

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION NO. 83-60A
Sec. 3(21)(A)(ii)

NOV 21 1983

Mr. J. Hamilton Crawford
Securities Industry Association
20 Broad Street
New York, New York 10005

Re: Identification Number F-2553

Dear Mr. Crawford:

This is in reply to your letter of November 22, 1982, requesting an advisory opinion on behalf of the Securities Industry Association (SIA) under the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that members of the SIA engage in diverse facets of the securities business, including the provision of brokerage and investment advisory services. Most members of the SIA execute or effect securities transactions as agents for employee benefit plans. In the process of executing such orders for plans, broker-dealers are frequently asked for and frequently volunteer recommendations about securities. The recommendations are often given by broker-dealers without the receipt of any distinct compensation other than the "normal" negotiated commission for executing a securities transaction. You further state that such recommendations raise questions about the status of broker-dealers as plan fiduciaries under section 3(21)(A)(ii) of ERISA.

In an effort to clarify the status of broker-dealers under ERISA, you request that the Department issue an advisory opinion that a broker-dealer will not be deemed a fiduciary under section 3(21)(A)(ii) of ERISA unless the broker-dealer provides investment advice for distinct, non-transactional compensation.

Section 3(21)(A)(ii) of ERISA provides, in pertinent part, that a person is a 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.

Regulation 29 CFR §2510.3-21(c) defines what constitutes "investment advice" for purposes of such 3(21)(A)(ii) of ERISA. That regulation provides, in pertinent part, that a person renders "investment advice" only if:

- (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and
- (ii) Such person either directly or indirectly (e.g., through or together with any affiliate) - -

(A) has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

The Department has previously recognized that broker-dealers regularly provide research, information and advice concerning securities in the ordinary course of their business as broker-dealers. The provision of such research and/or recommendations to a plan would not in and of itself constitute the rendering of "investment advice" under the regulation unless rendered pursuant to a mutual agreement, written or otherwise, to provide individualized advice to a plan on a regular basis which will serve as the primary basis for plan investment decisions. Thus, for example, the provision of general research materials to a broker-dealer's customers including employee benefit plans would not fall into that category. In other instances, a determination whether the provision of research and/or recommendations by a broker-dealer constitutes the rendering of "investment advice" within the meaning of section 3(21)(A)(ii) of ERISA will depend on the particular facts and circumstances.

The definition of fiduciary under section 3(21)(A)(ii) is a two-part test requiring both the provision of "investment advice" and the receipt of a "fee or other compensation" for such advice. The preamble to the regulation, in outlining what constitutes "a fee or other compensation, direct or indirect," states that:

Although this matter is still under consideration by the Department and the Service, as a general guideline until a more definitive statement is issued, a fee or other compensation, direct or indirect, for the rendering of investment advice to a plan by a fiduciary, within the meaning of section 3(21)(A)(ii) of the Act, should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered. This may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions. (emphasis added)¹

Similarly, the preamble to the proposed class exemption for insurance agents or brokers and pension consultants² restated the position quoted above with respect to insurance and mutual fund sales commissions.

While the receipt of commissions by a broker-dealer which performs services in addition to that of

¹ 40 FR 50842 (October 31, 1975)

² 41 FR 56760, 56762 (December 29, 1976). The preamble further stated that "[t]he Department ... [has] not modified or revised this position, notwithstanding the contrary views expressed in several of the applications for class exemption."

effecting or executing securities transactions for a plan is not necessarily dispositive of whether the broker-dealer received a portion of such compensation for the rendering of "investment advice", if, under the particular facts and circumstances, the services provided by the broker-dealer include the provision of "investment advice", as defined in regulation 2510.3-21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.

Accordingly, the Department cannot concur with your position that the phrase "fee or other compensation, direct or indirect", as used in section 3(21)(A)(ii) of ERISA, excludes from the definition of "fiduciary" persons who do not receive distinct, non-transactional compensation in connection with the provision of brokerage and investment advisory services.

This letter is an advisory opinion under ERISA Proc. 76-1. Section 10 of the procedure explains the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs