Great-West
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February 3, 2011

Submitted Electronically – **Re: Definition of the Term "Fiduciary" (RIN 1210-AB32)**

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
e-ORI@dol.gov

Ladies and Gentlemen:

We respectfully submit our comments on the Department's proposed rule (the Proposal)[1] redefining the term "fiduciary" with respect to the provision of investment advice under ERISA §3(21)(A)(ii). Given the significance of this proposal to the cost and availability of retirement plans, we very much appreciate the opportunity to share our thoughts with you.

<u>About Us:</u>

Great-West Retirement Services® ("Great-West"), a business unit of Great-West Life & Annuity Insurance Company, is the fourth-largest retirement plan record-keeper in the United States.[2] We provide 401(k), 401(a), 403(b) and 457 retirement plan services to 24,000 plans representing 4.4 million participant accounts and $138 billion in assets at September 30, 2010. We offer several different investment "platforms" that include both proprietary and unaffiliated investment products. In addition, we offer tools to our platform customers to assist their decision-making, including Fund Performance Reviews that provide information about the performance of platform investment options against selected criteria. Our services and products are marketed both by employees of Great-West and also by independent broker-dealers, Registered Investment Advisors, insurance agents and other financial advisers. Our extensive experience in assisting retirement plan fiduciaries and participants informs our analysis of the Proposal.

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[1] 75 Fed. Reg. 65263 (Oct. 22, 2010)

[2] Based on total participant accounts at year-end 2009, as ranked by *Plan Sponsor* magazine in June 2010.

Overview:

We agree that the retirement landscape has changed significantly since the Department's adoption of the current regulation at 29 C.F.R. § 2510.3-21(c) 35 years ago, and we support the Department's goal of improving the quality of advice received by plans and participants. However, we are concerned that the overly broad scope of the Proposal as currently written will not achieve this goal, but may instead impose significantly higher costs on plans and participants than the Proposal projects, and inhibit educational and marketing efforts that promote workplace retirement plans.

The determination of fiduciary status is an issue of fundamental importance to both plans and service providers, as fiduciary status affects, directly and indirectly, the cost and availability of services. In assessing the professional insurance needed, the permissibility of a compensation arrangement under ERISA's prohibited transaction rules, or the potential liability and responsibility of the provider and its employees, a service provider must be able to know, in advance and with certainty, whether it will be an ERISA fiduciary to its plan clients. Similarly, the plan must be able to determine whether the service provider will be a fiduciary in order to assess the reasonableness of the providers' fees and its capabilities in providing the services in question.

The Proposal greatly expands the potential scope of fiduciary status under ERISA. We acknowledge the Department's attempt to limit this expansion through certain exceptions (such as for sales, platform operators, investment education and reporting and disclosure valuations); however, we are very concerned that these exceptions are neither sufficiently clear nor sufficiently broad. The ultimate impact of the Proposal on the fiduciary status of service providers depends on the interaction between the general rule and all of the exceptions, and the text of these provisions is not sufficiently clear to allow us to discern either the intended or the actual scope of the Proposal. Our comments seek to identify for the Department those provisions in the Proposal that are ambiguous or are likely to cause significant dislocation in common plan activities, and we offer suggested revisions attempting to address these concerns. However, we request that the Department use these comments to develop and publish a new proposed rule. Reproposing the rule is the best way to ensure that the Department strikes the proper balance in our voluntary employee benefits system, protecting the interests of participants while not unnecessarily—or unintentionally—increasing costs and reducing services.

Broad General Scope:

The current regulation addresses two types of advice: recommendations regarding the *value* of securities and other property, and recommendations regarding the *advisability* of investing in, purchasing or selling securities or other property. For one giving such advice, the regulation establishes a five-part test: one is a fiduciary if the advice is (1) individualized, (2) provided regularly, (3) for a fee, (4) and provided pursuant to a mutual agreement (5) that the advice will be the primary basis for the plan's decision-making. All five of the requirements must be met for an advisor to be deemed an ERISA fiduciary.

According to the Preamble to the Proposal, the Department believes that the current requirement of meeting all five elements of the current regulation is too limiting, and permits conduct that is harmful to the interests of participants. However, we believe the effect of the Proposal would go well beyond addressing these concerns, and furthermore would result in significant transitional costs as many service providers respond to the uncertainty of the new proposal by either becoming fiduciaries - with the attendant costs of changing business models, including revising common variable compensation arrangements - or eliminating any services that might be construed as advice. In either event, we believe the resulting cost to plans and participants under the current Proposal would exceed the benefits the Department projects. For these reasons, the Department should reevaluate the projected costs and modify the Proposal to better tailor its requirements.

- Broad Definition of Covered Adviser

Under the Proposal, the five-part test of the current regulation would be replaced with four stand-alone provider categories; a service provider who falls within any one of the four would be deemed a fiduciary. We do not object to all of these categories—for example, we agree that an adviser representing itself as an ERISA fiduciary for the purposes of providing investment advice should be held to that standard, as paragraph (c)(1)(ii)(A) of the Proposal provides. However, we are concerned about the potentially very broad scope of two of the four categories.

Affiliate Fiduciary Status and Bundled Services

The second category in paragraph (c)(1)(ii)(B) of the Proposal would capture a service provider who is already a fiduciary to the plan for another purpose, even if "indirectly (e.g., through or together with any affiliate)." We urge the Department to clarify in the Proposal that this is not intended to conflict with the position taken by the Department in Aetna Advisory Opinion 97-16A (AO 97-16A) that a record-keeper in a bundled service arrangement will not be considered a fiduciary itself merely as a result of its affiliation with a person who is a fiduciary.[3] We do not believe that a record-keeper in a bundled service arrangement should be subject to fiduciary investment adviser status merely because an affiliate is, for example, an ERISA §3(38) investment manager with respect to the plan. Bundled service providers offer a very valuable and cost-effective service to plans, and clarification of this paragraph will help reduce confusion regarding the fiduciary obligations of service providers within the bundle, as well as ensure parity with independent record-keepers.

[3] In AO 97-16A, the Department wrote, "You have assumed that ALIC, an affiliate under common control with ALIAC, is a fiduciary with respect to the Plans by virtue of exercising authority or control over Plan assets invested in separate accounts maintained by ALIC. There is nothing, however, in your submission to indicate that ALIAC is in a position to (or in fact does) exercise any authority or control over those assets. Accordingly it does not appear that ALIAC would be considered a fiduciary merely as a result of its affiliation with ALIC."

Very Broad "May Be Considered" Standard

The fourth category (in paragraph (c)(1)(ii)(D) of the Proposal) is so broadly written as to likely include a very large proportion of service providers currently offering non-fiduciary services to plans. It requires merely an understanding that the advice "may be considered" in the fiduciary's decision-making and "will be individualized" to the needs of the plan or participant. Non-fiduciary service providers will find it very difficult to answer common plan questions, such as questions about automatic enrollment, Qualified Default Investment Alternatives ("QDIA") selection, or the differences between specific investment options, without providing "individualized" advice that "may be considered" by the fiduciary. Indeed, the Department should wish to encourage service providers to give fulsome answers to these questions, but the current Proposal discourages helpful answers with the threat of fiduciary status.

Further, the broad scope of paragraph (c)(1)(ii)(D) of the Proposal likely will capture many service providers who traditionally have not been fiduciaries under the plan, resulting in higher costs for plans and participants. For example, ERISA plans and plan asset investment vehicles[4] commonly retain attorneys to provide legal advice in connection with complex financial transactions. Such legal advice could easily be construed as a recommendation for a fee regarding the advisability of an investment under paragraph (c)(1)(i)(A)(2) that is individualized and may be considered by the plan under paragraph (c)(1)(ii)(D). Similarly, common services provided by accountants and actuaries relating to valuation or the new "management" form of advice (see discussion below) may well be captured by the broad scope of the "may be considered" standard.

While the exceptions included in the Proposal (which are addressed in detail below) may somewhat mitigate the broad scope of the general rule, the breadth of this Proposal would deny many plan fiduciaries the discretion to intelligently allocate fiduciary responsibility. If the plan's fiduciaries are willing and capable of bearing full fiduciary authority for investment decisions, the decision to work with non-fiduciary service providers may be prudent and cost-effective. Non-fiduciary service providers under the current regulation are a useful source of information for plan fiduciaries, and help educate plan fiduciaries to better carry out their duties. Because the Proposal undercuts the meaningful insight and experience to be provided by non-fiduciary service providers, it may force plan fiduciaries to hire additional fiduciary service providers, at greater expense.

We urge the Department to consider alternatives to the broad rule of the Proposal, and to revise paragraph (c)(1)(ii)(D) to target the Department's enforcement concerns more precisely. Changing the fiduciary status of a potentially very wide range of service providers does not seem the most efficient means to address the specific enforcement concerns identified by the Department. For example, the Preamble discusses undisclosed conflicts by some non-fiduciary service providers, such as pension consultants. To target

[4] Investment vehicles themselves subject to the fiduciary requirements of ERISA Title I—see ERISA §3(42) and 29 CFR §2510.3-101.

this class of entities, the paragraph could be revised to deem as fiduciaries advisors who provide advice, but fail to disclose such conflicts by referencing the disclosure requirements of the recently-promulgated Interim Final §408(b)(2) regulation.[5] This would significantly reduce the burden of the Proposal on plans, participants and service providers, while addressing the Department's enforcement concerns.[6]

- Expansion of Categories of Advice

Similarly, we are concerned about the scope of the new type of "fiduciary advice" identified in paragraph (c)(i)(A)(3) of the Proposal, advice "as to the management of securities or other property." The Proposal does not define the term "management," and the Preamble notes only that it "would include, for instance, advice and recommendations as to the exercise of rights appurtenant to shares of stock (e.g., voting proxies), and as to the selection of persons to manage plan investments."

As a provider of non-fiduciary record-keeping and investment platform services (among other services), we are concerned by the ambiguity inherent in this undefined concept. We provide our platform and non-platform clients with a great deal of information regarding the investment options selected by the plan's fiduciaries. It is not clear from the Proposal whether any of this information could be viewed as "management" advice. The effect on services provided to plan clients that hold illiquid or unusual property is also unclear. Given that plans are permitted under ERISA to hold virtually any asset as part of a prudent and diversified portfolio, service providers need more clarity as to what constitutes "management" advice with respect to these assets, which could include real estate, art, or other property.

Thus, we urge the Department to define more clearly what it means by "management," and suggest that revising the paragraph to reference the two examples listed in the Preamble would be sufficient. The Department could, for example, simply state in paragraph (c)(i)(A)(3) that management advice is advice "as to the selection of persons to manage plan investments and as to the voting of proxies and the exercise of rights appurtenant to shares of stock."

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[5] 75 Fed. Reg. 41599 (July 16, 2010)

[6] A possible revision to paragraph (c)(1)(ii)(D) of the Proposal would be: "Provides advice or makes recommendations described in paragraph (c)(1)(i) of this section pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such 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, or a participant or beneficiary; and fails to provide the disclosures required by 29 C.F.R. § 2550.408b-2(c)." While the Proposal removes both the "primary basis" and "mutual understanding" requirements of the current regulation, the Preamble addresses only the Department's concerns with the primacy of advice, and expresses no concern regarding mutuality. We believe the mutual understanding of the parties must be clear given the significance of fiduciary status, and retain the mutuality requirement in this revision. Indeed, without a meeting of the minds regarding fiduciary status, ordinary notions of contract rights would suggest that imposing a fiduciary standard on a service provider for a casual observation would be inequitable.

Concerns Regarding Exceptions:

As discussed above, we appreciate the Department's attempt to limit the broad scope of the Proposal's general rule. However, we believe the exceptions, as drafted, are neither broad enough nor clear enough to provide certainty as to a service provider's fiduciary status. Indeed, we cannot be certain, based on the text, whether we have properly understood the Department's intent. Accordingly, we offer the following observations on the Proposal's exceptions:

- Exception for Participant Education Defined by Interpretive Bulletin 96-1

We applaud the Department's decision in the Proposal to retain the exemption from fiduciary investment advice for participant education in Interpretive Bulletin 96-1 (IB 96-1). IB 96-1 is valuable guidance that allows millions of participants to receive basic investment information, helping them to avoid common investment mistakes such as lack of diversification or the failure periodically rebalance their portfolios.

However, we strongly believe that any final regulation should expand this exception to include plan-level education. At Great-West, we commonly assist our clients in understanding their responsibilities as plan fiduciaries, or evaluating issues such as the significance of section 404(c) status or how automatic enrollment and QDIAs would impact their plans. We are very concerned that this educational information could be considered fiduciary advice. We do not believe that the Department's goal of improving the security of employee benefit plans will be increased if service providers cease providing basic fiduciary education information to their plan clients due to fear of fiduciary liability.

