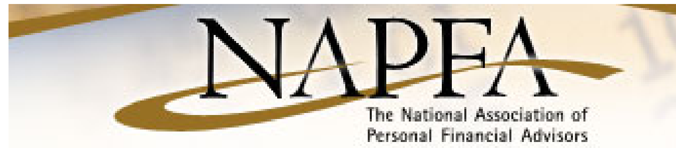

Via e-mail to e-ORI@dol.gov

October 6, 2008

FOCUS on Fiduciary™

Fee FO Only®

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Investment Advice Regulations
Room N-5666
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Regulation, Investment Advice

Ladies and Gentlemen:

The National Association of Personal Financial Advisors ("NAPFA") appreciates the opportunity to provide comments to the Employee Benefits Security Administration of the U.S. Department of Labor regarding its proposed regulations implementing the provisions of the statutory exemption set forth in sections 408(b)(14) and 408(g) of the Employee Retirement Income Security Act ("ERISA"). NAPFA is the nation's leading national organization of fiduciary fee-only personal financial advisors. NAPFA's members provide substantial assistance to both plan sponsors and to plan participants in the selection of investment plan options for participant-directed retirement plans. Through NAPFA's strict adherence to fee-only compensation for its members, nearly all material conflicts of interest relating to the recommendation of investment products and solutions are avoided.

NAPFA concurs with the Department of Labor that DOL in its observation that, without expert investment advice, many participants and beneficiaries in self-directed plans and IRAs make poor investment decisions. Such inappropriate decisions include paying higher fees and expenses than necessary for investment products and services, engaging in excessive or poorly timed trading, failing to rebalance their portfolios, and inadequately diversifying their portfolios and thereby assuming uncompensated risk. However, NAPFA believes that the Department of Labor's proposal to exclude certain "affiliates" of a "fiduciary advisor" from consideration in determining whether "other than level compensation" is received is contrary to the express provisions of the Pension Protection Act of 2006 and will likely result in harm to millions of individual investors by permitting conflict-ridden advice, which would be contrary to sound public policy. Moreover, given recent events in which investment banks and other firms triggered a financial crisis in this country due to the presence of so many conflicts of interest, and the strong

motivation for higher profits even in the face of the evident systematic risk infecting our financial system, NAPFA believes that the Department of Labor's proposal is unlikely to afford plan participants the protections which Americans deserve.

Overview: The Pension Protection Act's Express Provisions Regarding "Fiduciary Advisor" and "Fee Leveling."

The Pension Protection Act of 2006 made amendments to ERISA intended to provide narrowly crafted exemptions in order to permit investment advice providers to offer their services to participants and beneficiaries responsible for investment of assets in their individual accounts, provided certain requirements are met. It should be noted that *in the absence of an exemption*, under Section 406 of ERISA, providers are *prohibited* from rendering investment advice to plan participants regarding investments that result in the payment of additional advisory and other fees to the fiduciaries or their affiliates.

Specifically, section 408(b)(14) of ERISA provides conditional exemptive relief from ERISA section 406 for certain transactions in connection with the provision of investment advice (as described in ERISA section 3(21)(A)(ii)) if the requirements of new section 408(g) of ERISA are met. Under section 408(g), subsection (b)(14) applies if the investment advice provided by a "fiduciary adviser" is provided under an "eligible investment advice arrangement." Persons (defined by ERISA to include individuals, corporations, etc.) who may act as fiduciary advisers, as defined in section 408(g)(11)(A), include, but are not limited to, investment advisers registered under the Investment Advisers Act of 1940, certain banks and similar financial institutions, insurance companies qualified to do business under the laws of a State, and brokers or dealers registered under the Securities Exchange Act of 1934.

The requirements of ERISA are therefore designed to safeguard against a firm's creation of incentives for individuals to recommend certain investment products. Under the Pension Protection Act of 2006, there are only two types of eligible investment advice arrangements:

> First, portfolio recommendations which are based on a computer model that has been audited by a third party; and
>
> Second, a fiduciary advisor provides investment advice services by charging a level fee (i.e., "fee leveling").

<u>The Proposed Rule's Exclusion of Certain "Affiliates" Is Contrary To the Express Provisions of Law.</u> Despite the clear desire of Congress to eliminate, as much as possible, for potential for conflicts of interest by advisers, the Proposed Rule purports to exclude consideration of extra compensation provided to "affiliates" of "fiduciary advisors." In so doing, the Proposed Rule opens the possibility – indeed, near certainty – of substantial abuse of consumers through payment of excessive fees in connection with the receipt of investment advice and the investment products chosen. It is precisely this kind of abuse which the provisions of ERISA and the Pension Protection Act of 2006 were designed to prevent.

