



4245 North Fairfax Drive
Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

Response to Request for Comments on Definition of the Term “Fiduciary” Proposed Regulation

January 27, 2011

**Employee Benefits Security Administration
Department of Labor**

**29 CFR Part 2510
RIN 1210-AB32**

The American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Independent Retirement Plan Advisors (NAIRPA) and the Council of Independent 401(k) Recordkeepers (CIKR) appreciate the opportunity to comment on the proposed modifications to the regulation that defines the term “fiduciary” under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) (the “Proposed Regulation”).¹

ASPPA is a national organization of more than 7,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA membership is diverse and united by a common dedication to the private retirement plan system.

NAIRPA is a national organization of firms which provide independent investment advice to retirement plans and participants. NAIRPA’s members are registered investment advisors whose fees for investment advisory services do not vary with the investment options selected by the plan or participants. In addition, NAIRPA members commit to disclosing expected fees in advance of an engagement, reporting fees annually thereafter, and agreeing to serve as a plan fiduciary with respect to all plans for which a member serves as a retirement plan advisor.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. The independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative

¹ Definition of the Term “Fiduciary,” 75 Fed. Reg. 65263 (Oct. 22, 2010).

plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of \$120 billion in assets.

Summary

ASPPA, NAIRPA, and CIKR support the efforts of the Department of Labor (“Department”) to update the regulation defining the term “fiduciary” under ERISA section 3(21) (the “Current Regulation”).² As the Department recognizes, there has been considerable change in the retirement plan industry in the thirty-five years that have passed since the Current Regulation was issued.³ ASPPA, NAIRPA, and CIKR support a broadening of the definition of fiduciary. However, we believe that the proposal should be revised and clarified to better protect plan participants. ASPPA, NAIRPA, and CIKR respectfully make the following recommendations.

I. Need for Updated Guidance - ASPPA, NAIRPA, and CIKR applaud the Department for updating the Current Regulation so that the definition of investment advice is consistent with current practices in the industry, which will provide enhanced protections for plan fiduciaries, participants and beneficiaries.

II. Plan Level Advice Limitation - ASPPA, NAIRPA, and CIKR recommend that with respect to plan level investment advice given to fiduciaries, the limitation set forth in § 2510.3-(21)(c)(2)(i) of the Proposed Regulation should require that explicit disclosure of the seller/purchaser’s conflict of interest be made in writing or electronically, in clear and conspicuous language, and that it be acknowledged in writing or electronically by a plan fiduciary.

III. Participant Level Advice - ASPPA, NAIRPA, and CIKR recommend that the limitation set forth in § 2510.3(21)(c)(2)(i) of the Proposed Regulation should not apply to participant level investment advice and should only be available for advice given to plan fiduciaries. This is consistent with Congressional intent, as demonstrated by the protections afforded participants in this regard as enacted in the Pension Protection Act of 2006 (“PPA”) and set forth in ERISA §§ 408(b)(14) and 408(g).

IV. Appraisals and Fairness Opinions - ASPPA, NAIRPA, and CIKR recommend that appraisals and fairness opinions be exempt from these rules due to the likelihood of added costs to plans and plan participants and the potential chilling effect on the availability of these services.

V. Applicability to RIAs - ASPPA, NAIRPA, and CIKR recommend that the Proposed Regulation be clarified to provide that § 2510.3-21(c)(1)(ii)(C) of the proposal applies only to an individual who has actually registered as an investment advisor with the U.S. Securities and Exchange Commission (SEC) or a state agency of appropriate jurisdiction.

² 29 CFR § 2510.3-21.

³ 75 Fed. Reg. at 65264.

VI. Definition of Investment Advice – ASPPA, NAIRPA, and CIKR recommend that the Proposed Regulation be clarified to provide that investment advice does not include information regarding the relative value and financial effect of optional forms of benefit available to participants, valuations related to lump sum distributions or the division of property pursuant to qualified domestic relations orders (“QDROs”), or the offering of 403(b) investment products, and should clarify that the provision of recommendations or advice regarding the selection of fiduciaries would not, without additional action, cause a person to be considered a fiduciary.

VII. IRAs – ASPPA, NAIRPA, and CIKR recommend that the Proposed Regulation should not be applied to IRAs; rather a comprehensive approach, which includes consideration of fee transparency, should be examined at some future date and perhaps in conjunction with the newly formed Consumer Protection Financial Bureau.

