December 11, 2012

Hon. Phyllis C. Borzi
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Regulations Relating to the Definitions of “Fiduciary” and “Investment Advice” Under Section 3(21) of ERISA

Dear Assistant Secretary Borzi:

Enclosed are comments on proposed regulations relating to the definitions of “fiduciary” and “investment advice” under section 3(21) of ERISA. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

[Signature]

Rudolph R. Ramelli
Chair, Section of Taxation

Enclosure

cc: Steven T. Miller, Acting Commissioner, Internal Revenue Service
Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
William J. Wilkins, Chief Counsel, Internal Revenue Service
The following comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Andrew L. Oringer of the Section’s Employee Benefits Committee (the “Committee”). Substantive contributions were made by Beth J. Dickstein, Barbara D. Klippert, Jeffrey A. Lieberman, W. Waldan Lloyd, Jeffrey Ross and Linda K. Shore. The Comments were reviewed by Martha L. Hutzelman and Mark A. Bodron, Vice Chairs of the Employee Benefits Committee, and Joni L. Andrioff, Chair of the Employee Benefits Committee. The Comments were further reviewed by the Quality Assurance Group of the Committee, which is made up of former chairs of the Committee and chaired by Kurt L.P. Lawson. The Comments were further reviewed by James R. Raborn on behalf of the Committee on Government Submissions of the Section and by Pamela Baker, Council Director for the Committee.

Although the members of the Section who participated in preparing these Comments have clients who might be affected by the rules addressed by these Comments, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

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Date: December 11, 2012
EXECUTIVE SUMMARY

Section 3(21)(A) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), defines a “fiduciary” with respect to a plan, as relevant here, as one who “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.” On October 22, 2010, the Department of Labor (the “Department”) published a proposed regulation (the “Proposed Regulation”) under section 3(21)(A)(ii).

The Proposed Regulation generally provides that, if certain service providers having the adviser relationships to a plan described in paragraph (c)(1)(ii) of the Proposed Regulation (“Covered Relationships”) provide advice of the type described in paragraph (c)(1)(i) of the Proposed Regulation (“Covered Advice”) to a fiduciary or a participant for a fee, then the service provider will be a fiduciary unless an exception applies. In the preamble to the Proposed Regulation (the “Preamble”), the Department stated that the Proposed Regulation “is designed to protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA’s fiduciary standards.”

Since the issuance of the Proposed Regulation, the Department has announced that it will re-propose the regulations under section 3(21)(A)(ii), thereby indicating that any number of the provisions thereof are subject to reconsideration as it develops final regulations thereunder (“Final Regulations”). In this Comment, we respectfully offer suggestions on a number of items in the Proposed Regulation for consideration as the Department reviews whether and how to proceed with respect to the possibility of re-proposing regulations under section 3(21)(A)(ii).

I. Basic Standard Regarding What Is “Investment Advice”

We recognize that the Department has determined that the existing regulation under section 3(21)(A)(ii) (the “Existing Regulation”) regarding what constitutes “investment advice” should be fundamentally changed. However, as to the basic structure of the rules, we think that the Existing Regulation, which has been tested and become a part of market practice over the years, provides a more workable and preferable approach than the approach in the Proposed Regulation. Thus, if given the choice between the Existing Regulation and the Proposed Regulation, we would recommend that the Department retain the basic approach in the Existing Regulation. However, if the Department will be continuing to propose fundamental changes to the existing rules, we

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1 Unless the context indicates otherwise, section references herein are to sections of ERISA.
2 ERISA § 3(21)(A)(ii) (subject to an exception not relevant here).
6 29 C.F.R. § 2510.3-21(c).
have a number of recommendations. First, if the Department does not retain the “primary basis” prong of the existing section 3(21)(A)(ii) regulation, we recommend that “investment advice” within the meaning of the Proposed Regulation exclude any advice that is not delivered on an individualized basis pursuant to an understanding on the part of the provider that the advice will be a substantial consideration by a plan, a plan fiduciary, or a plan participant in connection with an investment or management decision being made with respect to plan assets. Our intention is that the standard of “substantial consideration” would not rise to the level of a “primary basis” for the decision but would be more than merely a material consideration.

II. **Exception for Selling and Related Marketing**

(a) We recommend that Final Regulations expand the exception from fiduciary status for service providers acting in their principal capacity or when acting as an agent for a person with interests adverse to the plan (the “Selling Exception”) to situations where the service provider is seeking to sell a product or service.

(b) In addition, we recommend that Final Regulations clarify that any incentive to earn additional fees or other compensation for the service provider’s own account (or the account of an affiliate) is sufficient to create an interest adverse to the plan or its participants or beneficiaries for this purpose.

(c) We also recommend that Final Regulations clarify that the Selling Exception will apply to new clients of the service provider as well as to pre-existing clients, provided the service provider has notified the client that the service provider, in the marketing context, is not acting in a fiduciary capacity.

(d) Finally, we recommend Final Regulations provide that the Selling Exception be expanded to cover certain mere agency transactions.

III. **Valuation Information**

We recommend that Final Regulations provide that a person who provides advice, or an appraisal or fairness opinion, concerning the value of securities or other property (“Valuation Information”), including with regard to employer securities, without providing any advice regarding whether to consummate a proposed transaction, even where rendered in connection with an acquisition or disposition of such property (e.g., by an ESOP) will not be a fiduciary.

IV. **Investment Advisers**

We recommend that Final Regulations provide that mere status as an Investment Adviser not automatically result in there being a Covered Relationship.
V. **Status as a Fiduciary Administrator**

We recommend that Final Regulations provide that mere status as a fiduciary administrator not automatically result in there being a Covered Relationship.

VI. **Provision of Section 404(a) and Section 404(c) Information**

We recommend that Final Regulations clarify that the provision by a plan sponsor, or an employee or agent thereof (including the plan administrator), of information required under section 404(a) or (c) in the case of participant-directed plans, not be considered the provision of investment advice.

VII. **Reimbursement of Expenses**

We recommend that Final Regulations clarify that the normal salary and other compensation payments to a plan sponsor’s employees and the reimbursement by a plan of direct expenses properly incurred on behalf of a plan by a plan sponsor (including without limitation, reimbursements of salary) expressly not be considered “fees or compensation” for the purposes of Final Regulations.

VIII. **Individual Retirement Arrangements**

We recommend that the Department specifically address how the Individual Retirement Plan Exception applies to Individual Retirement Accounts (“IRAs”). We suggest that re-proposed regulations include provisions specifically relating to IRAs, on which the public may comment.

IX. **Accountants, Actuaries, Lawyers and Similar Professionals**

We recommend that Final Regulations provide that accounting, actuarial, legal and similar professional advice, as such, and advice provided solely incidental to the professional’s practice, not be considered investment advice or otherwise result in that person’s being a fiduciary, so that excessive interference with matters traditionally regulated by the states can be avoided, and so that potential providers of professional services will not be unduly discouraged from providing those services.

