PENSION RIGHTS CENTER

PROTECTING AND PROMOTING RETIREMENT SECURITY
1350 Connecticut Ave., NW, Suite 206 | Washington, DC 20036-1739
P: 202-296-3776 | F: 202-833-2472 | www.pensionrights.org

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

Attn: Public Hearing on Definition of Fiduciary

Following two days of hearings on proposed regulations on the definition of "fiduciary," the Department of Labor invited additional comments. The Pension Rights Center submits the following comments to supplement those filed on February 3, 2011, and our testimony presented on March 1, 2011. The Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers and their families. We believe, that with one modification described in Section 4 below, the proposed regulations will add significantly to the retirement security of the millions of Americans who depend on employer-sponsored plans to prepare for financial security in retirement.

1. Coordination with Other Regulatory Agencies.

At the hearing some commentators suggested that the Department of Labor should work with other regulatory agencies toward the development of uniform standards of care for retail accounts, including a uniform definition of fiduciary that would cross statutory regimes. We believe that such an approach would be seriously misguided. Congress enacted ERISA in significant part to protect participants in employee benefit plans from conflicts of interest and other self-dealing. Although its protections have some overlap with statutory regimes designed to protect the integrity of the financial markets and consumers who participate in those markets, ERISA's purposes, scope, and provisions are not identical to these other regimes. Perhaps most important, ERISA's fiduciary provisions are based primarily on trust law principles and overriding fealty to the interests of participants. ERISA is designed not merely to disclose conflicts of interest, but to prevent them.

While we believe it is appropriate for the Department of Labor to cooperate, consult, and coordinate with other agencies, we do not believe that the Department should subordinate its singular mission to protect participants in employee benefits plans to the different and at times more limited purposes of other statutory regimes. Moreover, as we noted in our original written comments, the Department's proposed regulations are long overdue. They should not be put on hold until other agencies have fashioned final rules or completed studies under the statutes that they administer.

2. Prohibited Transactions.

Some commentators raised concerns that the regulations could turn non-objectionable and often benign business arrangements among affiliates of a fiduciary into prohibited transactions.

We believe that the answer to these concerns is the promulgation of appropriate class and individual prohibited transaction exemptions.

3. Valuations of Plan Assets.

Some commentators argued that the regulations should not characterize individuals who value non-publicly traded plan assets as fiduciaries. The thrust of these arguments seems to be two-fold. First, they argue that valuation firms are subject to rigorous professional standards that can be enforced under state law. But the professional standards are not necessarily identical to standards under ERISA, and there is no basis under the statute to relax federal standards in favor of standards imposed on valuation firms by professional organizations or state or other local laws. Moreover, it is generally held that individual participants would not have standing to enforce such standards, which would mean that enforcement would almost certainly be left to the plan fiduciaries who engaged the valuation firm in the first instance.

Second, opponents of the regulation's approach contend that the plan fiduciary is the individual that is ultimately responsible for purchasing or selling plan assets and there is thus little reason to extend fiduciary status to a person who merely advises such fiduciary. They argue that participants can, in appropriate situations, bring a civil action against the responsible fiduciary. The problem with this argument is that the plan fiduciary responsible for purchasing or selling the non-publicly traded asset can defend its actions by claiming that it reasonably relied on the opinion of the expert. Thus, the reliance of the valuation expert dilutes the responsibility of the fiduciary who engaged the expert, who would be beyond ERISA's reach. If the expert made errors that the fiduciary could not reasonably have identified, neither the existing fiduciary nor the valuation firm that committed the errors would be responsible under ERISA.

4. The Sales Exception

In its written comments and in its comments at the hearing on the regulations, the Center argued that the "sales" exemption under the proposed regulations was too broad and should not be applied to participants, who would not always be sufficiently sophisticated to evaluate even a disclosed conflict of interest. We also suggested that the sales exemption should not be applicable to "unsophisticated" fiduciaries. At the hearing, the panel asked what mechanisms might be available to identify "sophisticated" plan fiduciaries. We believe that the Department might provide that the sale exception is limited to fiduciaries with the background and expertise to evaluate an investment that is presented to it in a sales presentation. The regulations could create safe harbors to identify such fiduciaries. A safe harbor might, for example, be based on the total dollar value of plan assets for which the fiduciary has responsibility and years of experience at a particular asset level.

Some commentators suggested that if the sales exception were narrowed, routine written advertisements or solicitations discussing a particular investment would be considered investment advice. We would support a clarification by the Department either in the preamble to final regulations or in the regulations themselves making plain that certain written advertisements or widely disseminated written solicitations are not investment advice.

Some commentators also asked that the sales exception not require the "sales" person to disclose that its interests might be adverse to those of the plan participant, suggesting instead that the person only disclose that he or she has a financial interest in a sale. Although we do not think that the sales exception should apply to communications with participants, if it were to apply, we would be concerned that simply indicating that the sales person has a financial interest in a transaction would not adequately convey the risk of conflict and, indeed, might clothe the sales person with an aura of excessive concern for the client's welfare ("He even told me he had a financial interest, so he must be honest and concerned for my welfare.") In our view, any disclosure should be clear that the sales person has an interest that might be adverse to the interests of the plan participant, and should indicate that federal law requires the disclosure.

More generally, we note that commentators raised a range of concerns about how the regulations might be read in an overbroad manner to reach unintended results. Some of these objections were based on unreasonable and unrealistic interpretations of the regulations, but others may raise legitimate concerns. For example, a broker dealer who provides a fiduciary with the results of market research or "market color" should not be considered to be providing investment advice if the fiduciary has sufficient sophistication to understand the nature of the information being provided and will not consider it investment advice. In any event, we think that the Department can address virtually all of these concerns either in the preamble to final regulations or in the regulation itself by providing a list of specific activities that do not involve the furnishing of investment advice for a fee. We would be pleased to work with the Department in helping create such a list.

Finally, we note that many of the objections to the proposed regulations seem to be based on the idea that fiduciary status will almost necessarily result in liability for honest advice rendered competently and in good faith and in the best interests of the participants. In our experience, courts do not find fiduciaries in breach except in those rare situations where a fiduciary has put his or her own interest ahead of the interests of the plan and its participants or has failed to meet the basic standards of prudence that ERISA prescribes. Literally hundreds of thousands of individuals and institutions have been willing to serve as plan fiduciaries and will continue to be willing to do so if the definition of fiduciary is expanded as proposed by the Department. In our view, individuals and institutions who are not willing to provide investment services to plans and their participants, unless they are shielded from liability for subordinating plan or participant interests to their own or for acting imprudently, have no business providing investment advice in the retirement plan market.

Respectfully submitted,

Norman P. Stein
Senior Policy Advisor

Rebecca Davis
Legislative Counsel