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

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Re: Definition of Fiduciary Proposed Rule

The Pension Rights Center (the Center) and the National Employment Lawyers Association (NELA) submit the following comments on the Department of Labor's proposed regulations on the definition of fiduciary. 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. NELA has been advancing employee rights and serving lawyers who advocate for equality and justice in the American workplace since 1985.

The proposed regulations would replace current regulations, adopted in 1975, that tightly circumscribe the circumstances under which a person or entity becomes a fiduciary when providing investment advice to a plan or participant for a fee. The regulations would also reverse a 1976 advisory opinion holding that a firm valuing employer stock for an ESOP was not a fiduciary.

The 1975 regulation and 1976 advisory opinion were not compelled by the statute and, in our view, reflected an improper narrowing of the congressional definition of fiduciary. In addition, as the Department suggests in its preamble to the proposed regulations, economic and legal developments in the fields of investments and employee benefit plans have rendered the earlier positions anachronistic and, at times, at cross-purposes with the statute. The proposed regulations are much-needed and long-overdue.

Background

When Congress passed ERISA in 1974, it included rules governing the conduct of fiduciaries. Senator Harrison Williams, Chair of the Senate Labor Committee and a key co-sponsor of ERISA in the Senate, explained the need for these rules when he presented the ERISA Conference Committee resolution reconciling the House and Senate versions of pension reform legislation: "Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such

abuses as self-dealing, imprudent investing, and misappropriation of plan funds.”¹ In other words, fiduciary standards were essential for the protection of participants in employee benefit plans. Congress crafted rules applying fiduciary standards not only to plan trustees, but to a range of individuals and entities whose actions affect the security and use of plan funds and the benefits of participants. These rules of conduct applied to “fiduciaries,” which Congress defined as any person who fits one of the following categories:

(1) exercises any discretionary authority or discretionary control respecting management of a plan;²

(2) exercises any authority or control respecting management or disposition of a plan’s assets;³

(3) renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of a plan, or has any authority or responsibility to do so⁴; or

(4) has any discretionary authority or discretionary responsibility in the administration of a plan.⁵

The 1975 regulations addressed the third aspect of the definition – a person who renders investment advice for a fee. The regulations narrowed the statutory language (which broadly provided that a person is a fiduciary if he renders investment advice “for a fee or other compensation, direct or indirect, with respect to any moneys or other property of” a plan) to two narrow circumstances: first, if a person has discretionary authority or control with respect to purchasing or selling securities or other property for a plan;⁶ and second, if a person renders investment advice to a plan on a *regular* basis, pursuant to an agreement or understanding that the advice will be a *primary* basis for the plan’s investment decisions, and that the advice is *individualized* to the particular needs of the plan.⁷ In the preamble to the presently proposed regulations, the Department describes this as a five-part test, with a person found to be a fiduciary only if all five parts of the test are met.

The regulations also provided, in effect, a definition of the type of advice that concerned plan investments: advice concerning the value of securities or property, or advice concerning the advisability of investing in, purchasing, or selling securities or other property.

¹Comments of Senator Harrison Williams, Legislative History of the Employee Retirement Income Security Act of 1974, Vol. III, at 4741(Aug 22, 1974)(comments concerning the Committee of Conference on H.R. 2).

²ERISA § 3(21)(A)(i).

³ERISA § 3(21)(A)(i)

⁴ERISA § 3(21)(A)(ii)

⁵ERISA § 3(21)(A)(iii).

⁶We note that a person who has such authority would be an investment adviser even without the “investment advice for a fee” component of the statutory definition, since the person would be exercising discretionary control of a plan asset.

⁷29 C.F.R. § 2510.3-21(c)(1)(ii)(B).

A year after the 1975 regulations were promulgated, the Department held that a consultant that provided an evaluation of employer securities for an ESOP was not a fiduciary under the regulatory definition, because the valuation would not “involve an opinion as to the relative merits of purchasing the particular employer securities in question as opposed to other securities,” and would thus not serve as a “primary basis” for plan investment decisions nor “constitute advice as to the value of securities.”