Under the "fee leveling" exemption, related party investment advice is permitted where the advice arrangement "provides that any fees (<u>including</u> any commission or <u>other compensation</u>) received by the <u>fiduciary adviser</u> for investment advice or <u>with respect to the</u> sale, holding, or <u>acquisition of any security</u> or other property for purposes of investment of plan assets <u>do not vary depending on the basis of any investment option selected</u>." Key in understanding the provision is the definition of "fiduciary advisor," which is defined broadly to include banks, insurance companies, broker dealers, registered investment advisers, <u>all of their affiliates</u>, and all of their employees, representatives and agents.

"Affiliate" means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940. Under section 2(a)(3), "affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof. In addition, under section 2(a)(2) "affiliated company" means a company which is an affiliated person. Furthermore, term "person" is defined in Title 29 of the U.S. Code, Chapter 18, Subchapter I, Subchapter A, which provides at §1002(9), that the definition of "person" means "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization."

Hence, the term "fiduciary advisor" refers not only to the individual providing the advice, but also to the firm which employs that individual, and also to the affiliates of that firm, whether under common control or otherwise. Despite this clear language, which defines the term "affiliate" expressly, the Department of Labor incorrectly surmises: "It appears that, while an individual may have a general interest in the overall success of his or her employing firm, this interest, by itself, would not be inconsistent with the individual compensation requirement." This conclusion is not supported by any evidence; indeed, to the contrary it is widely known within the securities industry that registered representatives are often heavily influenced to promote the sale of "proprietary funds." As just one indication of the not-so-subtle influences related to the sale of mutual funds provided by affiliates, *see* State Of New Hampshire, Department Of State, Bureau Of Securities Regulation, Staff Petition For Relief, In The Matter Of American Express Financial Advisors, Inc. (Feb. 17, 2005), alleging that "field management increased pressure on its investment

advisor agents to recommend proprietary American Express and specially selected mutual fund products over other higher rated, better performing mutual fund products available for investment purposes" in violation of the firm's and agents' fiduciary duties.

For example, consider the following hypothetical. A registered representative of a broker-dealer firm provides investment advice to participants in a 401(k) plan. The broker-dealer firm is owned by a holding company, which in turns owns a mutual fund company. The registered representative instructs the plan participant to invest in the funds of the affiliated mutual fund company. The affiliated mutual fund company's funds have higher fees than other funds available in the 401(k) plan. If the participant purchases the funds of the affiliate, then - while not *directly* receiving additional compensation, the registered representative receives *indirect* compensation. This indirect compensation may include higher profits for the holding company in which the registered representative holds stock (a common occurrence in broker-dealer firms), which in turn may be a major factor in determining the amount of annual bonuses awarded to the registered representative. Moreover, many registered representatives receive stock in their firms, or stock options, leading to another form of material compensation which would be influenced by the sale of proprietary mutual fund products. Yet, under the Department's Proposed Regulation, this arrangement would be permitted, despite the clear conflict of interest possessed by the "fiduciary advisor."

By the express terms of the legislation Congress adopted, affiliates of the fiduciary advisor are included within the definition of "fiduciary advisor." Hence, the Department of Labor's reliance on legislative history is ill-founded. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, USA, Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). While a government agency may reasonably interpret a statute, an agency may not promulgate a rule on an issue which Congress has addressed precisely, as is the case here. In essence, the agency may not create a new exemption, especially where Congress has expressly provided the only class exemptions in this area.

Instead of taking the course that Congress intended, the Department of Labor has, in essence, gutted the "fee leveling" requirement of the Pension Protection Act of 2006. Rather than requiring the securities industry to conform to the law, the Department has improperly engaged in an "effort to accommodate a wider variety of business structures and practices." In so doing, the Department seeks to conform the law to conflict-ridden practices within the securities industry, a result which was not intended by Congress.