We urge the Department to build on its success in IB 96-1, which clarifies when information provided to a participant is fiduciary advice or investment education. We believe that by developing a parallel bright-line standard for educational information provided to plan fiduciaries, the Department will encourage service providers to provide value to their plan clients by helping these fiduciaries better understand their duties and obligations.

We believe the Department should move forward with such guidance regardless of the final disposition of the Proposal, but we also believe the Proposal should not move forward without such guidance due to the significant chilling effect the Proposal could have on these beneficial conversations between plans and their service providers.

We also believe that the Proposal should specifically explain that IB 96-1 applies to education provided to IRA holders as well as to participants in ERISA-covered plans. While we believe that the principles of IB 96-1 are intended to apply to IRA accounts, an express statement would foster greater availability of educational materials to IRA holders.

- Exception for Valuation for Reporting and Disclosure Purposes

While we support the Department's goal of ensuring accurate valuation of plan assets, we are concerned that the Proposal's significant expansion of the definition of fiduciary valuation services will negatively impact plans, participants and service providers in ways the Department likely did not intend. In particular, we believe the Department's effort to limit the scope of the provision in paragraph (c)(2)(iii) of the Proposal by providing an exception for valuations conducted for reporting and disclosure purposes is too limited.

For example, a valuation for reporting purposes that nonetheless involves any 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" would be a fiduciary valuation under the Proposal. The Preamble to the Proposal explains that the Department is specifically concerned with the valuation of company stock held by Employee Stock Ownership Programs (ESOPs). The Proposal "is not limited to employer securities," however, and specifically includes real estate appraisals as another covered valuation service. There are, however, valuations of other kinds of property this broad language would capture that are quite different in kind from closely-held employer stock or real estate, and that present very different questions to plan fiduciaries.

First, the Department should clarify that the definition of fiduciary valuation services does not reach to fair value pricing effected in connection with an underlying open-end registered investment company (mutual funds) or collective investment trust funds, which are designed to prevent market timing activities in the funds. These activities are used to achieve accurate prices that reflect the market value of all portfolio securities held in such funds, are provided on behalf of all fund investors and not provided for the singular benefit of qualified plans utilizing such funds as investment options. Given the potentially broad scope of the "is not limited to employer securities" positioning, we believe clarification that these types of valuation services are not fiduciary valuation services better captures the Department's intent.

We also are concerned that Great-West's group annuity insurance products and other insurance investment contracts likely do not qualify for the reporting and disclosure exception, despite the fact that the underlying investments in these contracts often are securities and other property for which there is a generally recognized market, because the insurance products themselves are not traded on a "generally recognized market." It seems unlikely that the Department intended to cause insurance companies and their employees to become fiduciaries merely because they mechanically calculate the value of an insurance contract for the purpose of a participants' minimum distribution requirement. Therefore, we recommend that the Department generally exempt from the regulation the valuation of investment products offered by insurance companies, including group annuity contracts, whether provided for reporting purposes or otherwise.

As a record-keeper, we also provide information to plans and participants regarding the value of their accounts, including assets for which there is no "generally recognized market," that may be used for distribution purposes. We believe any final regulation should clarify that a record-keeper or other service provider who did not actually perform the valuation of the property is not a fiduciary for merely "passing-through" the valuation information provided to it, whether passed-through for reporting purposes or otherwise.

- Exception for Sales

The Department correctly recognized in the Preamble that advice or recommendations made in connection with sales activity "ordinarily should not result in fiduciary status" in the Proposal. Paragraph (c)(2) of the Proposal therefore excepts a person "providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller." However, we believe certain clarifications are necessary to ensure the exception serves the needs of plans and participants and functions as the Department intended.

First, we urge the Department to clarify that the sales exception applies to information provided in connection with sales by a service provider after its selection and throughout the provider's relationship with the plan. Information related to sales is exchanged on an ongoing basis with the plan throughout the course of the service provider relationship as the plan selects and monitors its investment options and conducts other plan business. Sales discussions will occur, for example, when plans seek changes to their fund lineups or implement new design features like automatic enrollment and QDIA options months or even years after selecting the service provider and making the initial round of decisions regarding plan investments and features. The exception should clearly state that sales activity is excepted regardless of when during the service provider relationship it occurs.