X. **Scope of Final Regulations Generally**

For all purposes of Final Regulations, we recommend that the standard under the existing final regulations (the “Existing Standard”) continue to apply:

(a) to services provided to a “QPAM,” an “INHAM,” a bank with respect to a “bank collective investment fund,” an insurance company with respect to an “insurance company pooled separate account,” or an insurance company with respect to its “general account;”

(b) (i) in the case of advice or other information provided to defined contribution plans that do not provide for participant-directed investments
and to defined benefit plans (collectively, “Non-Directed Plans”) that satisfy specified requirements such as the size (A) of the plans (including other plans in the same related group of plans), or (B) if applicable, a group trust, and (ii) in the case of advice or other information provided to fiduciaries that meet requirements to be specified by the Department relating to client capital under management; provided that the provider has given a written confirmation that the services are not intended to be fiduciary in nature; and

(c) to services provided to an individual participant in a participant-directed plan, or another recipient of advice or other information in connection with any plan, who is an “accredited investor” under U.S. securities laws; provided that the service provider provides prominent written notice to the participant, and has the agreement of an independent plan fiduciary (e.g., a trustee or administrator), that (i) the applicable standard for determining the provider’s fiduciary status is the Existing Standard, and (ii) the provider will be proceeding on the basis that, under the Existing Standard, it will have no liability or obligations as a fiduciary, including, without limitation, liability or obligations arising under ERISA.  

INTRODUCTION

ERISA section 3(21)(A) defines a “fiduciary” with respect to a plan, as relevant here, as one who renders “investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.” The ramifications of a person’s being a fiduciary are broad, implicating general fiduciary duties under section 404, the per se prohibited transaction rules of section 406(a), the self-dealing prohibited transaction rules of section 406(b), other fiduciary responsibilities under Part 4 of Subtitle B of Title I of ERISA, and possible direct and other practical considerations under section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”) (through the companion provisions of section 4975(e)(3) of the Code and the regulations thereunder). A long-standing rule under the Existing Regulation was issued in 1975.

On October 22, 2010, the Department issued the Proposed Regulation, which provides that if certain service providers generally provide Covered Advice to a fiduciary or a participant for a fee, then the service provider will be a fiduciary unless an exception applies. In the Preamble, the Department stated that the Proposed Regulation “is

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7 As a point of clarification, we are suggesting a dichotomy between presently covered activities and newly Covered Activities that would effectively operate so that the basic rules of the Existing Regulation would continue to operate in the three types of cases specified in the recommendations summarized above, while new rules in Final Regulations would operate in situations that are outside of those three cases.

8 Classifying a person as a “fiduciary” is highly significant, subjecting the person to responsibilities that have been described as “the highest known to law.” See, e.g., Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

9 Reg. § 54.4975-9(c).

designed to protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA’s fiduciary standards."\(^{11}\) As a result, “under the [Proposed Regulation], certain service providers that are not fiduciaries under the [Existing Regulation] would be determined to be fiduciaries under ERISA.”\(^{12}\)

The Department has announced that it will re-propose regulations under section 3(21)(A)(ii), thereby indicating that any number of the provisions thereof are subject to reconsideration as it develops Final Regulations.\(^{13}\) We recognize that there effectively is no currently pending proposal, but note that the Department has been indicating that it is actively crafting a re-proposal. As a result, we are making recommendations at this transitional stage intended to be of assistance to the Department as it evolves its thinking.\(^{14}\)

Thus, we will not endeavor herein to suggest a fundamentally new approach, but rather will generally work within the confines of the current outline of the Proposed Regulation. However, our comments on the Proposed Regulation should not be read as a tacit agreement with any particular provision of the Proposed Regulation. Rather, our comments are intended to assist the Department with crafting a re-proposal in furtherance of the development of Final Regulations, should the Department otherwise determine that any particular provision of the Proposed Regulation should be retained in principle.

We therefore respectfully offer our suggestions on the Proposed Regulation, as the Department reviews whether and how to proceed with respect to the possibility of re-proposing regulations under section 3(21)(A)(ii). Sections I through IX of this Comment address particular aspects of the Proposed Regulation, while Section X suggests an additional approach regarding the overall scope of the rules under section 3(21)(A)(ii).

**DISCUSSION**

I. **Basic Standard Regarding What Is “Investment Advice”**

A. **Summary**

The Existing Regulation provides, in part:

A person shall be deemed to be rendering “investment advice” to an employee benefit plan, within the meaning of section 3(21)(A)(ii) . . ., only if: . . .

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\(^{12}\) Id. at 65,263.

\(^{13}\) EBSA News Rel. 2011-1382-NAT (Sept. 19, 2011).

\(^{14}\) Secretary of Labor Hilda L. Solis has generally reaffirmed a desire for comment and other assistance regarding the section 3(21) rules during testimony on March 21, 2012 before the House Committee on Education and the Workforce, reportedly saying, “No, we’re not finished. That’s why it’s open, and we definitely want to hear from stakeholders and your comments and obviously hear from the public overall.”
(ii) Such person either directly or indirectly (e.g., through or together with any affiliate) . . .

(B) [r]enders any advice [to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in purchasing, or selling securities or other property] on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments. 15

Thus, advice must satisfy the “primary basis,” “regular basis,” and “mutual agreement or understanding” requirements of the Existing Regulation to rise to the level of being “investment advice.” By contrast, the Proposed Regulation eliminates all three of these requirements in the Existing Regulation and provides instead that the advice be provided pursuant to an understanding that the advice will be considered in connection with making a decision relating to plan assets. 16

We recognize that the Department has determined that the Existing Regulation regarding what constitutes “investment advice” should be fundamentally changed. However, as to the basic structure of the rules, we think that the Existing Regulation, which has been tested and become a part of market practice over the years, provides a more workable and preferable approach than the approach in the Proposed Regulation. Thus, if given the choice between the Existing Regulation and the Proposed Regulation, we would recommend that the Department retain the basic approach in the Existing Regulation. However, if the Department will be continuing to propose fundamental changes to the existing rules, we have a number of recommendations, set forth below.

B. Recommendation

Assuming that the Department will not retain the “primary basis” prong of the Existing Regulation, we recommend that “investment advice” within the meaning of the Proposed Regulation exclude any advice that is not delivered on an individualized basis pursuant to an understanding on the part of the provider that the advice will be a substantial consideration by a plan, a plan fiduciary, or a plan participant in connection with an investment or management decision being made with respect to plan assets. Our intention is that the standard of “substantial consideration” would not rise to the level of a “primary basis” for the decision but would be more than merely a material consideration.

15 29 C.F.R. § 2510.3-21(c)(1) (emphasis added).
16 Prop. DOL Reg. § 2510.3-21(c)(1)(ii)(D) (2010).
C. **Explanation**

We have substantial concerns regarding the Department’s decision not to have retained in the Proposed Regulation the “primary basis” standard of the Existing Regulation, and believe that a change in this regard is unwarranted. If the “primary basis” prong is ultimately not to be retained by the Department, the replacement standard in the Proposed Regulation that applies to advice if it “may be considered” in connection with an investment or management decision is, in our view, overly broad and could result in impact well beyond the intended scope of section 3(21)(A)(ii).\footnote{For similar reasons, we recommend that, before issuing Final Regulations, the Department carefully consider the possible effects of any rule that might cause proxy-voting and similar advice and services (for example, those provided by shareholder-advisory organizations) to be considered fiduciary advice subject to the full panoply of ERISA regulation.} We believe that the effect of this standard could be to discourage discussion or any other exchange of views between a knowledgeable investment professional and plan investment committees or other fiduciaries.

If the Department does not retain the “primary basis” prong of the Existing Regulation, we suggest that Final Regulations provide that the advice or other information in question be treated as investment advice for purposes of section 3(21) only if it is a substantial consideration regarding the investment or management decision. While we recognize that the concept of “substantial consideration” is not objectively certain, it is, in our view, broader than the “primary basis” standard that the Proposed Regulation eschews, while still providing a meaningful standard.

We also suggest that, for information or advice to be considered fiduciary in nature, it must be individualized, so that the parties can have some measure of certainty regarding the status of the provider of information or advice. Without such a requirement, a service provider may legitimately be concerned that it could be a fiduciary without even knowing when or how a plan is using the information. It seems to us that, if the mutuality requirement of the rule in the Existing Regulation is not retained, Final Regulations should contain some meaningful concept of privity, and we recommend an express individualization requirement to address this privity concern.

If the Department is concerned that certain advice or other information could be understood by a recipient to be fiduciary in nature, even though it would not constitute “investment advice” under Final Regulations, the Department may wish to consider establishing standards pursuant to which exclusion from fiduciary status would be conditioned on notice from the provider that information or advice is not intended to be fiduciary advice.\footnote{There is precedent for the Department’s seeking to increase awareness that certain otherwise available statutory protections might not be available in specified circumstances. See, e.g., 29 C.F.R § 2550.404c-1(b)(2)(1)(B)(1)(i) (under which generally a plan will not satisfy section 404(c) unless participants receive an explanation that the plan is intended to constitute a plan described in section 404(c), and that the fiduciaries of the plan may be relieved of liability as contemplated by section 404(c)).} In our view, a provider should be able to satisfy such a requirement with the notice given in satisfaction of the disclosure requirements of section 408(b)(2), provided that the notice is sufficiently specific regarding the type of information or other...
services not intended to be fiduciary in nature. We note that additional refinement of this rule might be necessary for IRAs and plans to which regulations under section 408(b)(2) do not apply.

Furthermore, in our experience, there is a distinction between information that may serve as an element in investment and management considerations, and information intended as tailored recommendations or other real advice for a client’s individual circumstances. For example, financial services organizations and their employees and agents typically produce research reports, forward fact sheets, give interviews, send newsletters, and provide information that the capital markets believe to be useful sometimes separately and sometimes ancillary to the provision of other basic services. The provision of such reports and other information under the rule in the Proposed Regulation could, however, make the provider of such general information a fiduciary because the information “may be [information that is] considered” in the context of a securities purchase. In our view, characterizing such general information as fiduciary in nature may encourage service providers to limit the availability of what is now commonly available information useful to plans, plan fiduciaries and plan participants.

19 Section 202(a)(11) of the Investment Advisers Act of 1940, Pub. L. No. 76-768, 54 Stat. 847, as amended (the “Advisers Act”) contains an exception for brokers who provide incidental advice in connection with their brokerage services. An Opinion of the SEC’s General Counsel stated that the section 202(a)(11) exception “amounts to a recognition that broker-dealers commonly give a certain amount of advice to their customers in the course of their regular business as broker-dealers and that ‘it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business.’” Opin. of Gen. Counsel Relating to Sec. 202(a)(11)(C) of the Inv. Adv. Act of 1940, Investment Advisers Act Rel. No. 2 (Oct. 28, 1940), 11 Fed. Reg. 10996 (Sept. 27, 1946). Because “brokerage firms and other interested parties may be unsure about whether [the SEC] continue[s] to hold these views,” the SEC specifically announced in 2007, in connection with the publication of a proposed interpretive rule to clarify when a broker must register as an advisor under the Advisers Act, that it would not change the expectations or obligations of brokers or “take steps or alter their business practices in such a way that would require them to incur new or additional costs as a result of the adoption” of the proposed rule. 72 Fed. Reg. 55126, 55130 (Sept. 28, 2007).

20 As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank”), the SEC released a Study on Investment Advisers and Broker-Dealers (the “Section 913 Study”). As the study makes clear, “[b]roker-dealers generally are not considered ERISA fiduciaries, as traditional recommendations by broker-dealers would not usually constitute investment advice for ERISA purposes.” One of the central points of the Section 913 Study is that “the standard of conduct should be ‘business model-neutral,’ i.e., that the standard should not prohibit, mandate or promote particular types of products or business models.” The study also makes clear that “the implementation of the uniform fiduciary standard should preserve investor choice among such services and products and how to pay for these services and products (e.g., by preserving commission-based accounts, episodic advice, principal trading and the ability to offer only proprietary products to customers).” As the Section 913 Study says, one of the SEC’s goals is “to preserve retail investor choice, as part of the [SEC’s] mandate to protect investors with respect to, among other things, availability of accounts, products, services, and relationships with investment advisers and broker-dealers, and not inadvertently eliminate or otherwise impede (for example through higher costs that investors are unwilling to bear) retail investor access to such accounts, products, services and relationships.”
II. Exception for Selling and Related Marketing

A. Summary

Another broad contextual concern involves attempts by a service provider to both sell its products and services, and, at the same time, to provide fiduciary advice. Typically, a service provider, even when concededly a provider of fiduciary services, engages in efforts to market its products and services with the intention of increasing its business for its own benefit.\footnote{The question of whether a party is permissibly acting for its own account as opposed to acting as a fiduciary can arise in other contexts as well. See, e.g., \textit{Useden v. Acker}, 734 F. Supp. 978 (S.D. Fla.1989), \textit{aff'd}, 947 F.2d 1563 (11th Cir. 1991), \textit{cert. denied}, 508 U.S. 959 (1993) (bank that loans money to a plan and exercises its own rights as lender is not acting in a fiduciary capacity with respect to the plan); \textit{Bd. of Trustees of the AFTRA Ret. Fund v. JPMorganChase Bank}, 09 Civ. 686 (SAS) (S.D.N.Y. Aug. 5, 2011) ("[T]he defendant was not acting in a fiduciary capacity when it extended repo financing . . ., selected . . . 'best' assets as collateral, and seized that collateral [upon default]"); \textit{see also Ershick v. United Mo. Bank}, 948 F.2d 660 (10th Cir. 1991) (declining to conclude that a prohibited transaction occurred where a bank was trustee of an employee stock ownership plan and a major secured lender of the sponsoring company); \textit{cf. DOL Adv. Opin. 2011-07A} (Apr. 25, 2011) ("[T]he Wrapper is not negotiating on behalf of the plan. Instead the Wrapper is negotiating the terms of the individual parameters to reduce its own exposure under the wrap contract.")} For this reason, the Proposed Regulation contains the Selling Exception.

B. Recommendation

We recommend that Final Regulations expand the Selling Exception\footnote{DOL Prop. Reg. § 2510.3-21(c)(2)(i) (2010).} to situations where the service provider is seeking to sell a product or service.

In addition, we recommend that Final Regulations clarify that any incentive to earn additional fees or other compensation for the service provider’s own account (or the account of an affiliate) is sufficient to create an interest adverse to the plan or its participants or beneficiaries for this purpose.

We also recommend that the Final Regulations clarify that the Selling Exception applies to new clients of the service provider as well as to pre-existing clients, provided the service provider has notified the client that the service provider, in the marketing context, is not acting in a fiduciary capacity.

Finally, we recommend the Final Regulations be expanded to provide that the Selling Exception covers certain mere agency transactions.

C. Explanation

In our view, the Selling Exception should not be limited to “purchases and sales” of “securities or property”\footnote{\textit{Id.}} but rather should apply to any situation in which the service provider is seeking to sell a product or service, including, for example, interests in
investment funds and other investment vehicles, non-securities investments (such as certain swaps and other derivatives), securities lending and other lending activities, underwritings investment-management services, and other management and advisory services generally, where it is understood that the service provider’s financial incentive is adverse to interests of the plan or its participants and beneficiaries (including, without limitation, an incentive to earn additional fees or other compensation for the service provider’s own account (or the account of an affiliate)).

The Proposed Regulation does not define when an interest is “adverse” to a plan or its participants or beneficiaries. Since fiduciary status has such significant ramifications for the fiduciary, we believe that it would be helpful to clarify when an interest is “adverse.” We suggest that: an interest is sufficiently adverse to invoke the Selling Exception if the service provider has any incentive to earn additional fees or other compensation for the service provider’s own account (or the account of an affiliate) in addition to the fees for fiduciary advice or other fiduciary services in connection with the sale of securities, property, products or services.

Where a service provider has been rendering fiduciary advice and then undertakes to sell securities, property, products or additional services, there may be confusion on the part of the client as to where the line is drawn between fiduciary and non-fiduciary activities. Some clarity for all parties is desirable. We think that the desired level of clarity would be achieved if the party intending to rely on the Selling Exception provided a written notice to the service recipient, delineating the services that are intended to be covered by the Selling Exception. Accordingly, we recommend, where a service provider develops an adverse interest in a relationship where previously the services have been wholly fiduciary in nature, that as a condition to being able to rely on the Selling Exception, the service provider be required to provide a notice to the existing clients that information and advice conveyed in the context of a sales presentation is not intended to be fiduciary advice.24

In addition, a question may arise as to whether information in connection with agency transactions should be treated more expansively under the fiduciary rules than activity in connection with principal transactions. Thus, we also recommend expanding the Selling Exception to cover certain mere agency transactions. We recognize that, in certain cases, an agent not otherwise a fiduciary may give information or other advice to a client or other customer in a situation in which the agent stands to earn a fee if the transaction is consummated. The Department has in the past adopted special rules where it concluded that sufficient protection for participants was present in certain agency scenarios.25 We believe that carefully tailored rules, particularly with respect to any required disclosure, should be adopted in the case of agency relationships.

24 See supra note 18.
III. **Valuation Information**

A. **Summary**

The Proposed Regulation would confer fiduciary status on a person if the person provides Valuation Information26 pursuant to an agreement, arrangement, or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant that such Valuation Information may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant.

The Preamble generally explains that the rule extending fiduciary status to a person who provides Valuation Information in certain circumstances (the “Valuation Rule”) will help the Department address incorrect valuations of employer securities held by employee stock ownership plans (“ESOPs”).27 As noted in the Preamble, the Valuation Rule is expressly intended to change the Department’s position since 197628 that a person is not a fiduciary by reason of providing a valuation of employer stock that will be relied upon by the ESOP in acquiring the stock.29 The Valuation Rule, as laid out in the Proposed Regulation, is not limited to ESOPs or employer securities.

We believe that the Department can achieve its goal of addressing incorrect valuations of employer securities held by ESOPs within the existing regulatory framework surrounding the definition of “adequate consideration,” rather than reversing the position it has held since 1976 with respect to appraisers under the definition of “fiduciary.” In this regard, we note that the Department has already issued proposed regulations on the definition of “adequate consideration.” Although these regulations have been outstanding in proposed form since 1988, “adequate consideration” remains a required component of every ESOP appraisal. Rather than reversing its long-held position on the definition of “fiduciary,” we suggest that the Department address its concerns by finalizing its proposed regulation on “adequate consideration.” In this way, the Department could provide clear guidance to ESOP fiduciaries and appraisers in the determination of “adequate consideration” in accurate and reliable ESOP appraisals. We further suggest that the Department establish set guidelines and/or a credentialing process with respect to the requisite qualifications for an ESOP appraiser.

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28 DOL Adv. Opin. 76-65A (June 7, 1976).
B. **Recommendation**

We recommend that Final Regulations provide that a person who provides Valuation Information, including with regard to employer securities, without providing any advice regarding whether to consummate a proposed transaction, even where rendered in connection with an acquisition or disposition of such property (e.g., by an ESOP), will not be a fiduciary.

C. **Explanation**

In our view, applying an expansive fiduciary characterization to services that have traditionally, in a wide variety of circumstances, not been regarded as fiduciary, may reduce the number of willing providers or unnecessarily drive up the cost of services. We believe that consumers of valuation and appraisal services should retain the discretion to procure, where they deem appropriate to their circumstances, such services on a non-fiduciary basis with the availability of expertise, competition among providers, and pricing that one might expect to be present in the case of non-fiduciary services.30

As to the broad policy question of whether a mere valuation of property without advice regarding whether to consummate a proposed transaction, even where rendered in connection with an acquisition or disposition (e.g., by an ESOP), should be considered to be fiduciary in nature, we are of the view that imposing fiduciary status on ESOP appraisers is neither warranted nor appropriate.

In the Preamble the Department sets forth its expectation as to a fiduciary appraiser’s determination of value and specifically states that the Department “expects . . . [it] to be unbiased, fair and objective, and to be made in good faith and based on a prudent investigation under the prevailing circumstances known to the appraiser.” Nevertheless, if the obligations of ERISA fiduciary status are imposed on the ESOP appraiser (or an appraiser for a non-ESOP that is similar, for these purposes, to an ESOP), we do not believe the appraiser can, in fact, “be unbiased, fair and objective” when ERISA’s fiduciary duty of loyalty requires that a fiduciary “discharge his duties with respect to a plan . . . solely in the interests of the participants and beneficiaries...for the exclusive purpose of providing benefits to participants and their beneficiaries.”

Code section 401(a)(28)(C) requires that all valuations of securities that are not readily tradable on an established securities market be issued by an appraiser that is independent from both the company sponsoring the ESOP and the ESOP itself (Code section 401(a)(28)(C)). The Proposed Regulation may be viewed as conflicting with this explicit requirement in the Code and with long standing Treasury Regulations.31

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30 We note that it has been reported that the Department has been considering narrowing the type of appraisals that would come within the new rules. See, e.g., 40 Tax Mgmt. Comp. Pl. J. 250 (Oct. 5, 2012). We support any efforts the Department may be considering to narrow the scope of the Proposed Regulation regarding appraisals and valuations, and, as indicated in text, would support any efforts to narrow the scope of any changes from the Existing Regulation.

31 Code sections 401(a)(28)(A) and (C) state in pertinent part: “(A) In general. In the case of a trust which
Congress has mandated that an ESOP must use an appraiser who is independent “with respect to activities carried on by the plan.” Failure to do so is a plan disqualifying defect. Imposing upon an appraiser the fiduciary requirement to act “solely in the interests of plan participants and beneficiaries.”32 may be inconsistent with what could be viewed as a congressional mandate of independence. “Activities carried on” by an ESOP include more than mere annual valuations for both reporting and distribution purposes. Such valuations also encompass exempt loan transactions.

Long established Treasury regulations require independence with respect to appraisers involved in ESOP activities.33

Treasury Regulation section 54.4975-7(b)(12)(iii), addressing the method of determining the valuation of shares distributed by an ESOP which (because they are not publicly traded) may then be put to the employer for purchase states: “The price at which a put option must be exercisable is the value of the security, determined under §54.4975-11(d)(5).”

In our view, the “appraiser as fiduciary” construct is also problematic, particularly in the ESOP context, because the co-fiduciary responsibility and liability that it creates is unmanageable. As required by the Code, an ESOP’s assets must be held in trust by a trustee. A trustee of an ESOP is by definition a fiduciary under ERISA. The Proposed Regulation would confer fiduciary status on the ESOP’s valuation firm. In a privately held ESOP, where the trustee is charged with the obligation of setting the value of the stock held by the ESOP, how is the co-fiduciary responsibility and liability parsed out? Who is the party responsible for determining value? When the trustee and the fiduciary appraiser disagree as to value, whose decision controls? Which one gets to decide whether or not a particular transaction is prudent and fair? If there were an erroneous valuation, would an ESOP trustee have a legitimate defense that it relied on the greater expertise of its co-fiduciary appraiser, thus escaping fiduciary liability altogether?

In our experience, neither an appraisal nor a fairness opinion rendered in a transaction recommends a course of action to the ESOP trustee. Rather, the ESOP trustee has the fiduciary responsibility under ERISA to evaluate the appraisal and make an investment decision and, the intent and purpose of ERISA was to focus responsibility on fiduciaries who make decisions, not on those providing information with respect to activities carried on by a fiduciary unless the person is providing investment advice. Stated differently, if there is no discretion and no investment advice, one is not a fiduciary (absent custody of plan assets). In fact, in ESOP transactions, there is a

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32 ERISA § 404(a)(1).
33 Reg. § 54.4975-11(d)(5).
A fiduciary who is responsible, and attempting by regulation to treat someone who provides valuation opinions, without more, as a fiduciary is neither appropriate nor authorized by the relevant statute. Under established practice, the appraisal or fairness opinion provides data and information to the ESOP trustee in making such decision. Under the existing structure, the ESOP trustee is responsible for determining the fair market value of the employer securities to be acquired by or held under the ESOP. It is the ESOP trustee’s fiduciary duty to ensure that the ESOP appraiser possesses the requisite skill and that the valuation analysis is appropriate, and we submit that it is the ESOP trustee who should be liable as a fiduciary for a failure in this regard. This relationship allows the ESOP appraiser to be both independent and objective and focus on the specific task of providing advice to the ESOP trustee who is the party responsible for decisions regarding transactions and the related fair market value of the employer securities.

IV. Investment Advisers

A. Summary

The Proposed Regulation provides generally that any service provider that is an Investment Adviser or affiliated with an Investment Adviser will be in a Covered Relationship to a plan. Thus, for example, an Investment Adviser providing otherwise non-fiduciary information might be viewed as a fiduciary, merely by virtue of being an Investment Adviser.

B. Recommendation

We recommend that Final Regulations provide that mere status as an Investment Adviser not automatically result in there being a Covered Relationship.

C. Explanation

While section 3(21)(A)(ii) describes fiduciary status in terms of persons who actually provide “investment advice” to a plan, the Advisers Act focuses instead on who should be treated as an “investment adviser” within the meaning of section 202(a)(11) of the Advisers Act. Unlike in the definition of “investment advice” in ERISA, whether a person is an “investment adviser” under section 201(a)(11) of the Advisers Act is not determined on a client-by-client basis, but rather is used primarily for the purpose of determining whether a person is subject to registration under the Advisers Act. This difference is consistent with the different approaches taken by the two regulatory regimes. Many of the restrictions placed on “investment advisers” in the Advisers Act can be addressed through disclosure, while persons who provide “investment advice” under ERISA are subject to per se prohibitions.

Note that most “appraisals” do not specify “a fair market value,” but rather a range. For example, an appraisal might suggest a property is worth between $85 and $115. In this circumstance, a fiduciary acting on behalf of a plan subject to ERISA might determine that “adequate consideration” or “fair market value” was somewhere within this range.

Because the status of a person under the Advisers Act definition is not related either to the advice provided to a particular plan (or other client) or to the expectations of the plan (or other client) regarding the fiduciary nature of the advice given by that person, the inclusion of Investment Advisers, as such, as those in a Covered Relationship does not seem necessary, in light of the general functional approach otherwise taken in the Proposed Regulation. The effect of such inclusion could be to cause information to be considered to be “investment advice” to a plan even in the absence of any particular relationship between the provider of the information and the plan that is otherwise a prerequisite to there being a Covered Relationship, as discussed at greater length in Section I. The open-ended inclusion of information from Investment Advisers as “investment advice” seems significantly to expand the reach of ERISA’s fiduciary’s rules in a manner not contemplated by the statute, and could chill the provision of information from Investment Advisers to plans and even to the market generally.

However, if the Department is concerned that a provider’s status as an Investment Adviser could lead to confusion regarding certain advice or other information provided by an Investment Adviser that has some direct relationship, albeit one that does not rise to the level of being a Covered Relationship under whatever generally applicable basic standard the Department ultimately adopts, it may wish to consider a limited notice requirement. Thus, in the case of an Investment Adviser with a relationship with the plan that is described under a standard to be developed by the Department for this purpose, but that does not rise to the level of being a Covered Relationship, the Department could consider conditioning the status of information from the Investment Adviser as not being “investment advice” on the provision of notice that the information is not intended to be investment-related information that is fiduciary in nature.36 If the Department were to proceed with such a notice requirement, we believe that the provider should be able to use disclosure provided under section 408(b)(2) to satisfy any applicable notice requirements.

We also note, as the Department expressly acknowledged in the Preamble,37 that the Advisers Act contains a number of exclusions from the scope of what constitutes an Investment Adviser.38 While the Preamble makes clear the Department’s intention that these exceptions would apply for purposes of the rule in the Proposed Regulation relating to Investment Advisers, we request that the Department make the exceptions explicit in Final Regulations, in the event that, contrary to our recommendation above, the Department proceeds to propose that mere status as an Investment Adviser may result in the existence of a Covered Relationship.

36 See supra note 18.
V. Status as a Fiduciary Administrator

A. Summary

The Proposed Regulation provides that any person (or an affiliate) who is already a fiduciary on account of having discretionary authority or discretionary responsibility in the administration of a plan will stand in a Covered Relationship to the plan and its participants. It is unclear from the Proposed Regulation why status as a plan administrator is relevant to a determination of fiduciary status by reason of providing investment advice, and a lack of clear connection could cause confusion among plan sponsors and administrators.

B. Recommendation

We recommend that Final Regulations provide that mere status as a fiduciary administrator not automatically result in there being in a Covered Relationship.

C. Explanation

Section 3(21)(A)(iii) includes within the definition of “fiduciary” a person who “has any discretionary authority or discretionary responsibility in the administration of such plan.” Administration of the plan may include such activities as making benefit claims determinations and complying with ERISA’s disclosure and reporting obligations. Under rules permitting effective allocation and delegation of duties and responsibilities, such administration does not typically involve activities relating to plan investments that are more than ministerial.

One concern is that incorporating plan administration into the “investment advice” test will make it more difficult for plan sponsors to find personnel willing to carry out any information-based functions on behalf of a retirement plan, in part because the Proposed Regulation may result in personal liability. In addition, it may have a substantial chilling effect on the willingness of plan sponsors and their employees to provide investment-related information and assistance to participants in participant-directed plans.

However, if the Department is concerned that a provider’s status as a fiduciary administrator could lead to confusion regarding certain advice or other information that does not otherwise constitute “investment advice,” the Department could consider conditioning the status of a fiduciary administrator as not being an investment-advice fiduciary on the provision of notice that the advice or information provided by the

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40 See, e.g., 29 C.F.R. § 2509.75-8 (Q&As D-2, FR-12 – FR-15) (relating to certain allocations and delegations of fiduciary responsibility); see also 29 C.F.R. § 2550.3-21(c)(2) (generally specifying that being a fiduciary as to certain plan assets does not cause one to be a fiduciary as to other plan assets); Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992), cert. denied, 506 U.S. 1081 (1993) (explaining that “a court must ask whether a person is a fiduciary with respect to the particular activity at issue”).
fiduciary administrator is not intended to be investment-related information that is fiduciary in nature. If the Department were to proceed with such a notice requirement, we believe that the provider should be able to use disclosure provided under section 408(b)(2) to satisfy any applicable notice requirements.

VI. Provision of Section 404(a) and Section 404(c) Information

A. Summary

It is not clear from the Proposed Regulation whether providing any of the information described in regulations under section 404(a) or (c) of ERISA relating to disclosure obligations to participants under participant-directed plans could be considered investment “advice” or “recommendations.”

B. Recommendation

We recommend that Final Regulations clarify that the provision by a plan sponsor, or an employee or agent thereof (including a plan administrator) of information required under section 404(a) or 404(c) of ERISA in the case of participant directed plans, not be considered the provision of investment advice.

C. Explanation

Certain information about plan assets and participant-directed investments under a self-directed individual account plan must be provided in order to comply with regulations under ERISA section 404(a) or (c). The information may be provided by a human resources department, other sponsor personnel, a benefits call center, or a mutual fund complex. Although the information may be used as the basis of investment decisions, much of the information required to be provided under the regulations is summary in nature, or is merely passed through to participants from another source. If the person providing the information were automatically an ERISA fiduciary, persons would be reluctant to provide the information and the flow of the information could be impeded. We recommend that the information described in these regulations should be explicitly excluded from the scope of information that could be considered “advice” or “recommendations,” so that the information can be provided as required, without making the provider an ERISA fiduciary.

VII. Reimbursement of Expenses

A. Summary

Employees of the plan sponsor who assist in plan administration - including providing materials on investments - are compensated by the employer/sponsor. Also, many plan sponsors advance the reasonable costs and expenses of administering the plan to the plan and are subsequently reimbursed from plan assets. If the definition of

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41 See supra note 18.
“fiduciary” is broadened, there could be some confusion as to whether these payments and reimbursements could make the employer sponsor or its employees fiduciaries.

**B. Recommendation**

We recommend that Final Regulations clarify that normal salary and other compensation payments to a plan sponsor’s employees and the reimbursement by a plan of direct expenses properly incurred on behalf of the plan by a plan sponsor (including, without limitation, reimbursements of salary) expressly not be considered “fees or compensation” for the purposes of Final Regulations.

**C. Explanation**

A person is not deemed to provide investment advice under section 3(21)(A)(ii) unless the person receives “fees or other compensation” for rendering investment advice. Some confusion could arise here in the case of plan-related activities of the plan sponsor, and we have a concern that sponsors may become unintended fiduciaries in a number of cases under the rules in the Proposed Regulation. Certain unintended consequences of the Proposed Regulation could be mitigated through a clarification that a salaried employee of a plan sponsor will not be treated as receiving “fees or compensation” for this purpose, and that the plan sponsor will not be treated as receiving “fees or other compensation” if it receives reimbursement for its “direct expenses” of providing services to the plan as permitted under section 408(b)(2) and 408(c)(2).

**VIII. Individual Retirement Arrangements**

**A. Summary**

There is an exception from fiduciary advice treatment in the “individual account plan” context for providing investment education, information, making a platform of investment alternatives available to plan participants, and providing general financial information and data to assist in selecting among platform investment alternatives (the “Individual Account Plan Exception”). It is clear from the Preamble that the Individual Account Plan Exception in the Proposed Regulation is intended to apply with respect to advice given to IRAs. By the terms of the Proposed Regulation, however, the Individual Account Plan Exception does not apply to advice given to IRAs. As a result, it may become difficult for providers who are otherwise nonfiduciaries to get information to IRA owners which they would more easily be able to get to plan participants.

42 We note that ERISA § 408(c)(3) expressly confirms that ERISA does not prohibit a fiduciary from also serving as “an officer, employee, agent, or other representative of a party in interest.”


B. **Recommendation**

We recommend that the Department specifically address how the Individual Account Plan Exception applies to IRAs. We suggest that re-proposed regulations include provisions specifically relating to IRAs on which the public may comment.

C. **Explanation**

The Proposed Regulation does not comprehensively integrate its general rules and the Individual Account Plan Exception in the case of IRAs. While there are no specific Department proposals in the Proposed Regulation on which to comment in this regard, we recommend that, as part of any issuance of Final Regulations applicable to IRAs, the Department should address how the general rules and exceptions apply to IRAs.

IX. **Accountants, Actuaries, Lawyers and Similar Professionals**

A. **Summary**

Under the Proposed Regulation, anyone who “provides advice or makes recommendations as to the management of securities or other property” will be a fiduciary if there is an understanding that such advice “may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant.”45 There is a question regarding whether this rule would extend to accounting, actuarial, legal, and similar advice provided as such. Such professionals have traditionally been the subject of regulation by the various states.

B. **Recommendation**

We recommend that Final Regulations provide that accounting, actuarial, legal and similar professional advice, as such, and advice provided solely incidental to the professional’s practice, not be considered investment advice or otherwise result in that person’s being a fiduciary, so that excessive interference with matters traditionally regulated by the states can be avoided, and so that potential providers of professional services will not be unduly discouraged from providing those services.

C. **Explanation**

The Proposed Regulation could be read to impose fiduciary status on professional advice given by actuaries, accountants, lawyers and other similar professionals to plans. Such service providers, who are subject to traditional state regulation and to professional standards external to ERISA,46 could be considered to be giving advice in connection

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46 Fiduciary status gives rise to potential liability as a co-fiduciary under section 405. At least with respect to lawyers, it is unclear whether the actions required by section 405 (particularly, actions taken to remedy any breaches of a co-fiduciary of which the fiduciary has knowledge) would be consistent with lawyers’
with investment or management decisions, and their advice will generally be individualized.

Without a clarification that such advice is ordinarily not fiduciary in nature, the Final Regulations could result in a chilling effect on the willingness of professionals to provide needed and desired advice with respect to plans (and at a minimum, it could be expected to have an adverse effect on pricing). We understand that professional liability insurance might not cover alleged fiduciary breaches, thus further complicating a professional’s decision-making as to whether or not to provide (and the price at which to provide) services to plans.

Professional advice given by actuaries, accountants, lawyers and other similar professionals has historically been generally excluded from the scope of fiduciary advice. For example, regulations have long specified that certain professionals are “ordinarily” not fiduciaries “solely” by virtue of “performing their usual professional functions,” absent a showing that the factual situation in a particular case falls into a fiduciary category.47 We recommend that the definition of “investment advice” in the Final Regulations not remove or undercut this historical exclusion.48 As the Department noted in the Preamble, the definition of “investment adviser” under the Advisers Act 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.” Our recommendation regarding these matters seeks to reflect these considerations.

X. Scope of Final Regulations Generally

A. Summary

At the core of the Proposed Regulation is the idea that fiduciaries and participants will always expect advice provided by certain persons in a position of trust to be unbiased advice, and that the persons providing such advice should be treated as fiduciaries as a result. We see a key threshold question regarding the scope of the rules under section

(footnote continued)
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.

47 29 C.F.R. § 2509-75-5, Q&A D-1. See also Mertens v. Hewitt Assocs., 948 F. 2d. 607, 610-11 (9th Cir. 1991) (concluding that an actuarial firm was not subject to a claim for breach of fiduciary duty, and also stating more generally that, although the courts have recognized theoretically a professional service provider can be liable as an ERISA fiduciary, “they consistently have found attempts to assert liability on that basis unavailing”), aff’d on other grounds, 508 U.S. 248 (1993).

48 Q&A D-1 of section 2509.75-5 of the Department’s regulations extends the exclusion therein to “consulting” services. In light of the efforts by the Department and other regulators to address consulting services to plans (see, e.g., Office of Compliance Inspections and Examinations, Securities and Exchange Commission, Staff Report Concerning Examinations of Select Pension Consultants (May 16, 2005); EBSA Fact Sheet, “Selecting And Monitoring Pension Consultants – Tips For Plan Fiduciaries” (Jun. 1, 2005), http://www.dol.gov/ebsa/newsroom/fs053105.html), we express no view as to whether the exclusion we recommend above regarding “similar professional advice” would extend to consulting services at least where those services are not subject to applicable professional standards.
3(21) as whether certain fiduciaries and participants may need or want the additional protection that would result from the services being treated as fiduciary in nature. A particular fiduciary or participant might be sophisticated enough to receive information or advice and understand that it is not intended to be relied upon as fiduciary advice. A particular fiduciary or participant might not want the information or advice to be treated as fiduciary in nature because it might cause the provider to be unwilling to provide any information or advice at all, or might result in a material increase in the cost of the information or advice.49

The broadened scope of the Proposed Regulation seems intended in part to protect those who did not have a significant role in the investment of plan assets at the time ERISA was enacted, such as sponsors of relatively smaller plans and participants in participant-directed individual account plans. For example, the Department specifically noted that the Proposed Regulation “takes account of significant changes in both the financial industry and the expectations of plan officials and participants who receive investment advice; it is designed to protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA’s fiduciary standards.”50 It seems that the Department’s goal is to protect individuals who are not otherwise able to protect themselves, particularly in a market that has evolved towards participant-directed plans.51

Thus, the Department in the Proposed Regulation has added provisions that are specifically aimed at participant-directed plans.52 However, many provisions of the Proposed Regulation would apply generally, regardless of whether a participant-directed plan is involved. We believe this elevated standard is not necessarily required in the case of certain Non-Directed Plans,53 particularly large plans, and plans with sophisticated advisors. In addition, in the case of participant-directed plans, the existing definition of fiduciary may continue to be appropriate depending upon the characteristics of particular participants.

It may also be appropriate for the Existing Standard to continue to apply to certain transactions between certain parties, and for the Final Regulations not apply to those transactions or parties. The market has for years dealt with services presently treated as investment advice under the Existing Standard. The Existing Standard has provided a

49 The Department acknowledges that “higher fees” for ERISA plans could arise due to the increased fiduciary exposure of service providers. 75 Fed. Reg. 65263, 65275 (Oct. 22, 2010).
50 Id. at 65263-64.
51 Similarly, in other areas to which the Department is devoting substantial attention. See IRS/DOL/PAGC Form 5500, Sch. C.; 29 C.F.R. § 2550.408b-2(c)(1), a number of concerns regarding fee transparency (for example, regarding such things as “12b-1,” transfer-agent, recordkeeping and similar fees) arise primarily in the participant-directed context.
52 E.g., DOL Prop. Reg. § 2510.3-21(c)(2)(ii)(B), (C) (2010). Similarly, in other areas to which the Department is devoting substantial attention, such as under section 408(b)(2) and in connection with Form 5500 requirements, a number of concerns regarding fee transparency (for example, regarding such things as “12b-1,” transfer-agent, recordkeeping and similar fees) arise primarily in the participant-directed context.
53 The reference in text to certain defined contribution and defined benefit plans is intended to encompass vehicles that hold “plan assets” under ERISA § 3(42).
substantial level of workability and protection, and both the private sector and the Department have become accustomed to that coverage. It may thus be useful to continue to treat investment advice in some circumstances under the Existing Standard. An advantage to this approach would be that sophisticated investors and their counterparties (“Sophisticated Investors”) could continue to proceed on a basis historically countenanced by the Department and that is familiar to parties in the market.

B. Recommendations

For all purposes of Final Regulations, we recommend that the Existing Standard continue to apply:

(a) to services provided to a “QPAM,”\textsuperscript{54} an “INHAM,”\textsuperscript{55} a bank with respect to a “bank collective investment fund,”\textsuperscript{56} an insurance company with respect to an “insurance company pooled separate account,”\textsuperscript{57} or an insurance company with respect to its “general account;”\textsuperscript{58}

(b) (i) in the case of advice or other information provided to Non-Directed Plans that satisfy a specified requirements such as the size of (A) the plans (including other plans in the same related group of plans), or (B) if applicable, a group trust, and (ii) in the case of advice or other information provided to fiduciaries that meet requirements to be specified by the Department relating to client capital under management; provided that the provider has given a written confirmation that the services are not intended to be fiduciary in nature; and

(c) to services provided to an individual participant in a participant-directed plan, or another recipient of advice or other information in connection with any plan, who is an “accredited investor” under U.S. securities laws; provided that the service provider provides prominent written notice to the participant, and has the agreement of an independent plan fiduciary (e.g., a trustee or administrator), that (i) the applicable standard for determining the provider’s fiduciary status is the Existing Standard, and (ii) the provider will be proceeding on the basis that, under the Existing Standard,

\textsuperscript{54} PTE 84-14, 49 Fed. Reg. 9494 (Mar. 13, 1984) (as corrected at 75 Fed. Reg. 38837 (July 6, 2010)) (relating to transactions determined by independent qualified professional asset managers).
\textsuperscript{56} PTE 91-38, 56 FR 31966 (July 12, 1991) (as corrected at 56 Fed. Reg. 59299 (Nov. 25, 1991) (relating to certain transactions involving bank collective trust funds).
\textsuperscript{57} PTE 90-1, 55 Fed. Reg. 2891 (Jan. 29, 1990) (relating to certain transactions involving insurance company pooled separate account).
\textsuperscript{58} PTE 95-60, 60 Fed. Reg. 35925 (July 12, 1995) (relating to certain transactions involving insurance company general accounts).
it will have no liability or obligations as a fiduciary, including, without limitation, liability or obligations arising under ERISA.\textsuperscript{59}

C. Explanation

As a point of clarification, we are suggesting a dichotomy so that the basic rules of the Existing Standard would continue to operate in the three types of cases specified in the recommendation above, while new rules in Final Regulations would operate in situations which are outside of those three cases. The Existing Standard would continue to apply if the services are provided to a “QPAM” or an “INHAM.” The Department has determined that the requirements of a QPAM or INHAM, to the extent satisfied, sufficiently protect participants, even to the point of permitting transactions that would otherwise be altogether prohibited under ERISA.\textsuperscript{60} QPAMs and INHAMS are by their nature versed in ERISA, and, we think, will be more likely to understand whether or not they are being provided with fiduciary advice. We recommend that similar considerations apply to banks with respect to “bank collective investment funds,” insurance companies with respect to “insurance company pooled separate accounts,” and insurance companies with respect to their “general accounts.” We also propose that similar considerations apply generally to “investment managers,” as defined in section 3(38).

Second, we recommend that minimal protection is needed in the case of advice or other information provided to large Non-Directed Plans and substantial investment

\textsuperscript{59} As a point of clarification, we are suggesting a dichotomy between presently covered activities and Newly Covered Activities that would effectively operate so that the basic rules of the Existing Regulation would continue to operate in the three types of cases specified in the recommendations summarized above, while new rules in Final Regulations would operate in situations that are outside of those three cases.

\textsuperscript{60} See generally 68 Fed. Reg. 52419, 52423 (Sept. 3, 2003) (noting the “essential premise” under which the exemption was granted to be “that broad exemptive relief from the prohibitions of section 406(a) can be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto, are the sole responsibility of an independent investment manager”); 60 Fed. Reg. 15597, 15597 (May 24, 1995) (“The QPAM exemption was proposed by the Department . . . in an effort to give institutional managers greater flexibility to engage in a variety of beneficial transactions which would otherwise have been prohibited by ERISA . . . .”); 61 Fed. Reg. 15975, 15977 (Apr. 10, 1996) (noting the “essential premise” under which the exemption was granted to be that “broad exemptive relief from the prohibitions of section 406(a) can be afforded for all types of service provider transactions in which a plan engages only if the INHAM independently negotiates the transaction and makes the decision on behalf of the plan to enter into the transaction”). It is noted that the Department has viewed similar considerations as justifying, under section 404(b), deference to judgments made by those responsible for the maintenance of the indicia of ownership of plan assets outside of the jurisdiction of the U.S. district courts. See also 29 C.F.R. § 2550.404b-1(a)(2) (providing for relaxed rules governing the maintenance of the indicia of ownership of certain plan assets outside of the jurisdiction of the U.S. district courts where the assets are under the management and control of a fiduciary which, in addition to meeting certain other requirements, generally is a bank with equity capital in excess of $1,000,000, an insurance company with net worth in excess of $1,000,000 or a (federally) registered investment adviser with total client assets under its management and control in excess $50,000,000 and shareholders’ or partners’ equity in excess of $750,000 (or is subject to certain assumption or guarantee arrangements)) (it being noted that, prior to certain amendments to the QPAM exemption, the indicia rules and the QPAM rules were more similar to each other than they are now).
fiduciaries and other third-party advisers to plans. The Department has looked to the size of
an investor to indicate its sophistication in other contexts. Here, it seems to us that
relevant indicators that higher levels of protection from the fiduciary rules are not
justified in light of the sophistication of the recipient of the advice or other information
could be: (i) the size of (A) the plan (including other plans in the same related group of
plans) or (B) where applicable, a group trust (or other similar vehicle); and also (ii) in
the case of a fiduciary receiving the advice, the amount of client capital that the
fiduciary has under management. We recommend as a condition to this treatment that the
Department require no more than a written confirmation from the provider that the
services are not intended to be fiduciary in nature.

In the case of an individual who is a participant in a participant-directed plan, or
who otherwise receives advice or other information in connection with any plan (whether
a participant-directed plan or a Non-Directed Plan), where the individual would be
qualified to be a Sophisticated Investor, as indicated by the individual’s status as, for
example, an “accredited investor” under Rule 501(a) of Regulation D under the Securities
Act of 1933, as amended, the Existing Standard could also continue to apply. We
recommend that the advice or other information given to Sophisticated Investors not be
treated as investment advice, and therefore not be treated as fiduciary in nature, to the
extent it would not be considered fiduciary advice under the Existing Standard; and (ii)
the service provider provides prominent written notice that the provider (A) is a fiduciary,
if at all, solely under the Existing Standard; and (B) will proceed on the basis that it has
no liability or obligations as a fiduciary, including, without limitation, liability or
obligations arising under ERISA. If our suggestion is adopted, the Final Regulations
could be structured so that the Existing Standard is grandfathered as discussed above and
that the new rules under Final Regulations apply solely in other situations.

61 DOL Adv. Opin. 89-28A (Sept. 25, 1989) (ruling favorably regarding a fee arrangement where each
client plan was a large plan with at least $50 million; see also DOL Adv. Opin. 86-20A (Aug. 29, 1986)
(ruling favorably regarding a fee arrangement where each client plan was a large plan with at least $50
million and no plan had more than 10% of its assets with the manager); DOL Adv. Opin. 86-21A (Aug. 29,
1986) (ruling favorably regarding a fee arrangement where each client plan was a large plan with at least
$50 million and no plan had more than 10% of its assets with the manager); DOL Adv. Opin. 99-16A (Dec.
9, 1999) (ruling favorably regarding a performance fee arrangement where each client plan subject to the
performance fee was a large plan with at least $50 million and no plan had more than 10% of its assets with
the manager).
62 Cf., e.g., PTE 84-14, as amended, Part I(e) (referring to certain related plans).
63 Cf., e.g., PTE 84-14, as amended, Part V(a)(4) (referring to a specified level of client assets under
management).
64 The Department has in other cases sought to increase awareness that certain otherwise available statutory
protections might not be available in specified circumstances. See, e.g., 29 C.F.R § 2550.404c-
1(b)(2)(1)(B)(1)(i) (under which generally a plan will not satisfy section 404(c) unless participants receive
an explanation that the plan is intended to constitute a plan described in section 404(c), and that the
fiduciaries of the plan may be relieved of liability as contemplated by section 404(c) (i.e., liability for any
losses which are the direct and necessary result of investment instructions given by the participant)).
66 See supra note 18.