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Statement for the Record

House Financial Services Committee, Subcommittee on Capital Markets and Government Sponsored Enterprises

"Ensuring Appropriate Regulatory Oversight of Broker-Dealers and Legislative Proposals to Improve Investment Adviser Oversight"

September 13, 2011
10:00 a.m.
Rayburn 2128

1. Policy Position on Sec. 914, Study on Enhancing Investment Advisor Examinations, *Dodd-Frank Wall Street Reform and Consumer Protection Act*

2. ACLI Statement, "Redefining 'Fiduciary': Assessing the Impact of the Department of Labor's Proposal on Workers and Retiree," for the House Education and Workforce Committee, Subcommittee on Health, Employment, Labor and Pensions on July 26, 2011.
    a. ACLI Comment Letter to the Department of Labor, February 3, 2011
    b. ACLI Statement for the Department of Labor Hearing, March 1, 2011
    c. ACLI Additional Comments in Response to Hearing Questions, April 12, 2011

ACLI Policy Position

Policy Position on Sec. 914, Study on Enhancing Investment Advisor Examinations,
Dodd-Frank Wall Street Reform and Consumer Protection Act

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Position on Investment Adviser SRO (September 9, 2011)

1. We believe that any response by Congress to the "Study on Enhancing Investment Adviser Examinations," prepared by the staff of the Securities and Exchange Commission (SEC) under Section 914 of Dodd Frank, must consider and advance the objectives of Section 913 and the SEC's related charge to create consistent standards of care for IAs and BDs when providing personalized investment advice to retail customers and to promote the harmonization of the broker-dealer and investment adviser regulatory regimes, including through investment adviser examinations and oversight.

2. If Congress determines that in order to enhance the ongoing examination and oversight of investment advisers by the SEC and to promote harmonization of the investment adviser regulatory regime, it is necessary to authorize the SEC to impose "user fees" on investment advisers registered with the Securities and Exchange Commission pursuant to Sections 203 and 203A of the Investment Advisers Act, the ACLI would support such authorization, subject to further discussion and comment on the method of calculation of these "user fees".

3. If Congress determines that in order to enhance the ongoing examination and oversight of investment advisers, it is necessary to authorize the creation and registration of a self-regulatory organization to examine, subject to the SEC's supervision, investment advisers, the ACLI would support a <u>single</u> self-regulatory organization (SRO)that would have limited examination authority over those investment advisers who, in accordance with Sections 203 and 203A of the Investment Advisers Act, provide personalized investment advice about securities directly to retail customers, provided that the SEC remains the sole holder of authority to develop regulatory policy under the Investment Advisers Act.

   (a) ACLI would support the SRO having limited rulemaking authority to address matters collateral to the exercise of examination authority (such as authority to require maintenance of records).

   (b) ACLI would only support giving the SRO examination or other authority over those investment advisers providing personalized investment advice directly to retail customers. It is ACLI's position that the authority to examine and regulate other investment advisers must remain with the SEC and, if necessary, that the examination and oversight of other investment advisers would be appropriately funded through "user fees", subject to further discussion and comment about the method of calculation of such fees.

   (c) ACLI would support giving the SRO examination or other authority over all investment advisers providing personalized investment advice about securities directly to retail customers, regardless of whether such investment advisers are registered with the state or the SEC. This position is based on the following facts:

      i. The pending "switch" (currently effective July 21, 2011) of approximately 4100 SEC registered investment advisers with between $25 and $100 million in assets under management to state registration created by Section 410(2)(A) of the Dodd Frank Act, would bring a total of approximately19,000 investment advisers under state-only regulation, most of whom will provide personalized investment advice directly to retail customers pursuant to advisory contracts.

ii. This “switch” will bi-furcate the regulation, examination and oversight of investment advisers and their associated persons providing personalized investment advice between the 50 states, the District of Columbia and the Securities and Exchange Commission.[1]

iii. According to the “State Securities Regulators Report on Regulatory Effectiveness and Resources with Respect to Broker-Dealers and Investment Advisers”, only 40 states have field examiner units with multiple full-time staff members dedicated to performing routine examinations of those states’ registered investment advisers.[2] The 7,000 or so remaining investment advisers with more than $100 million in assets under management, and their associated persons will be regulated by the SEC, even though many of these firms and their associated persons also provide personalized investment advice directly to retail customers.

iv. Although the SEC Staff’s “Study on Investment Advisers and Broker-Dealers” acknowledges the impending “switch”, the brief, 600 word, discussion of “state regulation of investment advisers intended to protect clients” provides no insight as to how the SEC will be able to enforce a uniform standard of care for all investment advisers providing personalized investment advice directly to retail customers in accordance with Section 913 of Dodd-Frank and regulations promulgated thereunder in a bi-furcated regulatory regime.

v. It is not clear how the SEC and states will address the inevitable customer confusion and disparate enforcement and examination of the standards of care that will vary between state and federally registered investment advisers providing personalized investment advice about securities to retail customers.

(d) ACLI would support the following legislative changes to implement the creation and registration of a single SRO, subject to SEC supervision, to examine investment advisers engaged in providing personalized investment advice about securities to retail investors:

1 *See* *SEC Study on Enhancing Investment Adviser Examinations* at iii, and footnote 31.

2 *See State Securities Regulators Report on Regulatory Effectiveness and Resources with Respect to Broker-Dealers and Investment Advisers* at 12.

i. Amending the Investment Advisers Act to authorize the creation of and registration with the SEC of a SRO for investment advisers who, in accordance with Sections 203 and 203A of the Investment Advisers Act, provide personalized investment advice about securities directly to retail investors , regardless of whether such IAs are registered with the state or the SEC.

ii. Amending Section 203 of the Investment Advisers Act to provide that "It shall be unlawful for any investment adviser to provide personalized investment advice about securities directly to retail investors, unless such investment adviser is a member of a self regulatory organization registered with the Commission under the appropriate provisions [to be crafted] of the Investment Advisers Act."

iii. Authorizing the Commission to exercise its discretion in exempting from registration with the SRO, certain investment advisers, including but not limited to, those investment advisers deemed not to be providing personalized investment advice about securities directly to retail customers.[3]

iv. Nothing herein is designed or intended to interfere with the authority of state regulators or the SEC to examine or enforce compliance with otherwise applicable laws and regulations, including Sections 203 and 203A of the Investment Advisers Act.

4. It is ACLI's position that any steps Congress may determine to take and any rules the SEC may promulgate thereunder should not impact the regulation, examination or oversight of broker-dealers or their associated persons registered under the Securities Exchange Act of 1934 or their operations under exemptions from the definition of "investment adviser," including for advice solely incidental to the sale of securities under Section 202(a)(11)(c) , even if such broker-dealers or their associated persons are engaged in providing personalized investment advice directly to retail customers under Section 913 of Dodd Frank and regulations promulgated thereunder.

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[3] Examples of such investment advisers might include those who (i) provide personalized investment advice about securities to retail investors solely as managers in separately managed account programs that are sponsored by other investment advisers that are registered with the SRO or (ii) incidental to their business of providing investment advice to non-retail clients, provide personalized investment advice about securities solely to retail investors that are "qualified purchasers" within the meaning of Section 2(a)(51) of the Investment Company Act of 1940 or are "accredited investors" within the meaning of Regulation D under the Securities Act of 1933.

ACLI Statements on Fiduciary Duty

ACLI Statement, “Redefining 'Fiduciary': Assessing the Impact of the Department of Labor’s Proposal on Workers and Retiree,” for the House Education and Workforce Committee, Subcommittee on Health, Employment, Labor and Pensions on July 26, 2011.

Attachments:

1. ACLI Comment Letter to the Department of Labor, February 3, 2011
2. ACLI Statement for the Department of Labor Hearing, March 1, 2011
3. ACLI Additional Comments in Response to Hearing Questions, April 12, 2011

American Council of Life Insurers (ACLI) Statement for the Record
"Redefining 'Fiduciary': Assessing the Impact of the Department of Labor's Proposal on Workers and Retirees."
House Education and Workforce Committee, Subcommittee on Health, Employment, Labor and Pensions
United States Congress
July 26, 2011

The American Council of Life Insurers (ACLI) commends this subcommittee for holding this hearing on the Department of Labor's (DoL) proposed rule on the definition of "fiduciary" for purposes of offering investment advice. We applaud Chairman Phil Roe (R-TN) and Ranking Member Rob Andrews (D-NJ) for holding this hearing to receive testimony from the Assistant Secretary of the Employee Benefit Security Administration, DoL, Phyllis Borzi, and various stakeholders on the impact this proposal would have on individuals saving for retirement and small businesses ability to provide investment education to their plan participants. Members on this subcommittee from both parties have already urged DoL to re-propose the rule to address a substantial number of revisions that need to be made to it to ensure the rule does not negatively impact these savers or businesses. We thank these members for their efforts and urge them to reach out to the Administration to share these concerns.

The American Council of Life Insurers is a national trade organization with over 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and investment products and services to qualified retirement plans, including defined benefit pension, 401(k), 403(b) and 457 arrangements and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies' also are employer sponsors of retirement plans for their employees.

Consistent with the comments submitted by stakeholders and concerns raised by Members of Congress, we have urged the DoL to re-propose the rule so that stakeholders have an opportunity to review and comment on the DoL revisions to address these comments and concerns. A re- proposal will provide an opportunity to ensure that plan sponsors, plan participants and IRA owners continue to have affordable access to investment education and investment choices. We have urged the DoL to address prohibited transaction exemptions (PTEs) in conjunction with its development of a new rule. Lastly, we also urge the DoL to re-propose the rule so that stakeholders will be able to review and provide comment on DoL's economic analysis of the impact the proposal would have on IRA holders, plans and plan participants.

<u>Background</u>

On October 22, 2010, the DoL proposed a new rule to expand the definition of fiduciary with respect to the provision of investment advice. The proposed rule broadens the definition, for example, by removing the "regular" and "primary" basis conditions necessary for advice to be considered fiduciary advice. The DoL received over 200 public comment letters in response to the proposal. On March 1st and 2nd, DOL held hearings on the proposal and heard from 39 panelists. Thereafter, DOL received 65 additional public comment letters. At that time, DOL noted its intent to issue a final rule by the end of the year.