The newly proposed regulations would substitute a simpler and more easily understood, enforced, and administered test that bears greater fidelity to the statutory language and is appropriate to developments over the intervening 35 years in the areas of retirement plans and investments. The new test would provide that a person renders investment advice for a fee under ERISA if the person gives certain types of advice to a plan, plan fiduciary, or plan participant or beneficiary, and also falls within one of four categories of persons.

The types of advice covered by the proposed regulation are: (1) advice, appraisal, or fairness opinion concerning the value of securities or other property; (2) advice or recommendation as to the advisability of purchasing, holding, or selling securities or other property; and (3) advice or recommendations as to the management of securities or other property. The new regulations thus expand the ambit of covered investment advice from the 1975 regulations to fairness letters and appraisals of property, and eliminates the cumbersome five-part test that depends on the proof of the details of the relationship between advisor and advised and eliminates from the realm of investment advice much that any layperson would understand to be such advice.

By including advice as to the management of securities or other property in the definition of investment advice (not just advice as to valuation or the advisability of purchasing or selling securities), the Department makes explicit in the text of the regulation, its longstanding interpretation of the existing regulation, which included advice as to the selection of managers and investment options. DOL Adv. Op. 84-04A, 1984 WL 23419, *1-3 (Jan. 4, 1984). The regulations also make clear that advice as to the management of a particular asset, e.g. advice as to proxy voting or how to maximize the income incident to a piece of real property, is also fiduciary advice. In addition, they make explicit that investment advice gives rise to fiduciary status if it is furnished to a plan participant or beneficiary.

To be considered a fiduciary under the proposed regulations, a person who gives such advice meets the requirement of the regulations if the person: (1) represents or acknowledges that it is acting as a fiduciary; (2) is already a fiduciary under the other legs of the statutory definition of fiduciary; (3) is an investment adviser under the Investment Advisers Act of 1940; or (4) provides advice or makes recommendations pursuant to an agreement, arrangement, or understanding between such person and the plan, plan fiduciary, 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. The proposed regulations’ most important departure from the 1975 regulations is that under the fourth category, the advice does not have to be rendered on a regular basis and need not be provided pursuant to an agreement or understanding that it will serve as a “primary” basis for investment.

As discussed below, however, the advice must be provided pursuant to an agreement or understanding that such advice may be considered in connection with making investment management decisions and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary. The existing regulations provide that advice be individualized to the needs of the plan. The new regulations, in what we understand is clarification of the Department's existing interpretation, make clear that the advice may be individualized to the needs of the plan, plan fiduciary, plan participant, or beneficiary, i.e. to the needs of the recipient of the advice, to distinguish such advice from the generalized buy recommendation that a broker might issue to all of its clients on a given publicly traded stock.

The regulations also include a number of limitations on the regulations' coverage. One of the limitations provides that a person offering advice or recommendations is not an investment-adviser fiduciary if such person can demonstrate that the recipient of the advice knew, or should have known, that the person is providing the advice in its capacity as a purchaser or seller (or agent for a purchaser or seller) of securities or other property, whose interest are adverse to the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.

The regulations also do not apply to persons who provide only investment education or persons who make available to a plan a group of investment options from which a plan fiduciary will decide which options to offer. The term investment advice also does not include advice or an appraisal or fairness opinion for purposes of complying with reporting and disclosure requirements of ERISA or the Internal Revenue Code unless such report involves assets for which there is not a generally recognized market and which serves as a basis on which a plan may make distributions to plan participants and beneficiaries.

The Preamble to the Regulations also invites comments on the question of whether a person who gives advice to participants with respect to distributions is providing investment advice.

Revision of the 1975 Regulations is Warranted

Developments in Retirement Plans and Investments Since 1975

The existing regulations were promulgated in 1975, at the dawn of the ERISA era. Since then, there have been significant changes in the retirement plan and investment universe that have undermined whatever justification there might have been for the regulations' cramped scope. As the preamble to the proposed regulations notes, there has been a seismic shift in the retirement plan world from defined benefit plans – in which investment advice was generally rendered to sophisticated plan fiduciaries – to self-directed defined contribution plans – in which investment advice is issued to individual participants, many of whom have only rudimentary financial literacy. Mutual funds, and sellers and brokers for mutual funds, who played a relatively small role in retirement plans at the time ERISA was enacted, have become dominant players in the new order. The variety and complexity of investment products has also changed markedly over the last three decades.

At the time of the 1976 advisory opinion on valuations of employer stock for ESOPs, there were only 250,000 participants in 1,600 ESOPs. Today ESOPs cover more than 12 million participants in over 10,000 plans, which hold almost 1 trillion dollars in employer securities.⁸ The exponential growth of ESOPs has been accompanied by numerous cases involving improper valuations of employer stock purchased or sold by ESOPs.⁹ Yet, the 1976 opinion letter effectively shields these plans' valuation advisers from fiduciary liability.

There have also been significant legal developments since the time the regulations were promulgated. The Supreme Court ruled in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), that a participant generally is entitled to legal relief under ERISA only if the defendant is a fiduciary who caused monetary loss to a plan.¹⁰ A participant can sue a person other than a fiduciary only for equitable relief, and the Supreme Court has narrowly circumscribed the extent to which such equitable relief is available. *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). The Labor Department, which filed *amicus curiae* briefs arguing against these positions, could not have known in 1975 that its narrowly drawn regulations and ERISA preemption would effectively create an unregulated playing field for so many actors who have a direct and substantial impact on plan investments.

Finally, in the period since 1975, the Department has determined that voting of proxies and similar issues are part of investment management and has concluded that investment advice as defined in the regulations includes advice regarding the selection of investment managers. This last point has caused controversy see *Cohrs v. Salomon Smith Barney*, 2010 WL 2104535 (D.Or., Aug. 31, 2005). and recently required the DOL to file an *amicus* brief to defend its interpretation of the old regulations. See DOL *amicus* brief in *In Re Beacon Securities Litigation*, 09-CV-077 (LBS), 2010 WL 3895582 S.D.N.Y. Although the Department's position prevailed in district court, the issue remains hotly contested and will likely be the subject of an appeal by defendants in *Beacon* if plaintiffs prevail on the merits. It is therefore appropriate for the Department to revise the regulations to address investment advice concerning such issues to eliminate any doubt in the courts that such advice should give rise to fiduciary status.

We have heard it argued that this view, that investment advice should include advice regarding the selection of fiduciaries to manage assets, will have the baneful effect of discouraging informal advice about, for example, the selection of independent fiduciaries from trusted advisors such as plan counsel. We disagree. Advice as to the selection of an independent fiduciary is not legal advice if it goes beyond evaluating whether a particular firm meets the legal requirements to act as an independent fiduciary or advising as to the nature of a prudent selection process. If lawyers choose to go beyond providing legal advice and provide advice as to whom a plan should select to manage plan assets, then there is no reason why those lawyers should receive a special dispensation from fiduciary status as compared to a consultant who habitually

⁸The National Center for Employee Ownership, "A Statistical Profile of Employee Ownership," <http://www.nceo.org/main/article.php/id/2>. These figures do not include 401(k) plans with employee stock funds.

⁹See, e.g., *Keach v. U.S. Trust Co., N.A.*, 239 F. Supp. 2d 820 (C.D. Ill. 2002)(appraiser not a fiduciary); *Clark v. Ameritas Investment Cor.*, 408 F.Supp. 2d 819, (D. Neb. 2005)(appraiser not a fiduciary).