The Department should also clarify that, consistent with the statute and the Department's long-established views regarding fiduciary status, the sales exception is unnecessary with respect to information provided prior to the Plan's selection of the service provider. Such "pre-selection" discussions are not fiduciary in nature under either the Proposal or the current regulation because the prospective service provider is not providing advice for a fee.[7]

Second, we believe the sales exception must be redrafted because the term "adverse" cannot properly be used to describe the plan and service provider relationship. Financial service providers are not engaged in *caveat emptor* transactions with their clients—state and/or Federal laws governing the conduct of financial service providers prohibit them from considering only their own interests. These providers must take into account the needs of their clients, consistent with their legal obligations under the prevailing duty of care, such as the securities law standard of suitability or fiduciary obligation. As a result of these legal duties, a service provider cannot properly be considered "adverse" to his or her client.

[7] Under ERISA §3(21)(B)(ii), a person is a fiduciary to the extent he "renders investment advice for a fee or other compensation..." If a service provider has not yet been selected by the plan, then the provider has no legal right to or expectation of a fee, and thus cannot be a fiduciary with respect to the provision of investment advice. For example, a detailed response to an RFP may include specific recommendations regarding the investment of plan assets, but the response to the RFP is not investment advice for a fee.

To clarify that the service provider is not a fiduciary acting "solely in the interest" of the plan or participant in the sales context (which we believe was the Department's intent), we recommend striking the phrase:

> "a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice"

from the text of the rule and replacing it with:

> "a purchaser or seller, who has a financial interest in the purchase or sale of the security or other property and who is therefore not undertaking to provide impartial investment advice."

- Exception for Platform Providers

While we do not believe that offering a record-keeping platform is a fiduciary act under current law or under the Proposal, we support the Department's decision to include in the Proposal an exception from fiduciary advice for making available an investment platform and for providing information related to the investment options on the platform. However, we are concerned that the exceptions in paragraphs (c)(2)(ii)(B) and (c)(2)(ii)(C) may be too narrow, as the exception does not expressly include certain services many platform providers, including Great-West, offer to their plan clients. Non-fiduciary record-keepers and other providers offering platforms provide valuable information to plan fiduciaries about the investment options available on the platform. At Great-West, we are concerned that the proposal as written would chill or eliminate beneficial services to plans, such as our diagnostic tools that assist plan fiduciaries in their selection and monitoring duties. In our experience, these diagnostic tools are especially important to small businesses, whose plan fiduciaries, may not have the time or resources to gather and compare the objective data our tools provide for them, and who might otherwise find it too complex and costly to offer 401(k) plans to their employees.

Ambiguity Regarding "Individualized Needs"

Paragraph (c)(2)(ii)(B) provides that a platform provider disclosing that it is not intending to provide impartial advice is not an investment advice fiduciary for making the platform available as long as it does so "without regard to the individualized needs of the plan, its participants or beneficiaries." It is not clear to us what conduct the Department intends to exclude with this language, as it would be nearly impossible for any service-provider to offer a platform that does not take into account the individualized needs of the plan in some manner. We recommend that this language be deleted from the Proposal.

Great-West offers three different platforms, each of which has a different menu of investment options, different features, and different pricing structures. In selecting one of our platforms for use by the plan, and in populating the plan with investment options from the platform, both the service provider and the plan fiduciary must consider the individualized needs of the plan. Plan fiduciaries often ask extensive questions about the platforms, any required funds, any discretionary funds, share classes, fees, alternative fee arrangements, investment options and other relevant characteristics of the platforms and the investment options in order to carry out their fiduciary duty to prudently select the service provider and investments. Broker-dealers and others working with the plan fiduciaries must be able to answer these questions and offer information related to each plan's individualized evaluation of Great-West's products and services. Some of Great-West's platforms offer extensive customization options for plans, and other platforms offer fewer options, all of which are intended to provide to plan fiduciaries the level of services and features they deem most appropriate for their individual plans. Offering products and services that take into account the plans' needs should not subject record-keepers and other platform operators to fiduciary liability for providing investment advice, and this language should be deleted from the Proposal.

Diagnostic Tools and "General Financial Information"

Paragraph (c)(2)(ii)(C) states that "In connection with the activities described in paragraph (c)(2)(ii)(B), the provision of general financial information and data to assist a plan fiduciary's selection or monitoring of such securities or other property as plan investment alternatives" is not fiduciary investment advice as long as the plan discloses that it is not intending to provide impartial advice. However, it is not clear whether compiling comparative financial data about the investment options on a platform constitutes "general financial information." The Proposal should specifically permit diagnostic tools that provide comparisons between options based on objective data, as this information is extremely valuable to plan fiduciaries attempting to monitor the performance of plan investment options and making appropriate changes to the plan's investment options.