There have been over 25 bipartisan, bicameral letters sent to the Administration outlining Members of Congress concerns about the impact the proposal would have on their constituents. These letters represent over 80 Members. Most notably, the Chairman and Ranking Member of the following Committees have sent letters to the agency heads expressing their concern about the proposal: Senate HELP, House Education and Workforce, Senate Banking, House Financial Services, Senate Agriculture, House Agriculture, Senate Finance and the House Ways and Means Committee.

<u>DoL Should Re-propose the Rule so that Stakeholders Can Have an Opportunity to Review How It Plans to Address Comments and Concerns Raised</u>

We recognize the DoL's authority to review its rules, especially in light of the responsibilities individuals have to plan for their retirement. We also appreciate the DoL's willingness to listen to stakeholders concerns about the proposal. However, the rule's expansion of who would be considered a fiduciary will interfere with employers and their management of plans and investment sales and distribution practices that are customary in the marketplace, well understood, and commonly relied upon by financial services providers, plans and participants alike. We are concerned that these changes will result in plans, plan participants, and IRA owners having less access to investment information and investment choices. We want to make sure that this result does not occur. We have offered comments to the DoL that seek to preserve the DoL's enforcement objective and avoid unnecessary disruption and negative impacts to plans, participants and individuals. Despite these efforts, we are unsure of whether and, if so, how the DoL will address these comments, and therefore seek to review its efforts once again to make sure the rule does not negatively impact individuals or small businesses.

Additionally, the DoL has acknowledged that it will need to revise a number of existing prohibited transaction exemptions (PTEs) which financial providers currently rely upon. ACLI has asked the DoL to issue a new proposal together with any proposed changes to or confirmations of exemptive relief. ACLI believes it is important to review and comment on these together. Absent a re-proposal, these revisions will be presented in conjunction with a final rule which may or may not address the concerns raised by ACLI, other organizations and companies. Stakeholders need an opportunity to review any proposed PTEs in conjunction with a proposed rule and provide comment as to whether they are workable within the newly revised rule.

<u>DoL Should Re-propose the Rule so that Stakeholders Can Review and Provide Comment on DoL's New Economic Analysis</u>

Assistant Secretary Borzi has recently announced that she will include a complete economic analysis on the impact of the rule on IRA holders, plans and plan participants in the final rule. Unfortunately, if issued as a final rule, stakeholders would not be able to comment upon the DoL's analysis. Given the rule's potential impact, such regulatory action should not occur without stakeholder review and comment.

A recent report issued by Oliver Wyman outlined the tremendous negative impact this proposed rule would have on IRA owners, especially those with smaller balances. Nearly 40% of IRAs in the study sample had less than $10,000 in their accounts. 98% of investor accounts with less than $25,000 were in brokerage relationships. This proposed rule would lead IRA providers to offer these small account owners either a higher fee-based advisory account or a no service account in order to comply with the proposal. Many low to middle income IRA owners would not be able to afford the estimated 75 – 195% increase in cost to pay for the advisory account. The DoL failed to include a similar analysis in its proposal, and needs to fully consider such analysis before initiating a rulemaking.

As an addenda to this statement, ACLI has attached a copy of its initial comment letter on this issue to the DoL dated February 3, 2011, its statement that it provided at DoL's public hearing on March 1, 2011, and additional comments in response to hearing questions dated April 12, 2011.

We look forward to working with this subcommittee, the larger committee, and DoL to address the concerns raised in this statement and to ensure Americans have abundant access to investment education and appropriate investment advice.

See attached addenda

ACLI Comment Letter to DOL February 3, 2011
ACLI Statement for the DOL Hearing March 1, 2011
ACLI Additional Comments in Response to Hearing Questions April 12, 2011

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February 3, 2011

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

Attention: Definition of Fiduciary Proposed Rule (RIN 1210-AB32)

Greetings:

On behalf of the American Council of Life Insurers ("ACLI"), we are writing to comment on the proposed rule promulgated under Section 3(21)(A)(ii) of the Employee Retirement Income Security Act ("ERISA"), which was published at 75 Fed. Reg. 65263 (October 22, 2010) ("Proposed Rule" or "Rule"). The Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply[1], by re-defining and substantially broadening the concept of rendering "investment advice for a fee" within the meaning of ERISA Section 3(21)(a)(ii).

The American Council of Life Insurers is a national trade organization with more than 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension, 401(k) and 403(b) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

[1] Although not covered under Title I of ERISA, individual retirement accounts and annuities ("IRAs") fall within the scope of the prohibited transaction excise tax provisions of Code Section 4975. The Proposed Rule would similarly enlarge the universe of persons defined as fiduciaries for purposes of applying Section 4975 to transactions involving IRAs.

ACLI appreciates the Department's concern that under some circumstances the current rule impinges the Department's ability to bring enforcement actions in situations that are clearly abusive. We share the Department's interest in seeing that plans and participants who seek out and are promised advice that is impartial and disinterested ultimately receive advice that adheres to the rigorous standards imposed by ERISA. At the same time, we are concerned that the Proposed Rule's pursuit of this objective interferes with investment sales and distribution practices that are customary in the marketplace, well understood, and commonly relied upon by financial services providers, plans and participants alike. We are concerned that these changes will result in plans, plan participants, and IRA owners having less access to investment information. Our comments seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

Persons engaged in the sale and distribution of investment product and services need to have confidence that ordinary course sales recommendations will not, in hindsight, be subjected to a fiduciary standard that disallows the payment of sales commissions and other traditional forms of distribution-related compensation. Please note that regulatory efforts are underway by the Securities and Exchange Commission ("SEC") regarding the standard of care under the securities laws for broker-dealers and investment advisers that provide investment advice about securities to retail customers. On January 21, 2011, the SEC issued a study on broker-dealers and investment advisers. We are reviewing this study which may lead to additional comments on the Proposed Rule. We urge the Department to provide the public sufficient opportunity to consider the SEC's regulatory efforts and offer additional comments on the Proposed Rule.

Parties engaged in transactions with ERISA plans and IRAs need clear, unambiguous rules by which to determine their duties and obligations in order for the marketplace to function efficiently and to ensure that plans, plan participants and IRA owners continue to have a broad range of investment products and services available to them, including investment advice and educational services. We offer these comments to assist in the development of such rules.

1. Recommendations Made by Sellers

Firms seeking to sell investments and investment products to plans and plan participants should be able to both (1) promote their products and recommend them to prospective purchasers,[2] and (2) benefit financially from the successful sale of those products. Without a financial interest, economic activity is stifled and opportunities for buyers and sellers to meet and transact are lost.

Sales activities naturally include recommendations to purchase and invest in products and services offered by the seller. For that reason, the seller's limitation provided by paragraph (c)(2)(i) (the "seller's limitation") recognizes financial institutions such as life insurers and their sales representatives should not be categorized as fiduciaries under ERISA or Code section 4975(e)(3)(B) when they are engaged in selling activities and are clear that they are acting in a sales capacity. The seller's limitation is a critical component of the Department's Proposed Rule.

Sales Activites. We believe it is absolutely critical to make sure that the wording of the seller's limitation be sufficiently inclusive to encompass the full scope of ordinary course selling and distribution activity. As written, the wording of the seller's limitation, which describes sellers and their agents, raises some uncertainties about the availability of the seller's limitation for other distribution channels, such as independent insurance agents, insurance affiliated and unaffiliated broker-dealers and registered investment advisers that offer life insurer products, whether exclusively or as one of many other products from a variety of different product manufacturers.

[2] Subject, of course, to any limitations on marketing and promotional practices imposed on sales of financial products generally.

Impartial, not "Adverse." Our membership is deeply troubled by the wording of the paragraph requiring that the recipient of the advice know or have a basis for knowing that the interests of the selling firm and its distributors are "adverse" to the interests of the plan and its participants. While the seller of a financial product has a financial interest in the outcome of a transaction, we think it is inappropriate to describe that financial interest as necessarily entailing broad adversity of interest. As responsible providers, we have an interest in seeing that our customers are well served, are happy with our products and services, and that our customers found those products and services useful to the attainment of their financial goals.

The process whereby purchasers and sellers bargain for and agree upon the terms of a proposed transaction is fundamental to the efficient operation of a market transaction. Adversity of interests exists in the area of price negotiation, where the seller of a product or service has an interest in maximizing profit and the purchaser has in interest in minimizing cost.

We believe the seller's limitation needs to parse this key distinction. It should make the point that a seller of an investment or an investment product has a financial interest in the transaction it is recommending and, if applicable, that less costly versions of an investment product may be available. So long as purchasers are provided with that information, they will have the requisite basis for evaluating the recommended transaction in light of the seller's financial interest, and will be in a position to understand that the selling firm's recommendation is not impartial.

Illustrate with Examples. The rule should provide an example or examples of circumstances in which a person would reasonably demonstrate that the recipient of information knows that a recommendation is being made by someone in a capacity as a seller. For example, a written representation would suffice if it clearly notes that the person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation in the event the plan, plan fiduciary or participant/individual selects the product and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected. This type of representation would provide a clear indication to the plan, plan fiduciary or participant/individual that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest. Again, ACLI urges the Department to adopt a rule that leaves the nature of the relationship unambiguous to all parties.

Ongoing Sales Relationship. The Department should clarify that the seller's limitation covers all aspects of both an initial sale and the subsequent ongoing relationship between a plan, plan fiduciary or individual and an investment provider or any agent, broker, and/or registered investment adviser involved with the sale of the investment provider's products and services. This would include information and recommendations regarding the use of a product, e.g., advice regarding the choice of investments available under a product's menu of investments. It is common for defined contribution plans to request of potential investment providers a sample menu of investments from among a provider's available investments which, in the opinion of the provider, best match the plan's current investment options. There should be no expectation that any such recommendation is impartial or that the plan seeks advice upon which it will rely for its investment decisions. The nature of this relationship should not change after a sale. A product provider, agent, broker, and/or registered investment adviser may continue to make recommendations regarding products and services. There should be no expectation that these recommendations differ in nature following the initial sale.

2. Representations of ERISA Fiduciary Status Should be Written

In its preamble, the Department expresses the belief that explicitly claiming ERISA fiduciary status, orally or in writing, enhances the adviser's influence and forms a basis for the advice recipient's expectation that the advice rendered will be impartial. The Proposed Rule reflects that view by applying fiduciary status to all persons affording those acknowledgments and disallowing the availability of the paragraph (c)(2)(i) seller's limitation to such persons.

We are concerned about the potential proof issues inherent in claims that an adviser provided oral representations of fiduciary status. Advisers may be hard put to dispute erroneous or otherwise fictitious claims by plans that oral assurances of fiduciary status were provided. At the same time we think prudence dictates that where a plan, plan participant or individual seeks out impartial, disinterested advice delivered in a manner consistent with ERISA's fiduciary standard of conduct, then the plan, plan participant or individual should obtain the appropriate acknowledgment in writing in order to secure the acknowledgement in a permanent form.

For these reasons, we strongly suggest that paragraph (c)(1)(ii)(A) be modified to apply only to persons who represent or acknowledge *in writing* (electronic or otherwise) that they are acting as a fiduciary within the meaning of ERISA with respect to the advice they are providing to the person or persons for whom they are so acting. This concept is consistent with the recently promulgated section 408(b)(2) regulations which require that a service provider acting in a fiduciary capacity acknowledge such in writing.

3. Separately Consider a Rule for Individual Retirement Arrangements

ACLI requests that the Department take additional time to study the IRA and Keogh/one-participant plan markets and carefully consider the economic impact of the Proposed Rule on both individuals and providers of products and services. We ask the Department to consider IRAs and these Keogh plans apart from the scope of a final rule for time to consider the IRA and Keogh market place, changes in its regulatory environment, the economic impact of a change to the current rules to the non-ERISA marketplace, a meaningful investment education safe harbor tailored to this marketplace, and to clarify the application of existing exemptions and/or issued new exemptions tailored to this marketplace. We believe that this would be similar to the Department's decision to separately consider welfare benefit plans under the recently issued 408(b)(2) regulations. The Department has held hearings and is close to issuing newly proposed regulations governing fee disclosure for welfare benefit plans. We urge the Department to consider a similar approach for IRAs and Keogh plans.

Unlike employer sponsored 401(k) plans that generally provide a limited number of investment options selected by a plan fiduciary, IRAs and Keogh plans offer individuals a practically unlimited number of options. Brokers and registered investment advisers who prefer to offer a wide range of options find it impossible to create a level sales compensation structure. Because that universe of investments is virtually unlimited, it is nearly impossible to design a computer model to take into the account every possible option. The rights of IRA owners are protected by way of their individual agreements and direct relationships with financial institutions.

<u>Seller's limitation.</u> We believe that the Department should confirm that the seller's limitation applies to IRAs. It is common for advisors and agents to engage clients and prospective client on their particular goals and objectives to better understand their product and service needs. Based on these conversations, an advisor might explain the pros and cons of various investment vehicles including variable annuities, mutual funds, brokerage accounts, banking products, fixed annuities, alternative investments and several types of advisory accounts. Within each of these types of securities and

property, advisors/agents can usually recommend several different specific securities that may have different features. It is extremely difficult to design different product types so that the product pays the advisor the same compensation regardless of the investment allocation within the product. It is virtually impossible to do so across product types. For instance, compensation charged for executing a stock trade will differ from compensation received for selling a variable annuity. Absent a seller's limitation, it would be next to impossible to provide recommendations as to products and services because generally fees are not level.

For example, a broker may receive 50 bps if the individual invests in Product A (a large cap growth fund), 25 bps if the individual invests in Product B (a bond fund) or 0 bps if the individual invests in Product C (a money market account). For an individual with $10,000 in her account, a recommendation to put all assets into Product A would result in compensation of $50. A recommendation to use two products, 60% to Product A and 40% to Product B would result in compensation of $40. If the seller's limitation is too narrow, a broker may avoid making a recommendation, thereby leaving the individual without any professional assistance. The individual could instead pay a fee-only advisor (typically $500) to get the recommendations that may well be identical to the recommendations the broker would otherwise have provided at a far lower cost. The economics of small plans and small accounts make it so that the only advice available is often the incidental advice provided by brokers. Absent a broad seller's limitation, the average individual may receive no advice at all.

Other Limitations – The limitations provided at Section 2510.3-21(c)(2)(ii) should be available to IRAs. The Proposed Rule carves out from the definition specific acts related to the dissemination of investment information and defined contribution plan "platforms." However, these carve outs are limited to individual account plans as defined in ERISA §3(34). ACLI urges the Department to explicitly extend these carve outs to include IRAs.

Insurers issue variable IRAs (IRC § 408(b) Individual Retirement Annuities) that invest in insurance company separate accounts. These accounts may offer a variety of investment options in different asset classes to address a range of possible investment objectives or asset allocations of different annuity owners all within a single separate account. The limited number of the funds in the separate account is similar to the "platform" of funds available to a defined contribution plan participant. The principal of the "platform" limitations described in 2510.3-21(c)(2)(ii)(B) & (C) should be equally applicable to IRAs.

Regarding education, the Department has provided considerable guidance regarding the line between activities that would result in fiduciary investment advice as opposed to activities that would be deemed non-fiduciary investment education. The Proposed Rule specifically references Interpretive Bulletin 96-1 (29 CFR 2509.96-1) to preserve this guidance for ERISA individual account plans, but does not provide a limitation for these activities to IRAs. Interpretive Bulletin 96-1 assumes that the investment education being provided relates to an ERISA individual account plan with a limited number of investment options. It addresses asset allocation models, but does not address the range of choices available for IRAs or Keogh plans such as annuity products, mutual funds, REITs, brokerage accounts, or an advisory wrap program to name just a few. Information that models the use of these various arrangements by hypothetical individuals should be viewed as "investment education" rather than investment advice.

Furthermore, the educational activities that apply to individual account plans are even more important with regard to IRAs. As indicated above, the investment options available to IRA owners could almost be limitless, as compared to employer sponsored plans which generally have limited options. The typical IRA owner needs help in picking the investment options needed to achieve their retirement goals and the concepts of IB 96-1 are therefore very important to IRA owners. We request that prior to issuing a final rule applicable to the IRA and Keogh plan marketplace, the Department issue a Field Bulletin that addresses investment education in IRAs and Keogh plans and make it clear that the "education limitation" applies to model information regarding the use of these various types of investment arrangements and asset allocation models for IRAs and Keogh plans.

Consumer Impacts - ACLI is extremely concerned that the Rule, if adopted as proposed, will negatively impact the very people the Department seeks to protect. We believe that the Rule may lead to less choice, reduced access and increased costs for products and services. Compensation structures vary by investment products for a variety of reasons, for example, to account for the increased time needed to explain a product that is not well understood or more complex than another. Sales agents must be able to address the needs of their customers. The Rule must permit this or, we fear, there will be fewer opportunities for IRA customers to learn about and consider a range of products and services.

We are not aware of a computer model that would advise an individual as to choices among different IRA product types. If typical sales activities, including recommendations regarding one or more IRA products under varied compensation structures, are not permitted by the final rule, IRA customers may find that advice is only available under a "wrap program." Under these arrangements, a set fee, either on a dollar or percentage formula basis, is paid for advice on the assets within the arrangement. Wrap programs are generally not available to individuals with small accounts. In many instances, wrap programs are more expensive than commission-based accounts, yet may be appropriate for certain IRA account holders. However, they are not necessarily as suitable a choice for other IRA account holders, such as buy and hold investors. Guaranteed lifetime income products are a "buy and hold" investment on which an ongoing wrap fee would not be a good fit. As annuities are sold on a commission basis, they are generally not available under a wrap program.

Individuals should not be limited in making IRA rollover decisions. A provider should be able to sell and an individual should be able to purchase an IRA insurance product even when the provider's products are used to fund the plan from which a rollover will be made. Fiduciary status should not be applied in a way that would restrict the options available to the participant seeking to purchase a rollover product. As we noted in section 1 above, so long as it is clear that the provider seeks to sell products, the seller's limitation in the Proposed Rule must apply here.

4. Recommendations to Take Distributions Not Investment Advice

The Department has requested comment on whether and to what extent the final rule should define "investment advice" to include recommendations related to the taking of a plan distribution. A decision by the participant to effect a distribution cannot be assumed to be an investment decision with respect to the plan as the Department noted in Advisory Opinion 2005-23A. A recommendation regarding whether to take a distribution from a plan might include advice which results in a new investment outside the plan (e.g., "you should rollover your benefit to your new employer's plan) or on what such distribution should be spent (e.g., "you may be eligible to take a hardship distribution to cover our repair to your home"), but it should not be construed to be advice "with respect to any moneys or other property of the plan."[3] While a plan may need to liquidate various investments to make the distribution, liquidation of plan assets is merely incidental to the primary transaction which is a distribution from the plan. In addition, a distribution will not necessarily result in a liquidation of assets if the plan distributes cash or other investments in-kind, i.e., no change in investment. To the extent that a recommendation to effect a distribution is also accompanied by specific advice regarding the plan's investments (e.g., to liquidate certain plan investments but retain others), the provision of such

[3] ERISA §3(21)(A)(ii)

investment advice would be subject to the Proposed Rule. However, a recommendation regarding whether to contribute to or take a distribution from a plan is not investment advice and should not be considered investment advice regardless of the fiduciary status of the financial professional making the contribution or distribution recommendation.

Fiduciary Responsibilities can be Limited by Agreement. In the preamble, the Department cited Advisory Opinion 2005-23A and noted its position that a recommendation to a participant to take a distribution does not constitute investment advice within the meaning of the regulation. We urge the Department to use the preamble to the final regulation to clarify an important issue raised by question 2 of the advisory opinion, i.e., the extent to which responses by a party who is "already a fiduciary" to participant questions regarding distributions are the exercise of discretionary authority regarding management of the plan which is subject to ERISA fiduciary restrictions. Specifically, we ask the Department to clarify that responding to a participant's question regarding plan distribution is not subject to fiduciary standards merely because the party responding to the question or its affiliate provides fiduciary services under a written agreement with the plan that are separate and unrelated to participant distributions. Such a clarification would be consistent with the understanding that fiduciary responsibilities can be limited by agreement and that no party is an all-purpose fiduciary merely because it or its affiliate has entered into an agreement to perform specific fiduciary services. More specifically, ERISA uses a functional definition of fiduciary. Therefore a person is only a fiduciary to the extent the person performs a specific fiduciary function. For example, an agent is a fiduciary due to an arrangement to provide plan participants with investment advice regarding designated plan investments. If that agent recommends that a participant take a distribution from the plan, this action is separate and apart from the scope of the fiduciary's duties under the arrangement. We urge the Department to confirm this functional definition of fiduciary and clarify that activities such as a recommendation to contribute to a plan or take a distribution from the plan, whether directly or via an IRA roll-over, do not fall within the scope of a fiduciary's duties merely because the person is a fiduciary for other purposes, e.g., participant level investment advice. We also urge the Department to confirm that the seller's limitation is available to persons recommending IRA arrangements to a plan participant or individual to receive a rollover from a plan or another IRA.

5. Status as RIA Alone Should Not Give Rise to Fiduciary Duty

Absent the application of the limitations in paragraph (2), section 2510.3-21(c)(1)(ii)(C) of the Proposed Rule provides that all registered investment advisors ("RIA") are ERISA fiduciaries. ACLI believes that this provision is both unnecessary and unworkable. We find the provision unnecessary as paragraph (D) of that subsection already includes any person that provides advice or makes recommendations to plans and plan participants as described. The provision is unworkable as its application in conjunction with the affiliate rule leads to fiduciary status even when no advice or recommendations have been made to the plan or plan participants.

Should the final rule include the provisions of section 2510.3-21(c)(1)(ii)(C), ACLI requests that the rule limit the application of the affiliate provision to only those instances in which an affiliate engages in actions or has authority with respect to the plan that is sufficient to cause a reasonable plan fiduciary to believe it is receiving fiduciary-level investment advice. Under the Proposed Rule, the mere affiliation with an RIA would result in fiduciary status. Specifically, the Proposed Rule says that a person may attain this status "directly or indirectly (e.g., through or together with any affiliate)." Affiliation with an RIA should not trigger ERISA fiduciary status unless the RIA is providing advice services to the plan. If the RIA is not providing advice services to the plan, the affiliate should be able to rely on the multi-factor test in section 2510.3-21(c)(1)(ii)(D) of the Proposed Rule in determining its fiduciary status.

Similarly, affiliation with, or even direct status as, an ERISA fiduciary other than by providing investment advice should not trigger the presumption that a person is an investment advice fiduciary unless such status would give plans and participants a reasonable expectation of impartial investment advice and the person is in a position to influence investment decisions. Thus, for example, status as an ERISA fiduciary for a limited purpose unrelated to investment decisions (e.g., directed trustee, investment manager of a "plan asset" investment vehicle in which a plan invests such as an insurance company separate account or collective trust), either directly or through an affiliate, should not trigger the presumption of investment advice fiduciary status because the fiduciary's limited status alone would not give rise to a reasonable expectation that the fiduciary should provide impartial investment advice and does not put the fiduciary in a position to influence investment decisions. To impose investment advice fiduciary status on these persons solely because of these other limited and unrelated functions would be contrary to the functional nature of fiduciary status under ERISA, which generally only imposes fiduciary responsibility on persons to the extent of their fiduciary activities with respect to the plan.

ACLI understands that the language assigning fiduciary status through an affiliate relationship is in the existing rule today so it may seem reasonable to continue this concept in the Proposed Rule. However, the difference between the existing rule and the Proposed Rule is that the existing rule is primarily focused on activity, not status. For example, under the current rule, the mere affiliation of a person with an RIA or a directed trustee would not trigger fiduciary status. Instead, the affiliate would have to engage in actions or have authority with respect to the plan that is sufficient to cause a reasonable plan fiduciary to believe it is receiving fiduciary-level investment advice. Because the Proposed Rule would presume fiduciary status based on status alone in some cases, extending that presumption based solely on the status of an affiliate is inappropriate.