¹⁰ERISA §409(a). A fiduciary who breaches its responsibilities under the statute is also obligated to return to the plan any profits the fiduciary made through the use by the fiduciary of plan assets. *Id.* In *Mertens*, the Court specifically held that a non-fiduciary who knowingly participated in a breach of trust was not subject to section 409(a)

makes recommendations about asset allocations and asset manager selections, unless we adopt the too-convenient fiction that no one heeds the advice of lawyers who exceed the ambit of their professional competence. The concern that plans will be deprived of the unique perspective of lawyers who have experience working with independent fiduciaries is overblown. Lawyers can identify the independent fiduciaries with whom they have worked and describe factually their experiences with them without purporting to make a recommendation. Alternatively, they can make a recommendation and lawyers, more than anyone, understand that the implicit claim of competence in giving such advice will give rise to fiduciary responsibility.

The 1975 Regulations Improperly Narrowed the Meaning of Investment Advice

ERISA § 3(21)(A) provides straightforwardly that a person is a fiduciary if he “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.” The 1975 regulations narrowed the scope of this language by limiting it to investment advice that was “regular,” rather than one-time or episodic; advice that was rendered pursuant to an agreement or understanding that it would be a “primary basis” for investment; and advice that is “individualized” to the particular needs of the plan.¹¹ These limitations are not consistent with the plain meaning of the term “investment advice,” and at least in retrospect can be said to impede rather than advance the congressional goals of limiting self-dealing and of assuring prudent investment of plan assets.¹² As the Preamble to the Proposed Regulations notes, people providing investment advice not covered by the regulations have considerable influence on the decisions of plan fiduciaries and sometimes have conflicts of interest that result in lower returns and less retirement income for plan participants and their beneficiaries. The regulatory definition

¹¹The Preambles to the proposed and final 1975 regulations include virtually no explanation for the Department’s introduction of these extra-statutory conditions on the meaning of investment advice. The few comments noted in the Preamble to the 1975 final regulations asked that the definition of investment advice be narrowed (the Department responded to these comments by adding to the final regulations additional limitations on the meaning of investment advice); asked that the meaning of “fee or other compensation” be clarified (the Department responded to these comments by indicating that it was still studying this issue); asked that the applicability of the regulations to investment companies subject to the Investment Company Act of 1940 be limited (the Department responded to these comments by adding to the final regulations some conditions and limitations related to the purchase and sale of securities by investment companies); and asked for clarification of certain issues involving broker-dealers and investment advice (the Department responded to these comments with a discussion of these issues in the Preamble to the final regulations). The Preamble to the final regulations is silent as to whether it received any comments suggesting that the regulations defined investment advice too narrowly, suggesting that it did not. From conversations we have had with other groups representing interests of participants, it does not appear that such groups submitted comments on the 1975 proposed regulations (neither the Center nor NELA existed in 1975). In any event, the Department, in response to a FOIA request, has indicated that it cannot locate the comments submitted on the proposed regulations.

¹²We also note that the Supreme Court had not yet decided *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court wrote that in determining what deference to give to an agency decision, the first question “always, is the question whether Congress has directly spoken to the precise question at issue. 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.” There is no ambiguity about the meaning of the term “investment advice” and the only limitation that Congress placed on whether a person becomes a fiduciary because it rendered investment advice is that the investment advice was rendered for a fee or other compensation. Yet the regulations substituted a unique definition of investment advice by providing that the advice had to be offered on a regular basis, had to be a primary basis for a plan’s investment decisions, and had to be part of an agreement to provide individualized advice.

is also inconsistent with judicial language indicating that Congress generally intended the term fiduciary to be “broadly” construed.¹³

The problems of the regulatory definition are illustrated in judicial decisions. *In Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Company*, 884 F.2d 288 (7th Cir. 1989), a plan followed a brokerage firm’s conflicted investment advice and suffered a loss, but the court held that the brokerage firm was not a fiduciary because “there was no mutual understanding that Jones’ advice would be a *primary basis* for Plan investments.”

