. The time has come to put some teeth back into the rules that govern the conduct of the financial services industry and better protections in place for the retirement savings of American workers.

DESCRIPTION OF THE COMMENTER

Francis Investment Counsel LLC ("FIC") is a Wisconsin-based and employee-owned registered investment advisor that was created in 2004 for the sole purpose of providing ERISA fiduciary investment advisory services to both employers and their qualified plan participants. We assist plan sponsors in the selection and monitoring of investment, trust, and recordkeeping service providers as well as provide generalized group financial workshops and individualized one-on-one investment advisory services to plan participants. FIC currently provides these services to approximately 60 mid- to large-sized qualified retirement plans that total over 30,000 participants and more than \$6B in plan assets.

FIC has grown steadily over the past eleven years. Our fixed-fee service model and continued growth refutes the "straw man" argument that organizations accepting full fiduciary responsibility, and receiving no ancillary revenue, cannot thrive in today's retirement plan investment advising marketplace.

1. Regarding the new definition of "fiduciary"

With respect to the carve out provisions for investment advice provided to a plan fiduciary that requires a representation from the plan that it has 100 or more participants, we respectfully suggest that this condition be eliminated. While there are certainly going to be instances in which the plan fiduciary to whom the proposal is being made will have sufficient expertise to evaluate it, we think it is often the case that this expertise is lacking. The "at least 100 or more participants" condition seems to us to be far less likely to have a beneficial impact for plan participants than the "at least \$100 million in plan assets" alternative test. While

successful businesses have great expertise in their own field, it is a given that the employee retirement benefit plans play second fiddle to that main attraction. This can result in less than optimal attention by business owners and managers to the details of the rather complex factors at work in the retirement plan arena. The end result can be arrangements that are less beneficial for plan participants than if the proposals were being reviewed by persons with the requisite retirement plan financial expertise who were also obligated to act in the best interests of participants.

2. EXPAND INVESTMENT ADVICE TO INCLUDE RECOMMENDATIONS TO DISTRIBUTE PLAN/IRA ASSETS.

We wholeheartedly endorse the Department's position to include within the definition of "investment advice" any "recommendations concerning the investment of securities to be rolled over or otherwise distributed from a plan or IRA." In our experience, the number of solicitations posing as objective investment advice has accelerated over the past ten years as the dollars involved continue to expand.

While there is clearly a need for general education about plan distribution alternatives, whenever a financial services representative offers an individualized recommendation the participant should be protected against a sales pitch masquerading as advice. The stakes are just too high for American workers and temptations too great for the financial services industry to allow the current oversight and enforcement regime to continue.

Many participants believe that because their employer makes call center representatives readily available, that these individuals must have their best interest at heart. Unfortunately, when it comes to answering questions regarding plan distributions, this is too often not the case. Some of our clients' plans allow for in-service distributions upon the attainment of a certain age or after a combination of service and age. In our experience, this plan design feature often leads to an increased level of prospecting by local financial services representatives seeking those eligible for such distributions and encouraging the transfer of plan assets to products not available on the plan's investment menu. After a lifetime of accumulating assets for retirement, it is difficult to imagine a situation in which a participant does not have a greater need for unbiased fiduciary advice.

3. THE BIC REGULATION SHOULD BE EXPANDED TO COVER ADVICE TO SMALLER PLAN SPONSORS ON THE COMPOSITION OF AN INVESTMENT OPTIONS MENU.

We believe that expanding the regulation in this way to cover such advice to smaller (fewer than 100 participants) participant directed plans would be a significant advantage to such sponsors and therefore to plan participants by leading to better designed plans.

First, participant directed defined contribution plans are the norm. The number of such plans which do not offer investment direction by participants is miniscule.

Secondly, the initial investment menu selection is critical to the plan's ability to offer participants the chance for a secure financial future. Often, the initial menu will stay in place for a long time. Thus, the plan sponsor's need for unbiased best interest advice is substantial, both at the time of initial selection and on an ongoing basis as changes occur. Expanding the regulation to cover advice to smaller plans in this regard would most likely redound to the benefit of the plan participants and recognizes that smaller plan sponsors are less likely to have the expertise in the retirement plan financial arena that larger plans are more likely to possess.