

**FOR IMMEDIATE RELEASE**  
March 18, 2011

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## **ASPPA CLARIFIES ITS POSITION ON PROPOSED DEFINITION OF FIDUCIARY REGULATION** *Strong Support for Department of Labor's Modifications to Regulation*

**ARLINGTON, VA, (March 18, 2011)** – *The following is a statement from Brian Graff, Executive Director/CEO of The American Society of Pension Professionals & Actuaries (ASPPA) about the [U.S. Department of Labor's \(DOL\)](#) proposed modifications to the regulation ([29 CFR Part 2510](#)) defining the term "fiduciary" under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA).*

"Recently, several articles have misconstrued ASPPA's position on the DOL's proposed regulation that would modify the definition of "fiduciary" for purposes of providing investment advice to retirement plans. ASPPA and its affiliated organizations, the [Council of Independent 401\(k\) Recordkeepers \(CIKR\)](#), and [the National Association of Independent Retirement Plan Advisors \(NAIRPA\)](#) would like to clarify that they strongly support the DOL's efforts to update the regulation and by doing so, provide plan fiduciaries with the necessary information to understand what type of recommendations they are receiving.

ASPPA, CIKR and NAIRPA believe that the proposed regulation would provide needed clarity in terms of whether plans are receiving ERISA-covered investment advice. A recent survey of plan sponsors<sup>1</sup> reported that 60 percent of the small business plan owners responding believed that they had received investment advice with respect to their plans. This indicates that almost two-thirds of small plans think they are being serviced by a fiduciary advisor. We believe that the current five-part test is confusing to many plan sponsors who incorrectly think they are receiving ERISA-protected advice.

Disclosure is key for retirement plan fiduciaries. They need to know whether the guidance they receive from their advisors is intended as ERISA-covered investment advice. The DOL proposal would be a significant step forward in achieving this goal.

ASPPA, CIKR, and NAIRPA have made several suggestions to the DOL for improving the proposed regulation. Included in these recommendations is a suggestion about the type of information to be provided to recipients of advice in order for the "seller's exception" to apply. The seller's exception provides that commission-based brokers/advisors are not fiduciaries if the person receiving the recommendations understands that they are not receiving impartial advice. These brokers/advisors would be required to tell plan fiduciaries and participants that their interests were "adverse to the interests of the plan or its participants".

ASPPA, CIKR, and NAIRPA recognize that most brokers/advisors are focused on the interests of their clients and do not have interests that are adverse to the plan and its participants. As a result, we believe such a disclosure would be confusing to recipients of those recommendations. Instead, we think it is most important that the following information be disclosed to recipients of advice:

- 1) That the broker/advisor is NOT acting as an ERISA fiduciary and thus the advice given is not afforded the protections of ERISA;
- 2) That the broker/advisor's advice may not be impartial since he or she is compensated by the provider of the investment options being considered and the amount of the compensation may be affected by the investments selected; and
- 3) The amount of compensation the broker/advisor is reasonably expected to receive based on the investments selected, which ties into what will already have to be disclosed under the DOL's new ERISA section 408(b)(2) regulations.

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<sup>1</sup> Profit Sharing/401k Council of America (PSCA), 53rd Annual Survey of Profit Sharing and 401(k) Plans.

ASPPA, ClkR, and NAIRPA also believe that these rules should not apply to Individual Retirement Accounts (IRAs). We recommend guidance for retail IRAs be considered in a comprehensive manner given the fundamental differences between IRAs and qualified retirement plans, and be supported by an active enforcement regime to ensure consistent application. Unlike retirement plans such as 401(k) plans, retail IRAs are not maintained by employers or employee organizations. Although this provides IRA owners with greater flexibility, it leaves them without many of the protections available to qualified retirement plans under ERISA and the Internal Revenue Code.”

Read our [testimony](#) to DOL, our [comment letter](#) filed with the DOL or watch our [video](#) on the issue.

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**About ASPPA:** [The American Society of Pension Professionals & Actuaries](#) (ASPPA) is a national organization of more than 7,500 retirement plan and benefits professionals that serves as the educator, voice, and advocate for the employer-based retirement system. ASPPA members are administrators, actuaries, advisors, attorneys, accountants, and other financial services professionals who provide consulting and administrative services for qualified retirement plans.

**About ClkR:** The [Council of Independent 401\(k\) Recordkeepers](#) (ClkR) is a national organization of 401(k) plan service providers. ClkR 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. Collectively the members of ClkR provide services for over 68,000 retirement plans covering 2.8 million participants and holding in excess of \$120 billion in assets.

**About NAIRPA:** The [National Association of Independent Retirement Plan Advisors](#) (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 it serves as a retirement plan advisor.