In a recent district court case, *Bhatia v. Dischino*, 2010 WL 1236406 (N.D. Tex. March 30, 2010), the trial court held that the actuarial consulting firm was not a fiduciary under the regulations, because the plaintiffs did not plead adequate facts to show that the firm “rendered advice on a regular basis as part of a mutual agreement that such advice serve as the primary basis of investment decisions.”

The Department has explained that developing proof of the elements of the regulations, even where proof exists, has slowed and impeded enforcement of ERISA for the Department of Labor. The lack of support in the statute for the conditions in the regulation and the difficulties for enforcement are reasons enough for the regulation. But the Center and NELA would like to point out that Congress intended that ERISA would be enforceable by ordinary participants and beneficiaries who, unlike the Department of Labor, do not have subpoena power and have no ready access to the documents and testimony that would demonstrate fiduciary status under the detailed existing regulation. This has always been a severe impediment to enforcement of fiduciary responsibility by private plaintiffs, but it has been greatly exacerbated in recent years because the Supreme Court has adopted a “plausibility” standard for the evaluation of complaints on a motion to dismiss. As a consequence, complaints alleging fiduciary status may be dismissed if they fail to allege factual support for some element of the regulation, and factual support will typically be unavailable or limited without discovery. See e.g. *Glen Ridge Surgicenter, LLC v. Horizon Blue Cross Blue Shield of New Jersey, Inc.*, No. 08-6160 (JAG), 2009 WL 3233427, at *6 (D.N.J. Sept. 30, 2009) (“[P]roof of [defendant]’s fiduciary status is an element of the fiduciary duty claim, and ‘a formulaic recitation [in the complaint] of the elements of a cause of action will not do.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); see also *Braden v. Walmart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (discussing the problem that participants are often without access to information that would allow them to plead factual support for each element of a claim).

The new regulations recognize that investment advice is no less important merely because it is rendered on a one-time basis. An individual who advises on the purchase of employer stock with all of the assets of an ESOP on a one-time basis is not less worthy of regulation than an individual who advises quarterly on asset allocation in a defined benefit plan. Moreover, the regular basis requirement finds no support in the statute or the legislative history.

Similarly, the requirement that advice be offered pursuant to an agreement or understanding that the advice will be a primary basis for making a decision is and always has been unsupported by the statute and extremely difficult to prove. As a practical matter, contracts with investment

¹³See, e.g., *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2nd Cir. 1997).

advisors are simply not written this way. An advisor agrees to provide advice of a particular sort in exchange for some form of compensation. There is no reason why the contract should specify how the advice may be used by the plan fiduciary. So while the advice may be the only real basis for an investment decision by the plan fiduciary, there will be no written agreement that the advice will be primary or even significant. Almost invariably, such an agreement or understanding will have to be inferred and will be rebutted by an integration clause in any written agreement providing for the advice. This hurdle, which the new regulations eliminate, seems to have been designed to give almost all advisors who did not specifically seek to be treated as fiduciaries a good faith argument that they are not fiduciaries. Consequently, this requirement in the old regulations is profoundly destructive of ERISA's purpose to protect participants and beneficiaries. The elimination of this requirement in the new regulations is not merely warranted, it is of critical importance.

The new regulations do not eliminate the requirement that advice be individualized, but clarify that advice should be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary. This reflects the Department's interpretation of the existing regulations but it is an important clarification. An enormous percentage of plan assets are managed in pooled vehicles holding plan assets of many plans. These may be master trusts, insurance separate accounts, fund-of-funds, and hedge funds usually organized as LLC's and operating pursuant to private placement memoranda. Advice that is "individualized" for the fiduciaries of these pooled vehicles is not individualized for a particular plan, and yet such advice is no less worthy of regulation than advice provided to one plan at a time. If anything, regulation of such advice is more critical than advice given to a single plan with the needs of that plan in mind. Similarly, many investment decisions are made by participants in 401(k) plans, and the advice given to them should not escape regulation because individual participants are uniquely vulnerable to self-interested investment pitches.