<u>The Department's Reliance on Disclosure As Means To Cure Ills of Conflict-Ridden Advice Is Misplaced.</u>

It should be further noted that the Department of Labor acknowledges the existence of the conflicted advice in its proposed language for the disclosure form. This disclosure form states in pertinent part:

> When [enter name of Fiduciary Adviser] recommends that you invest your assets in an investment fund ***of its own or one of its affiliates*** and you follow that advice, [enter name of Fiduciary Adviser] or ***that affiliate will receive compensation*** from the investment fund based on the

amount you invest. The amounts that will be paid by you ***will vary*** depending on the particular fund in which you invest your assets and may range from ___% to ___%. [***Emphasis added.***]

The Department's reliance upon disclosure of the conflict of interest, as a cure for the ills created by the proposed regulation, is misplaced. While it has been said that the federal securities laws have often relied upon disclosure, fiduciary requirements demand more than just casual disclosure. Even with disclosure of a conflict of interest, and disclosure of all of the material facts relating to a conflict, the *informed consent* of the client (or plan participant) must be obtained. Such informed consent is unlikely unless the best interests of the client remain paramount at all times. Courts have been inherently suspect of arrangements between fiduciaries and the entrustor (client) which results in higher compensation to the fiduciary. This is because it is rare that an entrustor desires to make a gratuitous transfer to the fiduciary. Hence, general principles of fiduciary law require not just that a conflict of interest be disclosed, but that – in accordance with the fiduciary's ongoing duty of loyalty – that the conflict of interest be managed in such a fashion as to keep the best interests of the client paramount at all times.

NAPFA also notes that while enhancing disclosures is always a worthwhile endeavor, there exist inherent limits for disclosure documents – of any size and whatever the content. This is due to behavioral biases which individuals often exhibit in connection with their investment decisions. Such behavioral biases include "bounded rationality," "rational ignorance," insensitivity to the source of information, and the tendency of oral communications to trump written communications.

The limitations of disclosures are well-known to broker-dealer firms and others in the financial services industry. Indeed, financial intermediaries utilize their knowledge of investors' behavioral biases in their marketing efforts and personal conferences, often to the detriment of consumers. There are training programs which are designed to train both investment advisers and registered representatives in how to build relationships based upon trust and confidence with consumers. Such training programs often note that once such a relationship is formed that the "consumer will sign anything." No amount of consumer education is likely to substantially counter the behavioral biases underlying this fact. As a result, financial intermediaries will continue to take advantage of the inherent limitations of disclosures.[1]

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[1] "[N]ot only can marketers who are familiar with behavioral research manipulate consumers by taking advantage of weaknesses in human cognition, but …. competitive pressures almost guarantee that they will do so." Robert Prentice, "Contract-Based Defenses In Securities Fraud Litigation: A Behavioral Analysis," 2003 U.Ill.L.Rev. 337, 343-4 (2003), citing Jon D. Hanson & Douglas A. Kysar, "Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. REV. 630 (1999) and citing Jon D. Hanson & Douglas A. Kysar, "Taking Behavioralism Seriously: Some Evidence of Market Manipulation," 112 Harv. L. Rev. 1420 (1999). Given potential use of behavioral biases by financial intermediaries, should there be attempts to educate individual consumers on how to counter these biases? "The … direction – inviting a role that securities regulation has never taken that seriously – is to become an aggressive therapist, seeking to de-bias investors from all their dangerous propensities … I doubt that the government could do this well, or that the intended audience would have the inclination to learn." Donald Langevoort, "Taming the Animal Spirits of the Stock Market: A Behavioral Approach to Securities Regulation," Paper 64, Berkeley Program in Law & Economics, Working Paper Series (2002). See also Robert Prentice, Professor of Law, University of Texas at Austin, "Whither Securities Regulation? Some Behavioral Observations Regarding Proposals For Its Future," 51 Duke L. J. 1397 (2002), stating: that there exists a "large body of behavioral evidence indicating that investors, even sophisticated institutional investors, are unlikely to protect themselves adequately." Id. at 1510. See also "Final Report on Financial Planner Standards of Conduct," prepared by the FPA® Fiduciary Task Force, dated June 1, 2007, stating at page 39: "Recent scholarship in behavioral law and economics reveals that behavioral biases substantially inhibit the ability of many individual investors to achieve sufficient

<u>Conclusion.</u> NAPFA recommends that the "fee-leveling" requirements of the Pension Protection Act of 2006 be adhered to, not only by individuals providing investment advice to 401(k) and other retirement plan participants, but also by their firms and affiliates of their firms. We ask for adherence to the statutory language, which is clear and express as to these requirements. The tens of millions of participants in American retirement plans – deserve investment advice which is not subject to the inherent conflicts of interest which the Proposed Regulation would create.

ERISA has long applied its fiduciary duties strictly. NAPFA is concerned that this Proposed Regulation deviates substantially from the fiduciary standard of conduct required of true fiduciary advisors. The Proposed Regulation, if it is adopted, will (to paraphrase Justice Benjamin Cardoza) effect a further diminishment of the highest standard of conduct under the law through a "disintegrating erosion" of "particular exceptions."

Again, the National Association of Personal Financial Advisors thanks EBSI for the opportunity to submit these comments. As the nation's leading organization of fiduciary financial advisors, we are available to respond to questions or submit further comments as you may desire.

Respectfully,

Diahann W. Lassus, CFP®	Ellen Turf	Susan MacMichael John, CFP®
Chair, NAPFA	CEO, NAPFA	Chair, Industry Issues Committee

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NAPFA has more than 2,000 members across the United States. All NAPFA-Registered Financial Advisors must submit a comprehensive financial plan and undergo a thorough review of their qualifications prior to admission. NAPFA-Registered Financial Advisors all sign a Fiduciary Oath which states that the advisor will only work in good faith and with the best interests of the consumer at heart. NAPFA-Registered Financial Advisors are strictly Fee-Only®, which means they do not accept commissions or any additional fees from outside sources for the recommendations they make to their clients.

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knowledge through a disclosure regime. An extensive discussion of these behavioral biases is found in the January 26, 2007 memorandum of Ron A. Rhoades, Esq., 'Lessons From Behavioral Science: The Effectiveness Of Disclosures Provided to Clients of Financial Intermediaries,' set forth as Appendix F to the Fiduciary Task Force's Report.

EXHIBIT A: Pension Protection Act of 2006 - Pertinent Statutory Provisions.

ERISA §408(g) describes the conditions under which the investment advice-related transactions are exempt from the prohibited transaction rules.

(g) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

(1) IN GENERAL.—The prohibitions provided in section 406 shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(2) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this subsection, the term 'eligible investment advice arrangement' means an arrangement—

(A) which either—

(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.

(3) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(A) IN GENERAL.—An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

(B) COMPUTER MODEL.—The requirements of this subparagraph are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(i) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(ii) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(C) CERTIFICATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

(ii) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

(iii) ELIGIBLE INVESTMENT EXPERT.—The term 'eligible investment expert' means any person—

(I) which meets such requirements as the Secretary may provide, and

(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(D) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this subparagraph are met with respect to any investment advice program if—

(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

(ii) any transaction described in subsection (b)(14)(B)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(4) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(5) ANNUAL AUDIT.—The requirements of this paragraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(6) DISCLOSURE.—The requirements of this paragraph are met if—

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(i) of the role of any party that has a material affiliation or contractual relationship with the financial adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(ii) of the past performance and historical rates of return of the investment options available under the plan,

(iii) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(v) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(viii) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),

(ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(iii) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(7) OTHER CONDITIONS.—The requirements of this paragraph are met if—

(A) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(B) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(C) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(D) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(8) STANDARDS FOR PRESENTATION OF INFORMATION.—

(A) IN GENERAL.—The requirements of this paragraph are met if the notification required to be provided to participants and beneficiaries under paragraph (6)(A) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(B) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (6)(A)(iii) which meets the requirements of subparagraph (A).

(9) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.— The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(10) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—

(A) IN GENERAL.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if—

(i) the advice is provided by a fiduciary adviser pursuant to an eligible investment advice arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

(ii) the terms of the eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the eligible investment advice arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

(B) CONTINUED DUTY OF PRUDENT SELECTION OF ADVISER AND PERIODIC REVIEW.—Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an eligible investment advice arrangement for the provision of investment advice referred to in section 3(21)(A)(ii). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.

(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

(11) DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—

(A) FIDUCIARY ADVISER.—The term ‘fiduciary adviser’ means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) by the person to the participant or beneficiary of the plan and who is—

(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(ii) a bank or similar financial institution referred to in section 408(b)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(iii) an insurance company qualified to do business under the laws of a State,

(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(v) an affiliate of a person described in any of clauses (i) through (iv), or

(vi) an employee, agent, or registered representative of a person described in clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice. For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) to the participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14), except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(B) AFFILIATE.—The term 'affiliate' of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

(C) REGISTERED REPRESENTATIVE.—The term 'registered representative' of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section)."

NAPFA further notes that Title 29 of the U.S. Code, Chapter 18, Subchapter I, Subchapter A, provides at §1002(9), that the definition of "person" means "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization."