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By first-class mail and electronic delivery
to Federal eRulemaking Portal [*http://www.regulations.gov*]

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of the term "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended; Proposed Rule

Ladies and Gentlemen:

The Committee on Employee Benefits and Executive Compensation of the New York City Bar Association (the "Committee") is composed of attorneys with diverse perspectives on employee benefits issues, including members of law firms and counsel to corporations.[1] We welcome the

[1] This letter was prepared by a subcommittee of the Committee on Employee Benefits and Executive Compensation of the New York City Bar Association co-chaired by Ira Bogner and David Olstein. The other members of the subcommittee were Wendy Bicovny, Craig Bitman, Evan Giller, Robert Kraus, Kenneth Laverriere, Jessica Lermond, Alicia McCarthy, Jeffrey Ross, Keith Snow, Vipin Varghese, and Jill Weintraub. Subcommittee member Jeffrey Ross was the primary author of this letter. The Committee on Employee Benefits and Executive Compensation gratefully acknowledges the review and suggestions of Paul Cellupica, a member of the Committee on Investment Management Regulation and Robert Buckholz, chair of the Committee on Securities Regulation (made in their individual capacities).

opportunity to comment on the proposed rule recently issued by the U.S. Department of Labor (the "Department") regarding the term "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), in the investment advice context (the "Proposed Rule"). The Proposed Rule, when finalized, would replace subsection (c) of the Department's current rule, which was issued in 1975 (the "Current Rule").[2]

The Proposed Rule represents one of the most significant developments in the regulatory framework governing ERISA fiduciaries since the statute was first enacted, inasmuch as it vastly expands the categories of persons who may become fiduciaries on account of rendering investment advice to a plan or plan participants or beneficiaries.[3] Because the Proposed Rule represents such a significant reconfiguration of stakeholders' long-held expectations in this area, we believe the Department should ensure that the Proposed Rule strikes the proper balance between, on the one hand, protecting plans, participants and beneficiaries and, on the other hand, ensuring that plans are able to access cost-effective services from qualified service providers.

According to the Department's press release, the Department updated the Current Rule because of its concern that the Current Rule's approach to fiduciary status in this area "may inappropriately limit the Department's ability to protect plans, participants and beneficiaries from conflicts of interest that may arise from today's diverse and complex fee practices in the retirement plan services market." The Proposed Rule, therefore, has been designed to "protect plan officials and participants who expect unbiased advice by giving a broader and clearer understanding of when individuals providing such advice are subject to ERISA's fiduciary standards."

We commend the Department for choosing to revisit the Current Rule to ensure that it remains appropriately protective of plans, participants and beneficiaries in light of the modern marketplace. Overall, however, we believe the Proposed Rule is too broad in that it would classify as fiduciaries many service providers who should not reasonably be regarded as such. While the Department may believe that a rule of expanded breadth is preferable to the Current Rule, we believe the Proposed Rule would have the unintended consequence of significantly increasing the costs of managing plans subject to ERISA and, in the worst case, making certain critical high-quality services wholly unavailable to plans or individual retirement accounts ("IRAs") at any cost.

As just one example, it seems that most brokers would be treated as ERISA fiduciaries under the Proposed Rule. As such, their receipt of commissions would most likely violate ERISA's fiduciary and self-dealing rules, requiring them to find alternative compensation arrangements or to stop doing business with plans and IRAs. Similarly, increasing the number of ways in which a

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[2] 29 C.F.R. § 2510.3-21.

[3] It should be noted that the Proposed Rule also applies to investment advice with respect to individual retirement accounts. *See* paragraph (c)(4) of the Proposed Rule. The Proposed Rule's potentially significant impact on services and products offered to individual retirement accounts, however, was not addressed by the Department in the preamble to the Proposed Rule.

service provider may be considered a fiduciary will likely lead to significantly increased compliance costs for service providers, particularly for larger financial services companies that provide a number of services to a plan. Many routine, arm's-length transactions that have to date been permissible will now raise potential issues under ERISA's self-dealing prohibited transaction rules—larger institutions will have to institute complex tracking systems to ensure that advice given by a "fiduciary" in one division has not led a plan to transact with another division of the institution.[4] It is likely that these restructuring and compliance costs will be passed on to plans or result in service providers leaving the benefit plan space. Finally, because potential legal liability is frequently factored into a product's cost, this will further result in added costs to plans, in many cases without any corresponding benefit.