The decision in the new regulations to cover appraisals is warranted. As a practical matter, appraisers set the price of assets that are purchased or sold by plans, including and especially the closely-held employer stock that plans purchase or sell. To suggest that this advice is not investment advice defies common sense. Often an appraiser is the only outside advisor a fiduciary relies on in deciding to purchase an asset at a particular price.

In an ESOP, price is the critical concern, since diversification is excused and the courts have been skeptical of claims that employer stock may be "too risky" to be a prudent investment. We anticipate that appraisers will argue that they should not be held to fiduciary standards when their appraisals are only used for compliance and distributions. We think the proposal as it stands is appropriate. Note that the courts seem to provide a more deferential review of decisions (and by extension advice) involving only distributions. See *Armstrong v. LaSalle National Bank*, 446 F.3d 728(7th Cir. 2006) (fiduciary setting a value for ESOP distributions is entitled to deference because he must balance the interests of those taking a distribution with the interest of those who stay in the plan).

Equally important, the Department's longstanding interpretation of its regulation to exclude appraisals is difficult to defend. The opinions of appraisers are at least "a primary basis" for a typical plan's decision to buy or sell a hard-to-value asset at a particular price, and this is

certainly understood by appraisers hired to value stock or other assets for a transaction. At best it might be argued that an appraiser is often hired for one transaction or one appraisal at a time, so an appraiser's opinion may well not be provided on a regular basis. Following the plain meaning of the statute, if not the old regulations, the advice given by appraisers that guides the fiduciary's decision to purchase or sell a particular asset at a particular price certainly falls within the plain meaning of "investment advice."

The Current Regulations Create Legal Uncertainty

The 1975 regulations also introduce inherently vague definitional concepts into the definition of investment advice. The regulations do not define what is meant by providing advice on a "regular basis," what is meant by advice that will be "a primary basis" for the plan's investment decisions, nor what is meant by advice that is "individualized to the plan's" needs. These must be determined on a case-by-case basis. The inherent ambiguity and subjectivity of these concepts creates uncertainty in the law and strains Departmental, judicial, and private resources in litigation of issues not related to the core concept of investment advice.

Comments on the Proposed Regulations

As we earlier indicated, we strongly support the Department's initiative to redefine the meaning of investment advice, although we offer the following comments that would strengthen the proposed regulation and more faithfully implement Congressional intent.

1. Section 2510-3-21(c)(ii)(D) makes a person who issues investment advice a fiduciary if, among other requirements, the advice "will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary." At least in cases of individual participants and beneficiaries, we are not certain why a person would be a fiduciary only if their advice was sufficiently individualized (and the regulations do not discuss when advice is sufficiently individualized to meet the proposed regulatory requirement). We have doubts that a typical participant or beneficiary will be able to discern a difference between individualized and non-individualized advice.

We are also concerned that some advisers who do not have the interests of participants at heart may be focused on selling a particular investment, rather than providing individualized advice about a variety of investments or strategies. In such instance, if the advice is directed to an individual, that advice might influence that individual's investment choices within a plan just as surely as advice that is individualized.

Finally, this aspect of the regulation might provide a perverse incentive to some providers of investment advice to not tailor the advice to the particular needs of the individual in order to avoid fiduciary status. Our concern for advice given to individual participants is heightened when the person giving the advice has been given an aura of legitimacy by virtue of having been appointed to provide advice by a plan fiduciary or who otherwise has the imprimatur of the plan, e.g., a custodian or contract administrator. At least with respect to participants, we would prefer

that the regulations provide that the advice be directed to a particular participant rather than that it be “individualized.”¹⁴

As to advice given to plans and plan fiduciaries, the regulation should be modified to eliminate the requirement that there be an agreement to provide individualized advice.

