INVESTMENT ADVISER
ASSOCIATION

February 2, 2011

Via Electronic Filing

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Definition of Fiduciary Proposed Rule

Ladies and Gentlemen:

The Investment Adviser Association ("IAA")[1] appreciates the opportunity to provide comments on the proposed rule defining "fiduciary with respect to a plan" under ERISA in the context of the provision of investment advice for a fee (the "Proposed Rule").[2]

Background

The IAA's members are investment advisers registered with the Securities and Exchange Commission, and must satisfy fiduciary responsibilities to their clients under the Investment Advisers Act of 1940. This fiduciary duty has been upheld by the U.S. Supreme Court[3] and reiterated by the SEC in various pronouncements over the years.[4]

Virtually all IAA members provide investment management services to their ERISA-covered plan clients on a discretionary basis. Under section 3(21)(A)(i) of ERISA, a person is a fiduciary with respect to a plan to the extent "he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." Discretionary investment advisers to plans therefore are fiduciaries under ERISA, and must satisfy fiduciary responsibilities both under the Investment Advisers Act and under ERISA with respect to the assets they manage.

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[1] The IAA is a not-for-profit association that represents the interests of investment adviser firms that are registered with the Securities and Exchange Commission. For more information, please visit our web site: www.investmentadviser.org.

[2] *Definition of the Term "Fiduciary,"* 75 Fed. Reg. 65263 (Oct. 22, 2010).

[3] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 at 186 (1963).

[4] *See, e.g., In re: Arleen W. Hughes*, Exchange Act Release No. 4048 (Feb. 18, 1948).

Scope of Proposed Rule

The Proposed Rule, however, addresses another prong of the ERISA fiduciary definition that does not require discretionary authority or control. Under section 3(21)(A)(ii), a person is an ERISA fiduciary with respect to a plan to the extent "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." The Proposed Rule would amend the circumstances under which a person would be considered to "render investment advice for a fee."

Instead of applying a five-part test universally (as does the current regulation), the Proposed Rule includes a specific provision concerning investment advisers within the meaning of section 202(a)(11) of the Investment Advisers Act.[5] Under this provision, any such investment adviser that rendered investment advice to a plan[6] for a fee would be a fiduciary under ERISA. We suggest the addition of examples, either in the final rule or in the Department's preamble, in order to confirm the scope of paragraph (c)(1)(ii)(C) of the Proposed Rule.

For example, we request confirmation that ERISA fiduciary status would not attach where the adviser, as part of its initial contact with a potential plan client, provided examples of the types of investment advice that the adviser would provide if ultimately hired by the plan to provide "investment advice for a fee." For example, plan fiduciaries regularly issue requests for proposal (RFPs) as part of their fiduciary responsibility to investigate potential investment advisers before hiring them to manage plan assets. We understand that ERISA fiduciary status would not attach if a federally registered investment adviser responded to a plan's RFP, by discussing the investment philosophy and the types of investments it might recommend if the plan were to hire the adviser. At this point in time, the adviser would not be "rendering investment advice for a fee," because it would not have established a relationship with the plan, and would not receive compensation for this activity.

Similarly, an adviser that already has an established ERISA fiduciary relationship with a plan client, or an affiliate of that adviser, may provide general investment-related information or commentary on matters beyond the scope of their existing relationship on an ad hoc basis, via educational newsletters or client conferences, or may discuss potential future services.[7] We understand that, although the adviser is an ERISA fiduciary with respect to the

[5] Proposed Rule paragraph (c)(1)(ii)(C).

[6] We note that the Proposed Rule would require that the investment advice triggering fiduciary status be rendered "to a plan," which includes the plan, plan fiduciaries, and plan participants and beneficiaries. Proposed Rule paragraph (c)(1)(i)(B). Accordingly, investment information in newsletters, conferences, and other general public forums would not constitute ERISA fiduciary investment advice to a plan unless the adviser specifically addressed those communications to one of these entities within the scope of an advisory relationship for a fee. If the Department were to reach a different conclusion, then the interpretation would be contrary to the plain language and intent of the proposal, and, in effect, read paragraph (i)(B) out of the Proposed Rule.

[7] As to the educational activities, the Proposed Rule's limitation in paragraph (c)(2)(ii)(A) regarding investment education materials in the context of participant advice reflects an analogous rationale.

plan assets under its management, it (or its affiliate, as applicable) would not be an ERISA fiduciary by virtue of these activities with respect to any other assets of the plan, as provided in paragraph (c)(5) of the Proposed Rule.[8]

Routine Valuations of Plan Assets

IAA members and other investment advisers often provide investment management through "plan asset" investment vehicles, such as collective investment funds. Administrators of these vehicles, and custodians of other plan assets, generally provide valuations to plans on a routine basis, particularly, but not exclusively, in connection with the plan administrator's preparation of Form 5500. Under paragraph (c)(2)(iii) of the Proposed Rule, valuations provided for purposes of compliance with ERISA's reporting and disclosure requirements would not constitute "investment advice for a fee," unless the report was prepared in connection with certain plan distributions. We assume that routine valuations, even if not prepared specifically in connection with a reporting and disclosure requirement, would not trigger ERISA fiduciary status. In order to avoid confusion, however, we recommend that the final rule clarify that this limitation includes routine valuations of plan assets, including, but not limited to, those prepared for purposes of the reporting and disclosure provisions of ERISA.

Transition Issues

Given the far-reaching changes that the final rule may produce, the effective date of the proposed changes should be further extended to at least 12 months after publication of the final rule in order for advisers and other ERISA fiduciaries to assess the impact of the new rule on the plans' other parties in interest, especially in the context of prohibited transactions.[9] Certain prohibited transaction exemptions, such as the statutory exemptions in sections 408(b)(15) (relating to certain block trades) and 408(b)(17) (relating to service providers), include conditions requiring that the party in interest in the transaction <u>not</u> be a fiduciary. The final rule, therefore, in broadening the universe of ERISA fiduciaries, could automatically limit the applicability of these and other exemptions that currently allow various transactions.

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[8] Paragraph (c)(5) of the Proposed Rule (and paragraph (c)(1) of the current regulation), provide that

> A person who is a fiduciary with respect to a plan by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or having any authority or responsibility to do so, <u>shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice.</u>

(emphasis added). As the remainder of this provision notes, the adviser may still be a party in interest and subject to co-fiduciary responsibilities with respect to the other plan assets.

[9] Plan fiduciaries also should be given sufficient time to identify fellow fiduciaries in light of their co-fiduciary responsibilities under section 405(a) of ERISA.

For example, the final rule may impact advisers' use of third parties to market their services and products.

Until the rule is finalized, and clarification is provided on such key issues, plan fiduciaries and the financial services industry will not be able to assess its impact fully. Furthermore, after the rule is finalized and clarified, plan fiduciaries will need time to apply the rule to their existing relationships and arrangements. Among other things, plan fiduciaries will need to identify new ERISA fiduciaries, and, in some cases, their affiliates.[10] In addition, if administrative exemptions prove necessary, then the effective date of the final rule should be further extended to ensure thorough consideration of such exemptions, including the conditions under which transactions might be permitted, before the expansion of the definition of fiduciary takes effect.

Conclusion

We appreciate the opportunity to provide our views on these issues, and would appreciate the opportunity to meet with the Department to discuss our comments. In the meantime, please do not hesitate to contact the undersigned if we may provide additional information or clarification regarding these matters.

Respectfully submitted,

-s- Kathy D. Ireland

Kathy D. Ireland
Associate General Counsel

[10] *See, e.g.,* ERISA section 408(b)(17).