Great-West makes available to its plan clients financial tools that are used by plans to assess how their options are performing relative to the other options available on the platform. We do not provide investment advice through these tools—the tools simply make comparisons among funds based on objective data and indicate through a simple color-coded system whether the funds are top, middle or low performers. These tools do not tell plans which funds to select, but merely provide the objective performance information in a comparative format for plan fiduciaries to use in making investment decisions. Providing plan fiduciaries with objective information regarding common fund metrics, such as comparative past performance or fee data, should not be fiduciary advice. Unless this is clarified, platform providers will have to reduce or eliminate the tools they offer to the detriment of plans and participants.

As discussed above, the term "management" in paragraph (c)(1)(A)(3) is not defined in the Proposal, and thus it is not clear whether diagnostic tools utilizing objective information could be construed as advice under this paragraph. It is also not clear whether such tools are "general financial information" within the exception in paragraph (c)(2)(ii)(C). Given the value this information provides to plan fiduciaries in selecting and monitoring investments, and given that the tools do not recommend but merely provide general rankings of the investment options based on objective criteria, we believe that the Proposal should specifically permit such diagnostic tools by including them in the exception for platform services. More broadly, we believe such tools should also be deemed educational material in plan-level guidance analogous to IB 96-1.

Mapping and Conversion

When a plan changes record-keeping platforms, it has several options for transferring funds from the previous investments to the new investments available on the new platform. Whether plans convert assets to cash for reinvestment or “map” the investments from the old options into new options most closely resembling the previous options, the platform operator typically assists the plan with this process, answering questions and providing insight. Offering assistance and insight to plan clients who retain the sole authority to make all fiduciary decisions associated with mapping and conversion should not make the platform operator a fiduciary investment advisor. We recommend that the Proposal specifically except information provided to the plan by the platform operator or its agents regarding the mapping and conversion process. For example, answering questions about which platform investment options have similar characteristics to the old plan investment options is not fiduciary advice, but should be viewed as the kind of non-fiduciary general financial information contemplated by the Proposal.

Investment Option Removal and Replacement

The Department’s guidance regarding the fiduciary status of platform operators in Aetna Advisory Opinion 97-16A (AO 97-16A) lays out a process by which such fund replacements are decisions made by the investing plan fiduciaries rather than the platform service providers. This guidance is essential to the current administration of record-keeping platforms. While the Proposal alludes to AO 97-16A in a footnote, the Proposal should expressly clarify that removing a fund and replacing that fund on the platform is not fiduciary advice if the requirements of the AO 97-16A are followed. We are concerned that the current Proposal could be construed, for example, to view the platform’s replacement of an underperforming fund with a similar but better performing fund as fiduciary investment advice. We believe that referencing AO 97-16A, and clarifying its application to fiduciary investment advice under ERISA 3(21)(A)(ii), will ensure that fund removal and replacement can continue as non-fiduciary business decisions by platform operators.

<u>Distribution Information:</u>

In the Preamble to the Proposal, the Department requested comments on issues related to its determination in Deseret Advisory Opinion 2005-23A (“AO 05-23A”) that advice regarding distribution options was not fiduciary advice. We believe the Department’s position in AO 05-23A was correct, and there is no need to revisit this narrow issue with further guidance.

If, however, the Department plans to revisit this issue, we strongly urge that this matter be considered as a separate project from the Proposal. The issues presented are extremely complex, with significant ramifications on the availability and cost of financial services to participants inside plans and to individual investors in individual retirement accounts ("IRAs"), Internal Revenue Code ("Code") section 457 plans and other non-ERISA retirement savings vehicles.

First, it is important to note that the activities of financial advisors are regulated by the Federal government, by the states, or by both. While the specific legal duties of care, remedies for loss due to breach of duty, penalties for misconduct, and licensing requirements of financial service providers vary depending on the type of provider, financial advisors are subject to oversight and regulation that protect the interests of their customers, whether plan participants or individual investors. Unilateral action by the Department to insert ERISA fiduciary concerns into advice regarding distribution options would disrupt this balanced system of oversight and regulation. For example, the Securities and Exchange Commission (SEC), which has regulatory authority over many of the financial service providers who contact participants regarding distribution options, is currently engaged in a review of the standards that such providers must abide by when providing financial services to their clients.[8] For this reason, we urge the Department to take no action in this area until the SEC has completed its work.

Second, the ramifications of imposing fiduciary status on any adviser who discusses distributions would be far-reaching, and could affect participants in plans well outside of ERISA's coverage. ERISA fiduciaries are subject to fiduciary liability and the prohibited transaction rules when providing advice to participants. If this includes all service providers who discuss distribution options, any financial adviser interacting with a 401(k) participant could become a fiduciary (with the attendant costs of fiduciary insurance and possibly changing its contractual arrangements to comply with the prohibited transaction rules). Such higher costs will result in fewer providers available to help participants make important decisions about their retirement accounts, making it harder and more expensive for participants to "roll over" their 401(k)s or IRAs and undercutting the important public policy goal of portability.

We urge the Department to consider any changes to the current Advisory Opinion separately from the Proposal, due to the complexity of this issue and its significance to participants. Further, we believe the Department's goal should be to make it easier for participants taking distributions to receive information or advice about their options, not more difficult. For example, we recommend the Department expand IB 96-1 to allow the provision of more specific information relating to distribution issues rather than expand the number of providers deemed investment advice fiduciaries.

Application to IRAs:

The Department of Labor has interpretive authority over the prohibited transaction provisions both in Title I of ERISA and in section 4975 of the Code. In the Proposal, the Department specifically used this authority to ensure that IRAs under section 408(a) of

[8] See "Study on Investment Advisors and Broker Dealers," SEC Staff Study under Dodd-Frank Act Section 913, January 2011.

the Code would be subject to the proposed rule, even though such accounts are not ERISA plans.

In the past, DOL has used its interpretive authority to recognize the inherent differences between IRAs and ERISA plans, and excluded IRAs from certain ERISA requirements. Most recently, in the Interim Final regulation implementing the new disclosure requirements of the prohibited transaction exemption for reasonable services in ERISA section 408(b)(2), the Department reasoned that it:

> "does not believe that IRAs should be subject to the final rule, which is designed with fiduciaries of employee benefit plans in mind ... moreover, IRAs generally are marketed alongside other personal investment vehicles. Imposing the regulation's disclosure regime on IRAs could increase the costs associated with IRAs relative to similar vehicles that are not covered by the regulation. Therefore, although the final rule cross references the parallel provisions of section 4975 of the Code, paragraph (c)(1)(ii) provides explicitly that IRAs and certain other accounts and plans are not covered plans for purposes of the rule."[9]

For similar reasons, we urge the Department to exclude IRAs from the requirements of the Proposal. The potential cost increase for IRAs caused by the Proposal would not apply to similar retirement vehicles not covered by the regulation, such as Code section 457 plans and other investment vehicles. Great-West serves a significant number of 457 plans that would not be subject to this Proposal. Yet participants wishing to rollover their Code section 457 plans to IRAs would suddenly become subject to different and significantly more burdensome and costly rules. As the Department noted in the section 408(b)(2) Interim Final Regulation, it is not in the best interests of the retirement system to make it more difficult for service providers to operate cost-effectively with respect to the different plan designs.

We note that the IRA marketplace is even larger than the ERISA defined-contribution marketplace, and we express concern that the Proposal does not appear to provide any meaningful economic analysis of the impact of extending the Proposal to IRAs. Further, given current Federal budgetary constraints, we think it is a real concern that the Department would not have the resources necessary to adequately oversee and enforce the application of the Proposal to the universe of IRA holders and IRA providers. The Department is already less-well funded than many similar agencies when viewed in light of the size of its regulatory and enforcement responsibility overseeing private sector employee benefit plans.

Though the prohibited transaction rules already apply to IRAs, the broad scope of the new rule likely would result in a significant expansion of the number of IRA providers deemed to be fiduciaries subject to the application of these rules, many for this first time. The education and outreach necessary to assist IRA providers in understanding and

[9] 75 CFR 41603.

complying with ERISA fiduciary and prohibited transaction requirements would likely be considerable.

Conclusion:

Thank you for the opportunity to comment on the Proposal. We look forward to working with you to improve the retirement security of America's workers, and we would be happy to answer any additional questions you may have. Please feel free to call me at 303-737-3086.

Sincerely,

Charles P. Nelson