It should be sufficient that there is an agreement to provide investment advice and that the service provider performs the agreement by the providing individualized advice. Agreements generally do not specify that advice will be individualized, even when individualized advice is contemplated. For example, when a consultant is hired to recommend investment managers for a particular fund, the agreement to provide individualized advice may be unspoken or assumed by the parties - generally such a consultant will take into account the needs of the fund by providing more than a generic ranking of manager performance. Consequently, some of the very proof and investigational difficulties that inspired the new regulations will still be present unless this requirement is modified.

Moreover, the definition of “individualized” should be clarified further. The Center and NELA understand that the Department does not wish to encompass within the definition of fiduciary mere brokers or others who provide “research” on stocks, bonds, and other investments, rating them as buys, sells or holds, calculating betas or other risk measures or predicting returns. But it should be clear that when an advisor tells a fiduciary with control of plan assets (pooled or not) or a participant to buy or sell a particular investment, or that an investment without a ready market that the fiduciary is considering purchasing or selling has a particular value, then that advice is sufficiently individualized. The distinction should be between saying “you should consider buying Xerox” and “our firm rates Xerox a buy;” the first statement should be considered “individualized,” regardless of the thinking or specific intent behind it. A focus on portfolio composition and diversification fails to capture this concept. Further clarification, perhaps with examples, should be undertaken in the final regulations.

2. Section 2510-3-21(c)(2)(i) provides that a person shall not be considered to be a fiduciary investment adviser if such person can demonstrate “that the recipient of the advice knows or, under the circumstances, should have known, that the person is providing the advice or making the recommendations in its capacity as a purchaser or seller of a security or other property, or as an agent of, appraiser for, such 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.”

While we believe that this limitation may be appropriate when such advice is provided to a sophisticated plan fiduciary, it is not appropriate when the advice is given to individual participants or their beneficiaries. The Center and NELA have worked with participants for 35 and 26 years respectively, and it is our experience that most plan participants will not be able to discern when advice is impartial or conflicted. In addition, even if there is disclosure, in a one-to-one meeting, whether in person or by phone, an unsophisticated investor will often regard the

¹⁴Non-individualized advice on asset allocation and the like, however, will generally be characterized as investment education rather than investment advice.

adviser as acting in his interest. This is particularly true if the participant does not have access to other advisers. Indeed, an adviser's success may depend on a client's belief that the adviser is interested primarily in the customer's welfare, despite a declaration of self-interest. There is the further fact that most participants will not be knowledgeable about the types of fees and benefits that can accrue to the purchaser or seller of securities. Thus, we strongly urge the Department to revise this limitation so that it only applies to advice and recommendations given to plan fiduciaries.¹⁵

3. Section 2510-3-21(c)(2)(iii) of the proposed regulations provides that investment advice does not include an appraisal or fairness opinion that reflects the value of an investment of a plan or participant or beneficiary, provided for purposes of reporting and compliance under ERISA or the Internal Revenue Code, unless such report involves 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 and beneficiaries. We believe that the Department should consider revising the limitation so that it would not apply to situations when an appraisal of property for which there is not a generally recognized market would have a material effect on the funding status of a defined benefit plan.

The Center and NELA recognize that appraisers will typically include scope limitations in their appraisals. For example they will say that they are relying on management projections in preparing a discounted cash flow. In such cases, it is up to the user of the appraisal to assure himself that the projections relied upon are reasonable. The Department should be able to address the concerns of appraisers by indicating that scope limitations will be respected, and appraisers will be held responsible only for the opinions that they express (complete with limitations), subject to section 405 of ERISA, so that an appraiser who knew that he was being provided with unreliable information would have a duty to take steps to remedy the situation.

4. The Department asked for comment on whether and to what extent the final regulation should define the provision of investment advice to encompass recommendations related to taking a plan distribution. The Department has taken the position that a person providing investment advice to a participant in an individual account plan is a fiduciary, even if the person is chosen by the participant and has no other connection to the plan.¹⁶ The Department has also held that if a plan fiduciary responds to participant questions about the advisability of taking a distribution or the investment of amounts drawn from the fund, that fiduciary must act for the sole and exclusive benefit of the participant. Moreover, a fiduciary that advises the participant to invest in an IRA managed by the fiduciary may be in violation of the prohibited transaction rules of ERISA and the Internal Revenue Code.