We acknowledge that the Department is aware of the potential for the Proposed Rule to lead to increased costs for plans. The Proposed Rule's Regulatory Impact Analysis notes that the Proposed Rule could result in "higher costs of doing business due to increased liability," that "the plan service provider market could become compressed" and that "[a]s more service providers become fiduciaries, more transactions could violate ERISA prohibited transaction rules."[5] However, while we understand that the Department has performed a comprehensive, unified analysis to estimate the costs and provide a qualitative assessment of the benefits attributable to the Proposed Rule for purposes of compliance with Executive Order 12866 and the Regulatory Flexibility Act, we urge the Department to reconsider its estimate, which we believe grossly understates the potential costs and market effects of the Proposed Rule.[6] In particular, it is imperative that the Department review each statutory and administrative prohibited transaction exemption under which relief has been conditioned upon the party in interest's non-fiduciary status to determine whether the Proposed Rule would essentially

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[4] We also note that many prohibited transaction class exemptions (*e.g.,* PTCE 75-1), as well as the statutory "service provider" exemption (Section 408(b)(17) of ERISA), require that the party in interest with which the plan is transacting not be a fiduciary (or an affiliate of a fiduciary) with respect to the assets involved in the transaction. The Proposed Rule, by expanding the types of services that could give rise to fiduciary status, could significantly limit the availability of relief under such exemptions. The Proposed Rule may also create unintended consequences under Section 3(42) of ERISA, which provides that the underlying assets of an entity shall not be treated as "plan assets" if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest is held by benefit plan investors. For purposes of calculating this percentage, Section 3(42) of ERISA requires that equity interests held by certain persons be disregarded, including interests held by any person (other than a benefit plan investor) "who provides investment advice for a fee (direct or indirect) with respect to the assets of the entity." Based on the Department's previous guidance in this area, we would generally expect that determinations as to whether one has provided "investment advice" for purposes of the foregoing rule would be based on the principles of the Proposed Rule. The result would be a broader application of ERISA's so-called "disregard" rule and potentially an inadvertent increase in the number of "plan asset" funds.

[5] 75 Fed. Reg. 65,270 (Oct. 22, 2010) (Table 1).

[6] We also request that the Department more explicitly address the costs of the Proposed Rule with respect to IRAs.

override such exemptions and preclude transactions that have long been permissible.[7] In this regard, we applaud the Department's recent decision to call for one to two days of hearings on the Proposed Rule in early March and urge the Department to solicit information for use in a formal exhaustive cost-benefit review before the Proposed Rule is adopted.

As it stands, it is our belief that the Proposed Rule does not yet strike the proper balance between protecting plans and ensuring that they are able to access cost-effective services from qualified service providers. We believe the Department can do a better job of more closely tailoring the rule to its stated goal. In addition, we note that a number of issues involving the standard of care owed by broker-dealers and investment advisers generally are currently being addressed by the Securities and Exchange Commission ("SEC") in conjunction with implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). In particular, the SEC has, pursuant to Section 913 of the Dodd-Frank Act, recently completed a study of the effectiveness of existing legal or regulatory standards of care for broker-dealers and investment advisers, and whether there are gaps, or overlaps, in the protection of retail investors related to these standards of care. This provision also authorizes the SEC to conduct rulemaking to address these legal and regulatory standards of care for broker-dealers and others providing personalized investment advice about securities to retail customers. We would urge the Department to monitor the SEC's activities on this topic and carefully consider the interplay between the Proposed Rule and any harmonized standard of care under development by the SEC, to ensure that duplicative or inconsistent standards are not imposed upon broker-dealers and investment advisers that provide advice with respect to ERISA plans and IRAs. Furthermore, we note that additional rulemaking initiatives authorized or mandated by the Dodd-Frank Act, including with respect to other agencies such as the Commodity Futures Trading Commission ("CFTC"), may also be relevant to the goals that the Department is seeking to achieve through its Proposed Rules.[8]

In light of the foregoing, the purpose of our letter is to suggest several limitations on the Proposed Rule's scope and request other clarifications of the Proposed Rule's intended effect.

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[7] The preamble to the Proposed Rule provides that "[a]bsent applicable prohibited transaction exemptions, service providers would have to restructure transactions and/or modify business practices." *Id*. However, it is not clear whether the Department has considered the effect that the Proposed Rule will have on existing prohibited transaction exemptions.

[8] For example, pursuant to rulemaking authority granted under Section 731 of the Dodd-Frank Act, the CFTC has issued a proposed rule (the "CFTC Rule") that would impose business conduct standards on "Swap Dealers" and "Major Swap Participants" that enter into, or propose to enter into, swaps with "Special Entities" (which, as defined under the CFTC Rule, would include employee benefit plans subject to ERISA). *See* Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties; Proposed Rule, 75 Fed. Reg. 80,639 (Dec. 22, 2010). We request that the Department consider the interplay between the CFTC Rule and the Proposed Rule. In particular, we note that the business conduct standards established under the CFTC Rule would require a Swap Dealer or Major Swap Participant to make certain disclosures to an ERISA plan counterparty that could potentially result in the Swap Dealer or Major Swap participant being considered a fiduciary under the Proposed Rule.

1. A Service Provider's Status As an Investment Adviser Should Not Determine Fiduciary Status. The Proposed Rule provides that if certain service providers having the relationships to a plan described in paragraph (c)(1)(ii) of the Proposed Rule ("Covered Relationships") provide advice of the type described in paragraph (c)(1)(i) of the Proposed Rule ("Covered Advice") to a plan, a plan fiduciary or a plan participant or beneficiary for a fee, the service provider will be a fiduciary unless an exception applies. The breadth of the Proposed Rule is highlighted when one observes that the legal status of a service provider as an "investment adviser" within the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940, as amended (an "Investment Adviser"), in certain cases will lead to fiduciary classification if that service provider gives Covered Advice, regardless of whether its recommendations are made in the context of an advisory relationship or potential advisory relationship.

Frequently, service providers will register a single legal entity as both an Investment Adviser and broker-dealer under the Securities Exchange Act of 1934, as amended. Thus, if a research analyst in the broker-dealer division of the entity provides a generalized recommendation to its clients regarding a security (*e.g.*, a general "buy" recommendation), the service provider will be a fiduciary with respect to that recommendation to any of its clients that are plans or plan participants or beneficiaries, regardless of whether the recommendation is individualized to the needs of the plan, participant or beneficiary or whether the advice is even considered by the plan, participant or beneficiary in making a decision. If that recommendation directly or indirectly leads to increased compensation to the service provider, a violation of ERISA's self-dealing rules will have occurred. While it may be possible that the exception in paragraph (c)(2)(i) of the Proposed Rule would apply (see discussion in Section 5 below), based on the limitations of that exception, it is not clear that a service provider could ever reach that conclusion with reliable certainty.

Eliminating status as an Investment Adviser as a Covered Relationship would more closely tailor the Proposed Rule to its stated purpose without compromising the Department's stated goal. Because the provision of individualized investment advice separately gives rise to a Covered Relationship (and because the provision of individualized investment advice is generally the type of advice that would normally give rise to status as an Investment Adviser), the Proposed Rule already captures the type of conduct that stakeholders should reasonably expect to be fiduciary conduct without the unintended consequences of an overly broad, status-based rule.

The overly broad nature of the Proposed Rule becomes even more evident when one considers that an entity can become an ERISA fiduciary based on a Covered Relationship involving an affiliate. We find no compelling rationale for why Covered Advice given by a broker-dealer should automatically result in fiduciary status merely because the broker-dealer happens to be affiliated with an Investment Adviser.

We therefore request that the Department revise the Proposed Rule to provide that a person's status as an Investment Adviser will not, by itself, result in a Covered Relationship. If the Department does not accept the preceding recommendation, we request that the Department revise the Proposed Rule to provide, at a minimum, that a

person's affiliation with an Investment Adviser will not result in a Covered Relationship unless such person is acting together with the affiliated Investment Adviser to provide Covered Advice.