VIII. Rollovers - ASPPA, NAIRPA, and CIKR recommend that the Department consider the question of whether a recommendation with respect to taking a plan distribution constitutes investment advice in conjunction with more comprehensive guidance regarding IRAs.

Discussion

I. Need for Updated Guidance

ASPPA, NAIRPA, and CIKR applaud the Department for updating the Current Regulation so that the definition of investment advice is consistent with current practices in the industry, which will provide enhanced protections for plan fiduciaries, participants and beneficiaries. As the Department acknowledged in the preamble to the proposal, there is a substantial need for the Current Regulation to be updated as the retirement plan industry has significantly changed (including the creation of 401(k) plans) in the thirty-five years since the Current Regulation was issued.⁴

A. Need for Clarity

It is without debate that defined contribution plans have become the predominant retirement vehicle for American workers. Workplace savings programs like 401(k), 403(b), and 457 plans have become by far the most effective way for employees to save for retirement. In the vast majority of these plans, participants are faced with the responsibility of having to choose where to invest their savings. Plan fiduciaries are faced with the responsibility of having to choose the investment options that will be offered to participants. Consequently, it’s critical that both plan fiduciaries and participants understand whether the advice that they receive constitutes “investment advice” under ERISA.

We support the Department’s efforts to bring clarity to an area in which considerable uncertainty currently exists. As the Department noted in the preamble, it is frequently unclear whether an individual is a fiduciary based on the Current Regulation’s five-part

⁴ 75 Fed. Reg. at 65263 - 64, 65270.

test.⁵ The Staff of the SEC has similarly recognized that recipients of advice are often confused about the duties and obligations of the persons providing advice to them.⁶

ASPPA, NAIRPA, and CIKR support the Department's approach that any provision of advice results in fiduciary status if the other criteria set forth in the Proposed Regulation are satisfied. The Current Regulation's requirement that advice must be provided more than once in order to result in fiduciary status is inconsistent with the reasonable expectations of plan fiduciaries today and results in an unclear rule that is difficult to understand and enforce. It simply makes no sense that the same advice is considered investment advice under ERISA merely because it is given more than once. Without these changes, plan fiduciaries and participants will be faced with continuing not to know whether or not the advice they are receiving is afforded the protections under ERISA.

B. Receipt of Advice by Small Plans

The need for clarity is particularly important with respect to small business retirement plans. Small business plan fiduciaries and participants generally lack the sophistication to appreciate whether or not the advice they are receiving is ERISA-protected advice. It is important to note that a large percentage of fiduciaries of small retirement plans believe that the recommendations that they are receiving are intended as "investment advice." In a 2010 survey, 60% of fiduciaries of retirement plans with less than 200 participants indicated that they received investment advice.⁷ However, it has been the experience of ASPPA members that the vast majority of small companies are receiving investment education, rather than investment advice. In other words, we believe that it is likely that the vast majority of this "advice" that they are receiving would not be considered investment advice under the Current Regulation. It is critical that fiduciaries of retirement plans be able to rely on the guidance that they reasonably believe is being provided as investment advice or be clearly informed that they are not receiving investment advice.

In the event that such a large percentage of small companies are actually receiving ERISA-protected investment advice, we would anticipate that the Department would receive significant support for the Proposed Regulation. We anticipate that individuals who are providing such investment advice have already embraced their status as

⁵ 75 Fed. Reg. at 65271.

⁶ Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers, pp. v, 93-101, Jan. 2011, available at <http://sec.gov/news/studies/2011/913studyfinal.pdf> (stating "Many retail investors and investor advocates submitted comments stating that retail investors do not understand the differences between investment advisers and broker-dealers or the standards of care applicable to broker-dealers and investment advisers. Many find the standards of care confusing, and are uncertain about the meaning of the various titles and designations used by investment advisers and broker-dealers. Many expect that both investment advisers and broker-dealers are obligated to act in the investors' best interests. The Commission has sponsored studies of investor understanding of the roles, duties and obligations of investment advisers and broker-dealers that similarly reflect confusion by retail investors regarding the roles, titles, and legal obligations of investment advisers and broker-dealers, although the studies found that investors generally were satisfied with their financial professionals.").

⁷ Profit Sharing/401k Council of America (PSCA), 53rd Annual Survey of Profit Sharing and 401(k) Plans.

fiduciaries and would want others who are providing similar services to be held to the same standards.

C. Importance of Department's Role in This Area

Opponents of the Proposed Regulation may argue that the Department should delay consideration of this matter until the SEC completes its determination of what type of fiduciary standard should generally apply to those engaged in the dealing of securities.⁸ They might argue for such delay to prevent any inconsistencies that could arise between the applicable fiduciary standards developed by the SEC and the Department.⁹ However, regardless of any inconsistencies, ASPPA, NAIRPA, and CIKR believe there are legitimate reasons for differences in standards that could arise. The Department has been tasked by Congress with protecting the interests of participants and beneficiaries in employee benefit plans. Unlike retail advice provided by brokers, advice given to plan fiduciaries directly impacts other individuals, that is, participants and beneficiaries. As a result, it is appropriate that persons providing advice to retirement plans be subject to rules that are specifically designed for these arrangements.

D. Disclosure

Opponents of the Proposed Regulation will also argue that if implemented, the new definition of investment advice will undermine the distribution of retirement plans, particularly to small businesses, by effectively precluding the industry from selling them. This is simply not the case. In reality, the practical effect of the Proposed Regulation would be to require plan fiduciaries to receive a disclosure in those cases in which advisors choose not to assume fiduciary responsibility as an ERISA investment advisor.

One of the most significant limitations contained in the Proposed Regulation is for individuals who give conflicted investment advice under certain circumstances (the "Conflicted Advice Limitation").¹⁰ In order to rely on this limitation, the individual must not have represented or acknowledged that he or she was acting as a fiduciary. Additionally, it must be demonstrated that the recipient of the advice knew, or reasonably should have known, that: (1) the advice or recommendation was made by the individual as a purchaser or seller of a security or other property, (or as an agent of or appraiser for the purchaser or seller); (2) the individual had interests that are adverse to the plan or its participants; and (3) the individual was not endeavoring to provide impartial advice.

⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203.

⁹ In any event, the approach taken by the Department is consistent with the recommendations of the Staff of the SEC in its Study on Investment Advisers and Broker-Dealers. In that study, the Staff recommended that commission-based compensation be allowed as long as there is disclosure of conflicts of interest. *See*, Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers, pp. vi-vii, 112-13, Jan. 2011.

¹⁰ Prop. Reg. § 2510.3-21(c)(2)(i), 75 Fed. Reg. at 65277.

The Proposed Regulation is significant in that it does not prohibit individuals who have a conflict of interest from providing advice, but instead merely requires that they disclose such information to the person receiving the advice in order to avoid fiduciary status. We note that the Department could have made the limitation much more narrow in scope. For example, the Department could have stated that the provision of conflicted advice was a prohibited transaction unless an exemption was satisfied. In this way, such individuals would otherwise be subject to fiduciary responsibilities under ERISA. Instead, by embedding the limitation in the regulation, such individuals can avail themselves of the opportunity to be completely exempt from any fiduciary responsibilities merely by providing appropriate disclosure materials.¹¹

We would anticipate that the industry would be supportive of the Department's disclosure approach in the Proposed Regulation given its previous support of the legislation originally proposed by Speaker John Boehner, when he was Chairman of the House Education and the Workforce Committee, that would have permitted conflicted investment advice as long as disclosures were made to the persons (including plan fiduciaries) who received the advice.¹² The Pension Protection Act of 2005 would have required:

[A] written notification (which may consist of notification by means of electronic communication)—

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

¹¹ As discussed later, we believe such disclosure should be more formalized. See Section II. We also acknowledge that the language that may be required in such a disclosure as contemplated by the Proposed Regulation is arguably a bit harsh. For example, the word “adverse” seems overly negative. We would instead recommend that the Department develop model disclosure language that clearly discloses the conflict without too negative a connotation.

¹² For example, the American Council of Life Insurers (ACLI) testified that it strongly supported the Retirement Security Advice Act of 2001 (H.R. 2269), which would have permitted advisors to receive variable compensation as long as participants were provided with written notification of the compensation received by the advisor and conflicts that related to the advice, available at <http://benefitslink.com/articles/aclitestimony010717.html>. The Investment Company Institute (ICI) has also applauded Speaker Boehner for introducing legislation that would allow conflicted advice with disclosures. See “ICI Applauds Subcommittee Approval of Retirement Advice Bill”, Jul. 19, 2000, available at http://conference.ici.org/pressroom/news/NEWS_00_401K_ADVICE2 (supporting the Retirement Security Advice Act of 2000); “ICI Applauds Introduction of ‘Retirement Security Advice Act’”, Jun. 21, 2001, available at http://www.ici.org/policy/retirement/retirement/NEWS_01_401K_ADVICE (supporting the Retirement Security Advice Act); and “ICI Commends Chairman Thomas for Advancing Key Retirement Legislation”, Nov. 9, 2005, available at http://conferences.ici.org/pressroom/news/ci.05_news_hr2830_2.print (supporting The Pension Protection Act of 2005). Additionally, the Securities Industry and Financial Markets Association (SIFMA) testified that it supported the Department's investment advice regulations that were issued in January 2009 (which were later withdrawn) that would have allowed affiliates of advisors to receive variable compensation as long as disclosures of material conflicts were made to the recipients of the advice, available at <http://edlabor.house.gov/documents/111/pdf/testimony/20090324MelanieNussdorfTestimony.pdf>.

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

“(iii) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

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

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

“(vi) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property...¹³

The requirement that “any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property” be revealed is clearly consistent with the disclosure concepts contemplated by the Proposed Regulation.

II. Plan-Level Advice Limitation

As discussed above, the Proposed Regulation includes a limitation that restricts its application to individuals who give conflicted investment advice under certain circumstances.¹⁴ In order to rely on this limitation, the individual must not have represented or acknowledged that he or she was acting as a fiduciary. Additionally, it must be demonstrated that the recipient of the advice knew, or reasonably should have known, that: (1) the advice or recommendation was made by the individual as a purchaser or seller of a security or other property, (or as an agent of or appraiser for the purchaser or seller); (2) the individual had interests that are adverse to the plan or its participants; and (3) the individual was not endeavoring to provide impartial advice. Unlike other limitations contained in the Proposed Regulation, this Conflicted Advice Limitation does not require any explicit disclosure be given in conjunction with the conflicted advice. It instead depends entirely on proving what the recipient knew or should have otherwise known about the impartiality of the individual giving the advice.

The practical effect of the limitation is to shift the burden of proving compliance to the individual providing the advice or recommendation. Although this approach may be useful to large companies, small business owners will not have the resources to hire counsel to determine whether the advice provider qualified for the limitation or was instead acting as a fiduciary. As a result, this approach alone will not provide adequate protection to the plans of small companies.

To ensure that plan fiduciaries fully understand the conflicted nature of the information being provided by the advisor, ASPPA, NAIRPA, and CIKR recommend that the Conflicted Advice

¹³ H.R. 4 (2005). Similar language was contained in earlier legislation introduced by Speaker Boehner.

¹⁴ Prop. Reg. § 2510.3-21(c)(2)(i), 75 Fed. Reg. at 65277.

Limitation contain more explicit disclosure requirements. The Proposed Regulation could allow an individual to escape fiduciary liability by simply burying the necessary language deep inside massive amounts of materials provided to the plan's fiduciaries.

Both plans and providers will be better served if there is less ambiguity in the law. By enacting a clear rule with detailed requirements, service providers will know what is required of them and plans will have greater understanding of the types of services being provided. This more direct and objective approach would enable all service providers to more easily know that they are satisfying the requirements of the Conflicted Advice Limitation.

Furthermore, the Department has indicated in the preamble to the Proposed Regulation its desire to focus its investigations on the conduct of individuals.¹⁵ However, the Department, through the Conflicted Advice Limitation, creates additional obstacles to enforcement. Under the proposal, instead of determining whether an individual has satisfied the Current Regulation's five-part test, the Department will have to focus on inherently factual issues of whether oral communications were made, what actually was said, were there written materials that covered these matters and were they made available to fiduciaries; or was there another basis by which the fiduciary reasonably should have known that the individual was providing the advice in his capacity as a purchaser or seller of a security and that the person was not undertaking to provide impartial investment advice. Although an individual seeking to avoid fiduciary status would have the burden of demonstrating compliance with the limitation, the Department would still face the challenge in enforcement actions of focusing on the limitation criteria rather than the misconduct at issue.

ASPPA, NAIRPA, and CIKR recommend that the Conflicted Advice Limitation apply only to an individual if there is explicit written or electronic disclosure of the individual's conflict of interest in clear and conspicuous language, and acknowledged in writing or electronically by a plan fiduciary to ensure that plan fiduciaries understand the circumstances under which conflicted advice is being given.¹⁶

III. Participant-Level Advice

The Proposed Regulation also makes the Conflicted Advice Limitation available for certain advice and recommendations to participants. However, the Conflicted Advice Limitation, when applied to participant-level investment advice, is inconsistent with Congressional intent as evidenced in PPA,¹⁷ which specifically limited the circumstances under which conflicted advice could be given to participants.¹⁸ Congress intended these rules to apply to persons who are fiduciaries as a result of providing investment advice, known as "fiduciary advisers."¹⁹

¹⁵ 75 Fed. Reg. at 65265.

¹⁶ As indicated previously, we believe that it would be preferable if the Department provided a model disclosure that would satisfy this requirement.

¹⁷ Public Law 109-280.

¹⁸ Codified at 29 USC §§ 1108(b)(14); 1108(g) (i.e., ERISA §§ 408(b)(14) & 408(g)). ERISA § 408(g) generally provides that a person who is providing investment advice by means other than a computer model must: (1) have level fees; (2) obtain express authorization by a separate fiduciary; (3) have an annual audit performed; (4) make required disclosures; (5) satisfy standards for the presentation of information; and (6) maintain adequate records.

¹⁹ ERISA § 408(g)(11)(A) (defining the term "fiduciary advisor").

Congress previously considered and rejected the idea that participant disclosures could mitigate the potential harm of allowing fiduciary advisors to give conflicted investment advice.²⁰

The Proposed Regulation circumvents the rules established by Congress by allowing persons who are providing investment advice to avoid compliance with the requirements imposed by PPA. The Conflicted Advice Limitation states that persons providing investment advice to participants will not be fiduciaries if they satisfy the disclosure requirements contained in the Proposed Regulation. This effectively provides an exception to the protections enacted under PPA, as an individual qualifying for the Conflicted Advice Limitation would not be a fiduciary and therefore would not be a “fiduciary adviser” under PPA. As a result, these individuals would escape the PPA protections applicable to participant-level investment advice.

ASPPA, NAIRPA, and CIKR recommend that the Department amend the Proposed Regulation to provide that the Conflicted Advice Limitation is restricted to advice given to plan fiduciaries (and is inapplicable to participant-level investment advice).

IV. Appraisals and Fairness Opinions

The Proposed Regulation states that persons may be fiduciaries if they provide appraisals or fairness opinions regarding the value of securities or other property. ASPPA, NAIRPA, and CIKR recognize that the proper valuation of employer securities held by employee stock ownership plans (ESOPs) has been an area of concern for the Department.²¹ However, ASPPA, NAIRPA, and CIKR believe that the approach taken in the Proposed Regulation is inconsistent with Congressional intent in this area. Code § 401(a)(28) provides that ESOP valuations must be performed by “independent appraisers.” The Code defines “independent appraisers” as individuals who hold themselves out to the public as appraisers or who perform appraisals on a regular basis, meet certain qualifications, and declare that they understand that they may be subject to penalties for certain acts.²² These requirements already put these special service providers on notice about their important role in relation to plans. Notwithstanding a Code section that specifies this significant role, Congress chose not to consider “independent appraisers” to be plan fiduciaries. Thus, Congress has indicated its belief that the qualifications to perform this type of service are sufficient to ensure the professionalism of appraisers, while at the same time reflecting the legislative intent that appraisers of ESOPs not be considered fiduciaries merely as a result of providing their customary plan services.

Moreover, forcing independent appraisers to be fiduciaries will likely increase the costs associated with appraisals and fairness opinions. Appraisers will be taking on additional responsibilities and liability by virtue of this new title. It is hard to imagine that they will glibly do so without charging extra for this. Furthermore, independent appraisers will likely need to purchase additional insurance for their new potential fiduciary liability. Both of these

²⁰ House Report of the Committee on Education and the Workforce on the Pension Protection Act of 2005, H. Rept. 109-232, Part 1, pp.279-282 (discussing Minority Views).

²¹ 75 Fed. Reg. at 65265.

²² Code § 401(a)(28)(C); Treas. Reg. § 1.170A-13(c)(5).

will increase plan costs, without any expectation that the performance of the appraiser – as required by his or her professional designation – will be in any way augmented.

Furthermore, there are a limited number of experienced independent appraisers who value employer securities and other hard-to-value assets. If persons are considered fiduciaries as a result of providing appraisals and fairness opinions, ASPPA, NAIRPA, and CIKR believe that many of these experienced independent appraisers will cease to provide these types of services. As a result, plans would have fewer choices for service providers, which would likely increase the costs for these services.

If the Department is convinced specifically that appraisers of employer securities for ESOPs should be considered fiduciaries (as the preamble to the Proposed Regulation suggests),²³ ASPPA, NAIRPA, and CIKR encourage the Department to limit application of the rule (if at all) only to appraisals relating to employer securities purchased, sold, or held by an ESOP.

ASPPA, NAIRPA, and CIKR recommend that the final regulation not require that persons providing appraisals or fairness opinions are fiduciaries; or alternatively, if the Department is unwilling to take that approach, to limit application of the fiduciary status to individuals appraising employer securities purchased, sold or held by an ESOP.

V. Applicability to RIAs

The Proposed Regulation provides that a person may be a fiduciary if he is “an investment adviser within the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940” (the “Advisers Act”). The Advisers Act defines an “investment adviser” by reference to the types of services they perform.²⁴ The definition does not require such persons to register with the SEC.²⁵

The Proposed Regulation does not specify whether a person who satisfies the definition of an “investment adviser” under the Advisers Act, but who does not register with the SEC would be considered a fiduciary. As a result, there is confusion as to who is covered by the Proposed

²³ 75 Fed. Reg. at 65265.

²⁴ Section 202(a)(11) of the Advisers Act states “ ‘Investment adviser’ means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.”

²⁵ That requirement is contained in Section 203 of the Advisers Act.

Regulation. There are already rules establishing when an individual must be registered as an investment adviser with the SEC or in the state in which the person does business. We encourage the Department to avoid compounding the ambiguity that already exists in terms of whether persons are providing advice or making a recommendation with having to determine whether they are an “investment adviser” under the Advisers Act if they have not registered with the SEC or a state agency of appropriate jurisdiction.

ASPPA, NAIRPA, and CIKR recommend that the Department clarify in the final regulation that a person is covered by § 2510.3-21(c)(1)(ii)(C) of the Proposed Regulation only if the individual has registered as an investment advisor with the SEC or a state agency of appropriate jurisdiction.

VI. Definition of Investment Advice

A. Management Decisions

The Proposed Regulation states that a person may become a fiduciary as a result of providing advice or recommendations as to “the management of securities or other property.”²⁶ The preamble to the Proposed Regulation states that “[t]his would include, for instance, advice and recommendations as to the exercise of rights appurtenant to shares of stock (e.g., voting proxies), and as to the selection of persons to manage plan investments.”²⁷

The Proposed Regulation is unclear as to what types of services would be considered “the management of securities or other property,” other than the two specific examples provided in the preamble. In our view, both the term “management” and “property” are broad terms that require further definition or at least examples to make the intention of the regulation clear. For example, the Proposed Regulation does not clearly indicate what is meant by the “selection of persons to manage plan investments.” Would this include the recommendation or advice regarding the selection of: (i) an ERISA § 3(38) investment manager for a portion of the plan’s assets, (ii) an advisor who would provide non-discretionary investment advice, (iii) the manager of a securities lending program, the manager of real property held by the plan, and/or (iv) the manager of a limited partnership in which the plan invests at the direction of the plan’s fiduciaries? Although it would appear that the individuals performing these functions would be fiduciaries, it is unclear whether the person who recommends or provides advice regarding the selection of such a service provider would also be considered a fiduciary under ERISA § 3(21)(A)(ii).

ASPPA, NAIRPA, and CIKR recommend that the Department clarify that the provision of recommendations or advice regarding the selection of fiduciaries would not, without additional action, cause a person to be considered a fiduciary.

²⁶ Prop. Reg. § 2510.3-21(c)(1)(i)(A)(3).

²⁷ 75 Fed. Reg. at 65266 (footnotes omitted).

B. Calculations

The Proposed Regulation provides that a person may be rendering investment advice if the individual provides advice concerning the value of securities or other property.²⁸ It is unclear under the Proposed Regulation whether investment advice would include the provision of information concerning the relative value and financial effect of the different optional forms of benefit available to a participant as required by Treasury Regulation § 1.417(a)(3)-1. Similar concerns relate to valuation of an annuity stream for the purpose of making a lump sum distribution, or valuation of benefits for division under a qualified domestic relations order. These types of services have traditionally been performed in a non-fiduciary capacity. If individuals providing these services were now classified as fiduciaries, the associated costs would almost certainly increase because of the need to account for their new potential fiduciary liability.

ASPPA, NAIRPA, and CIKR recommend that the final regulation clarify that a person will not become a fiduciary solely as a result of providing information concerning the relative value and financial effect of optional forms of benefit available to participants as required by Treasury Regulation § 1.417(a)(3)-1 and valuations related to lump sum distributions and the division of property pursuant to QDROs.

C. 403(b) Products

The Proposed Regulation provides that a person may be rendering investment advice when the individual makes recommendations as to the advisability of investing in, purchasing, holding or selling securities.²⁹ The Proposed Regulation includes a limitation for marketing or making securities or other property available through a platform or similar mechanism that is not based on the individualized needs of the plan or its participants.³⁰ (The platform or similar mechanism allows the plan fiduciary to designate the investment alternatives that will be made available to participants.) The person making the platform or similar mechanism available must also disclose in writing that he or she is not endeavoring to provide impartial investment advice. The purpose of the platform (or similar mechanism) is to allow the plan fiduciary to pick the investment alternatives that will actually be offered to participants from a larger “menu” of investments otherwise available.

Unlike 401(k) plans, Section 403(b) plans are required to invest exclusively in annuity contracts, custodial accounts, and retirement income accounts (collectively “403(b) products”).³¹ 403(b) products often provide participants with an extremely large variety of investment options wrapped in an annuity contract. More recently, 403(b) products have begun to be offered through an open architecture multi-fund-type investment platform. In these circumstances, the limitation would be applicable to a 403(b) plan only if the manner in which the securities are marketed is treated as a “similar mechanism” under the regulation. We believe that it should apply.

²⁸ 75 Fed. Reg. at 65277.

²⁹ Prop. Reg. § 2510.3-21(c)(1)(i)(A)(2).

³⁰ Prop. Reg. § 2510.3-21(c)(2)(ii)(B).

³¹ Code § 403(b).

The limitation should extend to a 403(b) provider who is simply offering to plan fiduciaries 403(b) products from which investments may be designated, assuming individualized investment advice is not otherwise provided. Clarification of the limitation in this way is necessary for the 403(b) market to function effectively and provide both plan fiduciaries and participants with a wide array of investment choices.

It is important for plan fiduciaries to be able to select from a wide variety of 403(b) products and providers. Fewer choices would be the likely result if providers exit the 403(b) market because of the potential for fiduciary liability and the added costs associated with compliance. Fewer providers competing in the market will drive up costs for all participants.

ASPPA, NAIRPA, and CIKR recommend that the Department clarify that the limitation contained in § 2510.3-21(c)(1)(ii)(B) of the Proposed Regulation applies to a 403(b) provider who is simply offering 403(b) products to plan fiduciaries on a non-individualized basis where appropriate disclosures have otherwise been made.

VII. IRAs

IRAs represent an important vehicle for individuals to save for retirement. The Investment Company Institute reports that in May 2010, there were 48.6 million (or 41 percent of) U.S. households who reported owning IRAs.³² The need for guidance and enforcement in this area is significant.

The Department has not yet addressed in a comprehensive fashion the issues that impact IRAs. In fact, the Department specifically excluded IRAs from its regulation on participant-level fee disclosure.³³ Nevertheless, the Proposed Regulation is slated to apply to investment advice given to IRA owners and beneficiaries. This inconsistency is problematic.

Guidance for retail IRAs³⁴ needs to be considered in a comprehensive manner due to the fundamental differences between IRAs and qualified retirement plans. Unlike retirement plans, retail IRAs are not maintained by employers or employee organizations for the purpose of providing retirement income to employees.³⁵ Unlike individuals in 401(k) plans, individuals with IRAs have greater flexibility regarding their investments and their management. Additionally, retail IRAs are not subject to the vast majority of rules under ERISA and the Code that apply to qualified retirement plans.³⁶

It is our experience that no agency within the federal government has any current significant enforcement regime with respect to IRAs. Any regulatory initiative in the IRA area must be supported by an active enforcement regime to ensure consistent application.

³² *The Role of IRAs in U.S. Households' Saving for Retirement, 2010*, Investment Company Institute (ICI), available at <http://ici.org/pdf/fm-v19n8.pdf>.

³³ 75 Fed. Reg. 64910, 64912 (Oct. 20, 2010).

³⁴ The term "retail IRAs" refers to individual retirement accounts and individual retirement annuities under Code section 408 that are not part of Simplified Employee Pensions (SEPs) and Simple-IRA Plans.

³⁵ ERISA § 3(2).

³⁶ For example, IRAs are not subject to ERISA's reporting, disclosure, or participation requirements or the Code's nondiscrimination requirements.

ASPPA, NAIRPA, and CIKR recommend that the Department exclude IRAs from the Proposed Regulation and instead consider issuing more comprehensive guidance that addresses key topics in the context of retail IRAs (and rollovers) and perhaps in conjunction with the newly formed Consumer Protection Financial Bureau.

VIII. Rollovers

In the preamble to the Proposed Regulation, the Department requested comments 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.³⁷ In a 2005 Advisory Opinion, the Department opined that a recommendation to a participant to take a distribution is not advice that would make the person giving the recommendation a fiduciary, even when the individual provides additional recommendations with respect to IRA investments.³⁸ Thus, non-fiduciary service providers are in a position to offer rollover opportunities to participants and beneficiaries for whom they are already providing services. If a recommendation to take a distribution were considered to be the provision of investment advice, such service providers would be effectively precluded from offering such rollover products.

The vast majority of retirement plan service providers who choose to discuss rollover options with participants are offering high quality and reasonably priced products. Further, by discussing rollover options with participants early on in the process, they are often in a position to prevent possible leakage (i.e., the participant failing to roll over the account at all). If the Department issues rules that effectively preclude these service providers from engaging participants in this manner, it will create an uneven playing field in the rollover market. This is because, as noted earlier, there is practically no enforcement of any federal rules that apply in the context of IRAs. As a consequence, independent vendors of IRA products, like self-directed IRAs, would be free to aggressively pursue rollovers while more established vendors would not.³⁹ This would not be to the benefit of participants and beneficiaries.

Until a comprehensive regulatory and enforcement scheme is applied to IRAs in a uniform manner, we strongly believe the Department should not change their current approach to distributions and rollovers.

ASPPA, NAIRPA, and CIKR recommend that the Department consider the question of whether a recommendation with respect to taking a plan distribution constitutes investment

³⁷ 75 Fed. Reg. at 65266.

³⁸ Advisory Opinion 2005-23A, Question 2.

³⁹ For example, the United States District Court for the Western District of Missouri recently approved a settlement for \$19.4 million to resolve a case where the plaintiffs had alleged that H&R Block deceptively marketed IRAs that contained hidden fees. *See, In re: H&R Block, Inc., Express IRA Marketing Litigation*, Case No. 4:06-md-01786 (W.D. MO 2010). Additionally, the State of Oregon's Division of Finance and Corporate Securities (DFCS) and the Kansas Insurance Department warn individuals about investing their IRAs in viatical settlement securities because they can lose their favorable tax treatment. *See, http://www.dfcs.oregon.gov/faqs/faq_pages/viatical.html* and <http://www.google.com/url?sa=t&source=web&cd=8&ved=0CDMQFjAH&url=http%3A%2F%2Fwww.ksc.ks.gov%2Fedu%2Fviatical.pdf&ei=RWf5TKC-LcOclgeS7-ybBw&usg=AFQjCNHifNhT5d7BWZMdhxBXA8ywZCvE0A>.

advice in conjunction with more comprehensive guidance regarding IRAs to be issued at a later date.

These comments were primarily authored by Debra A. Davis, APM with input from ASPPA's Department of Labor, Defined Benefit and Tax-Exempt/Governmental Plans Subcommittees of the Government Affairs Committee. We welcome the opportunity to discuss these issues with you. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO

/s/

Tommy Thomasson, Chair
Council of Independent 401(k) Recordkeepers

/s/

Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/

Craig P. Hoffman, Esq., APM
General Counsel

/s/

Mark Dunbar, MSPA, Co-Chair
Gov't Affairs Committee

/s/

Ilene H. Ferenczy, Esq., APM, Co-Chair
Gov't Affairs Committee

/s/

James Paul, APM, Co-Chair
Gov't Affairs Committee