However, the Department has also opined that, if the person providing such advice on distributions is not connected with the plan, that person can recommend that the participant take

¹⁵We also note an additional concern: the proposed rule appears to undercut the prohibited transaction exemptions that apply when fiduciaries provide investment advice under certain limitations designed to protect plan participants from conflicts of interest. See ERISA § 408(g). Under the proposed regulations, an investment adviser could claim that it did not become a fiduciary under the "sale or purchaser" limitation and thus was free to give investment advice without complying with section 408(g).

¹⁶DOL Advisory Opinion 2005-23A.

a distribution and invest in a fund managed by that person and that does not constitute investment advice under the current regulations.¹⁷ We see no reason for this distinction and believe that the regulations should be changed.

A recommendation to remove assets from the plan and invest them elsewhere is, in effect, a judgment about the relative merits of the plan options and the other investment(s). The person making the recommendation can have interests adverse to the plan participant and the recommendation can have a substantial effect on a participant's retirement security, both in terms of future investment performance, the loss of an economically efficient means of taking retirement income in annuity form, and tax considerations. Moreover, under the current interpretation, the person giving advice in these circumstances has no obligation under ERISA to reveal their conflict of interest. Such advice should be considered investment advice under the new regulations.

We are especially concerned about the problem of advice given by plan custodians and non-fiduciary administrators. We are aware of participants and beneficiaries who call plans to arrange for or inquire about a distribution who are then solicited to invest in products offered by the plan service provider. At a minimum the regulations should address this concern by making the entities that provide this "advice" fiduciaries. Participants and beneficiaries are inclined to believe that the persons assigned to address their inquiries regarding their rights in the plan have their interests at heart. In truth, they are unknowingly exposed to salesmen with a financial interest, whether disclosed or not. Persons using their privileged access to plan participants and beneficiaries gained through their positions (even ministerial positions) with a plan to steer participants and beneficiaries into their investment products should be held to fiduciary standards.

5. Section (c)(ii)(B) of the regulations should be clarified by adding "a plan fiduciary" after "individualized needs of the plan" and "managers" after "securities." More importantly, we are concerned that such menus that are excluded from investment advice be limited to those that give the fiduciary a broad choice to select from. At one extreme, if fiduciaries are presented with a specific or very limited lineup, it is hard to see why the individual promoting that lineup should be excused from being deemed a fiduciary, even if he discloses that he is selling a product and is not disinterested. In addition, such disclosure should specify the nature of the individual's financial interest—i.e., how is he being paid and how much he is being paid to recommend these alternatives.

6. The Preamble to the Regulations should be revised to indicate that the Department has taken litigation and administrative positions prior to the issuance of the proposed regulations interpreting the existing regulations that investment advice to a plan encompasses; a) advice to plan fiduciaries, including fiduciaries of pooled vehicles; b) advice with regard to the selection of managers; and c) advice paid for by third parties, e.g., commissions. Likewise, the Department should clarify in the Preamble that it does not view its interpretation of the existing regulations' requirement of individualized advice as precluding advice individualized to the needs of plan fiduciaries of pooled vehicles rather than a particular plan. Without such clarification,

¹⁷*Id.* See also *Walsh v. Principal Life Insurance Co.*, 49 EBC 1344 (S.D. Iowa 2010).

defendants will argue that the new regulations implicitly recognize that such advice would not give rise to fiduciary status under the existing regulations.

Conclusion

In sum, this is a much needed regulatory change that will better protect plans and participants and facilitate more effective enforcement when misconduct is uncovered. The Pension Rights Center and NELA applaud the Department for pursuing this initiative that will benefit both retirement plans and their participants and beneficiaries.

Respectfully submitted,



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