2. Status As a Fiduciary Administrator Should Not Give Rise to a Covered Relationship. Under the Proposed Rule, a service provider's existing status as a plan fiduciary described in Section 3(21)(A)(i) or (iii) of ERISA results in a Covered Relationship. The Current Rule contains a similar rule, which provides that a person who 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 will be a fiduciary if the person or its affiliate has discretionary authority over the purchase or sale of securities or other property for the plan (*i.e.*, is already a fiduciary to the plan under Section 3(21)(A)(i) of ERISA in some other capacity). Thus, a key difference between the Current Rule and the Proposed Rule is that the Proposed Rule would treat a person that has discretionary authority or responsibility with respect to plan administration (*i.e.*, is already a fiduciary to the plan under Section 3(21)(A)(iii) of ERISA) as having a Covered Relationship.

Presumably, the rationale in treating pre-existing fiduciaries as having a Covered Relationship with a plan is that these persons are expected to be in a position of trust, and therefore whatever investment advice they give should be treated as fiduciary advice. However, the fact that an organization is a third-party administrator of a retirement plan, for example, would not make it any more likely that another fiduciary with investment management responsibilities would expect expert, trusted investment advice from the organization. Moreover, a rule that essentially makes plan administrators fiduciaries with respect to statements concerning plan investments that they make in passing will likely have a chilling effect, making it less likely that one would be willing to serve in that capacity. Establishing a Covered Relationship based on the performance of administrative functions seems even more unwarranted when one considers that, under the Proposed Rule, mere affiliation with a fiduciary administrator would also result in a Covered Relationship.

We therefore request that the Department revise the Proposed Rule to provide that a person's status as a fiduciary administrator under Section 3(21)(A)(iii) of ERISA will not, by itself, result in a Covered Relationship. If the Department does not accept the preceding recommendation, we request that the Department revise the Proposed Rule to provide, at a minimum, that a person's affiliation with a fiduciary administrator will not, by itself, result in a Covered Relationship.

3. The Provision of Advice, or an Appraisal or Fairness Opinion, Concerning the Value of Securities or Other Property Should Not Constitute Covered Advice Unless a Plan, Plan Participant or Beneficiary Has Relied on the Advice As a Primary Basis in Making an Investment Decision. With the Proposed Rule, the Department reverses its longstanding conclusion in Advisory Opinion 76-65A (June 7, 1976) that a valuation of closely held employer securities that an ESOP intends to rely on in purchasing the securities does not constitute investment advice under the Current Rule. We express no view as to whether the reversal of this

rule is advisable. However, the language that the Department has used to reverse the result in AO 76-65A is much broader than needed to accomplish the Department's purpose, especially given the vast number of situations in which a service provider might be treated as giving "advice concerning the value of securities." This is particularly the case when coupled with the observations above that one's legal status alone can give rise to a Covered Relationship. Thus, any Investment Adviser (or any affiliate of an Investment Adviser) that gives advice regarding the value of securities to a plan or plan participant or beneficiary would become an ERISA fiduciary. Given this formulation, it is difficult to envision an investment-related service provider that would not be a fiduciary under the Proposed Rule.

Accordingly, we believe paragraph (c)(1)(i)(A)(1) of the Proposed Rule should be limited so that the advice described in that paragraph would not be Covered Advice unless a plan fiduciary, participant or beneficiary relies on the advice as a primary basis in making an investment decision or it is reasonable to believe that a plan fiduciary, participant or beneficiary would so rely. Although the Department may believe that the exception in paragraph (c)(2)(iii) of the Proposed Rule already significantly limits the effect of the rule in paragraph (c)(1)(i)(A)(1), that exception is simply not broad enough to cover many routine situations that should not reasonably be expected to give rise to fiduciary status. Without this proposed revision, fiduciary status would be inappropriately implicated in, for example, the situations below:

- Non-"Plan Asset" Funds. The provision of valuations in the context of a private investment fund should not constitute Covered Advice where the assets of the fund do not constitute "plan assets" under ERISA. Because private investment funds may routinely provide their investors, including investors subject to ERISA, with periodic reports regarding the value of fund interests, their routine operations could subject the managers of such funds to fiduciary status if the managers or their affiliates happen to be Investment Advisers, as will often be the case. If so applied, the Proposed Rule has the potential to upset stakeholders' longstanding expectations regarding the applicability of ERISA to investment vehicles that do not hold "plan assets." In essence, the Proposed Rule could render the plan asset regulation meaningless by treating many (perhaps most) private investment fund managers as ERISA fiduciaries regardless of whether the funds they manage hold plan assets.

- Jointly Retained Appraisers. From time to time, plans may enter into arrangements with adverse parties whereby the plan and the adverse party jointly agree to retain or compensate a third-party appraiser in connection with the purchase or sale of an illiquid asset. In these circumstances, it would not be reasonable to expect the third-party appraiser to act as the plan's fiduciary. The only result of the Proposed Rule, then, would be to require the plan and adverse party each to hire their own appraisers, thereby increasing costs for both parties without necessarily enhancing the protection afforded to the plan or plan participants.

- "Plan Asset" Funds. The Department's performance fee guidance requires that managers of investment funds or accounts that hold "plan assets" ("Plan Asset Funds") obtain independent valuations of their assets under management in certain circumstances.[9] In this context, independent valuations are required to satisfy the Department's apparent concern that, absent the check of independent valuations, investment managers might disregard their fiduciary duties under ERISA and inflate the value of assets under management in a bid to improve their compensation. These valuations are not typically used by such managers to make any kind of investment decision. As a practical matter, it is often difficult to find independent valuation agents under the current regulatory regime, where the mere threat of potential ERISA fiduciary liability is enough to deter many service providers from acting in this capacity. Under the Proposed Rule, where valuation agents to Plan Asset Funds would be regarded as ERISA fiduciaries, it is likely that independent valuators will become even more difficult to retain or, at the very least, prohibitively expensive. Because the manager receiving the advice will almost exclusively be a regulated financial institution with substantial assets under management (*i.e.*, Plan Asset Funds are almost always managed by "qualified professional asset managers" ("QPAMs")—see discussion in Section 6 below), we do not believe that there is any need for the Proposed Rule's protectiveness in this context.

We therefore request that the Department revise the Proposed Rule to provide that the advice described in paragraph (c)(1)(i)(A)(1) will not be Covered Advice unless a plan fiduciary, participant or beneficiary has relied on the advice as a primary basis in making an investment decision, or it is reasonable to believe a plan fiduciary, participant or beneficiary would so rely.

If the Department does not adopt the preceding recommendation, we request that the Department revise the Proposed Rule to provide, at a minimum, that:

- **"Advice, appraisals or fairness opinions" given in the context of private investment funds that do not hold "plan assets" will not constitute Covered Advice; Appraisers or similar agents who are jointly retained or compensated by a plan and an adverse party will not be treated as providing Covered Advice in that capacity; and**
- **Those providing independent valuations to Plan Asset Funds for purposes of complying with the Department guidance on performance fees will not be treated as providing Covered Advice.**

4. The Provision of Covered Advice by Lawyers or Other Professionals Should Not Give Rise to Fiduciary Status to the Extent Such Advice Is Solely Incidental to the Practice of Their Professions. Lawyers and other service providers subject to professional standards external to ERISA, such as accountants or actuaries, may, from time to time, be called upon to give what

[9] *See* DOL Adv. Op. 86-20A (Aug. 29, 1986), 86-21A (Aug. 29, 1986), 89-31A (Oct. 11, 1989) and 99-16A (Dec. 9, 1999).

could be viewed as Covered Advice. For example, a lawyer's opinion that a particular investment may or may not be permissible under a plan's governing instruments or that it could give rise to unrelated business taxable income could in certain circumstances be viewed as a recommendation as to the advisability of making the investment. In most cases, such advice would be individualized and pursuant to an understanding that the advice may be considered in connection with making an investment decision. As such, lawyers and other professionals could be deemed to be fiduciaries.

Because lawyers are already subject to codes of professional conduct, subjecting them to the ERISA fiduciary standard of care likely does little to further protect plans and participants. In addition, because acting as an ERISA fiduciary is not covered by most professional liability insurance policies, lawyers and other professionals who are treated as ERISA fiduciaries would likely need to obtain additional insurance coverage at a cost that would presumably be passed on to plans. Furthermore, fiduciary status gives rise to potential liability as a co-fiduciary under Section 405 of ERISA. At least with respect to lawyers, it is unclear whether the actions required by Section 405 of ERISA (particularly, actions taken to remedy any breaches of a co-fiduciary of which the fiduciary has knowledge) would be consistent with lawyers' duties of confidentiality to their clients, the codes of professional responsibility of many States, or the general conduct that clients expect from their lawyers in the typical attorney-client relationship. As the Department noted in the preamble to the Proposed Rule, the definition of "investment adviser" under the Investment Advisers Act of 1940, as amended, specifically excludes "any lawyer, accountant, engineer, or teacher whose performance of [investment advisory] services is solely incidental to the practice of his or her profession." For the reasons noted above, we believe a similar exclusion is warranted here.

Sometimes lawyers and other professionals may undertake to provide investment advice of a type that is beyond the scope of what is typically regarded as legal advice or the professional services at issue.[10] Of course, in those cases, the determination of whether lawyers or other professionals have provided fiduciary investment advice should be unaffected by their status as professionals.

We therefore request that the Department revise the Proposed Rule to provide that a lawyer or other service provider governed by professional standards other than ERISA, whose provision of Covered Advice is solely incidental to the practice of his or her profession, will not be considered a fiduciary under ERISA.

5. The Exception for Adverse Advice Should Be Broadened or Clarified. Given the concerns regarding the broad scope of the Proposed Rule expressed in Section 1 above, either the Covered Advice and Covered Relationship rules should be narrowed or the exceptions contained in paragraph (c)(2) of the Proposed Rule should be broadened (or both). With respect to the exceptions, while we concur with the intent underlying the "Adverse Interest Exception" in paragraph (c)(2)(i) of the Proposed Rule, it is not clear that the exception has been drafted

[10] *See, e.g., Seawell v. Brown*, S.D. Ohio, No. C-1-08-614, 11/10/10.

broadly enough to cover all the scenarios it should reasonably be expected to cover. Generally speaking, we believe it would not be advisable to impose fiduciary status on salespeople—persons that are plainly doing no more than attempting to sell any kind of investment or investment product to a plan. Furthermore, as noted above, issues involving the standard of care that such salespeople owe to their customers generally are already being addressed by the SEC through its own rulemaking process.

One way the Proposed Rule is too narrow in this regard is that the Adverse Interest Exception applies only to those who are providing advice in connection with the purchase or sale of a security or other property. Notably, the rule does not cover the provision of services or the extension of credit. So, for example, it is not clear that the exception would apply in the context of an Investment Adviser making investment-related recommendations during a pitch to a new plan client regarding a potential separate account that the adviser would manage for the plan (because separate account management services are not themselves securities or other property). This is an especially incongruous result when one considers that if the same Investment Adviser were pitching the new plan client regarding a potential investment in a Plan Asset Fund that it managed, the exception would presumably be available (because an interest in a Plan Asset Fund would be a security).

Another way the Proposed Rule may be too narrow is the requirement of an adversity of interest itself. In many circumstances, it may be clear that a service provider is attempting to sell products or services to a plan, but it may not be as clear whether there is any true adversity beyond the fact that the service provider or an affiliate may receive a fee or other compensation if the product or service is sold. The Department should clarify that the fact that the service provider or an affiliate will receive a fee or other compensation if a product or service is sold will be sufficient to meet the "adversity" prong of the Adverse Interest Exception.

We therefore request that that the Department revise the Proposed Rule to provide that:

- **The Adverse Interest Exception will apply to advice provided in connection with the sale of a service or an extension of credit; and**
- **The "adversity" prong of the Adverse Interest Exception will be satisfied by the fact that the service provider or an affiliate will receive a fee or other compensation if a product or service is sold.**

6. The Current Rule Should Continue to Apply in Circumstances Where a Service Provider Is Unlikely to Exercise Undue Influence Over a Plan or Plan Fiduciary. At the core of the Proposed Rule is the idea that certain persons will always be in a position of trust with respect to plans, participants or beneficiaries (*i.e.*, in a Covered Relationship) and those persons should be treated as fiduciaries when they give Covered Advice. A critical flaw in the Proposed Rule, however, is that a single set of rules applies for determining which service providers may be in a position of trust for this purpose, without regard to the identity of the recipient of the advice. For example, it is unreasonable to conclude that a QPAM who is managing a $350 million portfolio

for a large defined benefit pension plan will rely upon the advice from a service provider to the same extent as would a plan participant in a small 401(k) plan.

The Proposed Rule therefore needs to be much more flexible in its approach based on the identity of the recipient of Covered Advice. For a subset of stakeholders (large defined benefit and non-self-directed defined contribution plans, their fiduciaries and their service providers), the Proposed Rule adds substantial costs without providing any material corresponding benefit. Many of the changes in market practice and service-provider relationships that appear to have prompted the Department to revise the Current Rule arose in the self-directed defined contribution plan context. We do not believe market practice in the context of advice given to large plans, which are frequently represented by regulated financial institutions with substantial assets under management (such as QPAMs and "in-house asset managers" ("INHAMs")), has changed so much as to warrant such a drastic change in approach to fiduciary status. Furthermore, these institutional asset managers and other fiduciaries to these plans will possess far greater expertise as to investment matters than the average plan participant, and thus a greater ability to critically evaluate investment advice.[11]

We are concerned that if the Proposed Rule is adopted in anything close to its current form, large plans may end up paying substantially more for necessary services or may not have access to the best services available.[12] **To avoid this result, the Department should allow large plans and their service providers to continue to operate under the Current Rule. At a minimum, the Department should permit a large plan and a service provider to preserve the status quo by acknowledging in writing that the service provider is not being retained for the purpose of providing Covered Advice, and that any Covered Advice provided by the service provider will not be considered in connection with making investment or management decisions for the plan.**

In defining what constitutes a "large" plan for this purpose, we note that the Department has generally used a minimum asset threshold of $50-100 million (*e.g.*, performance fee guidance, the QPAM and INHAM exemptions, and certain individual exemptions).

7. The Department Should Not Expand the Definition of Investment Advice to Cover All Recommendations Regarding Permissible Plan Distributions. In the preamble to the Proposed Rule, the Department asked for comments on whether the Final Rule should define the provision of investment advice as encompassing recommendations related to taking a plan distribution,

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[11] We note, in this regard, that Section 404(a)(1)(B) of ERISA requires a fiduciary to discharge his duties with respect to a plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use *in the conduct of an enterprise of a like character and like aims*" (emphasis added). Thus, a financial institution or other fiduciary managing the assets of a large plan would be expected to adhere to a higher standard of care than would a manager of a smaller plan, or a participant in a self-directed defined contribution plan.

[12] See, for example, our observations above regarding the inability to find independent valuation agents for plan asset funds and accounts.

contrary to the present rule set forth in Advisory Opinion 2005-23A (Dec. 7, 2005). We recognize the concerns referenced in the preamble about the potential for the rendering of conflicted advice at the time of a permissible distribution from a plan. However, an overly broad extension of the definition of investment advice could impair a plan participant's ability to obtain critical guidance about the complicated process of converting a plan accumulation into an income stream at retirement. For example, many investment providers provide plan participants with assistance in determining how to structure their retirement income through the use of a variety of financial products, available both under the plan and outside of the plan. This assistance is particularly important when the participant is considering whether to choose an annuity option, which is a complex instrument not easily understood by unsophisticated participants. A rule that deems guidance on payout options to be investment advice would likely discourage investment providers from making this advice available. Similarly, many participants seek financial advice from financial planners to help them prepare for the transition to retirement. Such financial advice typically considers all of a participant's assets, both inside and outside of his or her retirement plans. A rule that has the potential to impose fiduciary status on the planner for advising on the distribution of retirement assets could provide a perverse incentive, effectively discouraging planners from including those assets in the financial plan. The result would be to significantly limit the usefulness of advice from professional financial planners in the context of retirement. The unintended consequence would be an impairment of retirement security for the population to be protected by ERISA.

We therefore request that the Department adhere to the general principles of AO 2005-23A, and maintain the rule that a recommendation to a plan participant to take a plan distribution does not constitute investment advice even when the advice includes a recommendation as to how the distribution should be invested, unless the advisor is already a plan fiduciary with investment responsibility. If the Department does not accept the preceding recommendation, we request that the Department expand the definition of investment education under 29 CFR 2509.96-1 to clarify that investment education also includes information and models to help participants understand how to use their accumulations under a retirement plan to create a retirement income stream.

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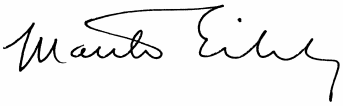
Members of the Committee would be pleased to answer any questions you might have regarding our comments and to meet with the Department if that would assist your efforts.

Respectfully submitted,



Matthew L. Eilenberg

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Jeffrey Ross, Esq.
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