6. Reasonable Expectations for Fiduciary Status

The Department should revise section 2510.3-21(c)(1)(ii)(D) to provide greater clarity as to which arrangements lead to fiduciary status. ACLI believes that fiduciary status should not apply when advice merely “may be considered.” The current rule provides that a person will be a fiduciary when the person and the plan agree that the advice “will serve as a primary basis” for investment decisions with respect to plan assets. ACLI believes that this is reasonable and in keeping with the intent of ERISA. The fiduciary standards of ERISA should only apply when the parties reasonably expect that the advice given and received will serve as a basis for a decision. That reasonable expectation should be evidenced by a written agreement between the parties or a written disclosure from the provider. Due to the nature of such a relationship, this advice should be subject to the fiduciary duties and responsibilities of ERISA. However, the Proposed Rule would subject such duties and responsibilities to persons whose advice or opinions hold no such import. A plan may solicit advice from a number of persons without engaging any one to serve as an advisor. When a plan’s interest in the advice is cursory at best, there is clearly not a relationship which would warrant the extension of ERISA obligations to the advisor.

7. Platform Provider Limitation

The Department should provide greater clarity on the “platform provider” limitation in section 2510.3-21(c)(2)(ii)(B) as it pertains to “individualization” in the context of the sales, marketing and retention activities of platform providers. In particular, we believe the platform provider limitation should be clear that platform providers are not providing investment advice for a fee when they suggest to plans sample menus, or otherwise, when the platform provider (1) does not hold itself out as a plan fiduciary, (2) discloses that its recommendations are not intended to be impartial advice, and (3) discloses that it has a financial interest in the transaction, which may include indirect compensation paid to the platform provider or its affiliates from investment fund complexes.

This is important to platform providers because in the ordinary course of selecting a platform provider, or determining whether to continue a contract with a platform provider, plan sponsors often require, either through a formal request for proposal or by means of an informal request by an intermediary acting for the plan such as a broker or consultant, that a platform provider supply a sample menu of investment funds (e.g., a subset of funds available from the provider's investment platform) for consideration by the plan sponsor and its advisers. Platform providers that fail to respond to such requests are often excluded from the sales opportunity, or fail to retain an existing plan customer.

In some cases, such requests may be accompanied by certain criteria or parameters supplied by the plan sponsor or its intermediary, to guide the platform provider such as the plan's investment policy, fund performance history requirements, Morningstar classifications and other similar criteria. Often, however, the plan sponsor's (or its intermediary's) request may be simply that the platform provider supply a suggested list of funds from the provider's platform that are substantially identical or closely comparable to the plan's existing designated investment funds.

In responding to these requests, platform providers engage in non-fiduciary sales activity. Platform providers strive to suggest sample menus that are consistent with the goals and objectives communicated to the platform provider by the plan sponsor, and consistent with the economic needs of the platform provider's non-fiduciary business model. Therefore, similar to the activity described in the seller's limitation at section 2510.3-21(c)(2)(i), the platform provider will typically attempt to respond to these requests by suggesting a sample menu or suggested list of funds that both (1) attempts to reasonably satisfy any criteria accompanying the request and (2) meets the platform provider's target revenue needs. Accordingly, we believe it is important that the limitation in section 2510.3-21(c)(2)(ii)(B) be clarified to include these types of sales activities.

8. Investment Product Offerings are not Investment Advice

The Department should clarify in a final rule or its preamble that the development and offer of an investment product with a limited investment menu, e.g., a bond fund, a stock fund and a balanced fund, is not a provision of investment advice. Investment providers such as insurers should have the flexibility to offer a range of products with varied investment menus.

9. Confirm Status of Existing Exemptions

The last time a new fiduciary standard was created to govern sales of products by brokers and other investment advisers, the Department responded immediately issuing a number of exemptions applicable to broker-dealer activity to protect certain activities. Creating a bright-line test to determine who is an advice fiduciary is a laudable goal. However, the bright-line test should not end at the determination of who is a fiduciary, but rather extend to the determination as to whether such advice creates a prohibited transaction when the broker or other financial professional receives fully disclosed direct or indirect compensation from such sale or service.

It is difficult to assess the impact of the Proposed Rule without a clear understanding of whether prior exemptions would continue to apply and whether new exemptions are contemplated. The Department has provided a broad exemption for the sale of annuities (PTE 84-24). We would appreciate the Department's confirmation that this exemption is still available and would cover sales of affiliated and unaffiliated annuities as well as any compensation, direct or indirect, received by an affiliated insurance company, affiliated money managers of variable annuity subaccounts, and any revenue sharing paid to the broker. Further, we seek the Department's confirmation that if the requirements of PTE 84-24 are met that the exemption covers the provision of investment advice. The Department should also confirm the status of exemptions such as PTE 75-1 and 86-128. In particular, it should confirm that these exemptions apply to the provision of investment advice. Product providers, agents and brokers need to know that these exemptions still apply, and cover advisory programs which meet the requirements of the exemption.

Finally, the Department has issued Advisory Opinions to investment providers that also provide investment advice to ERISA plan participants on whether the receipt of compensation under the arrangements in question result in prohibited transactions. In both Advisory Opinion 97-15A (the "Frost" letter) and Advisory Opinion 2001-09A ("the SunAmerica" letter), the Department concluded that, based upon the facts, the receipt of compensation described under these arrangements did not result in a prohibited transaction under ERISA §406(b). ACLI members agree with the Department's conclusions in these Opinions. We ask that Department continue to support these conclusions and leave no doubt as to the status of these Opinions under a final rule.

10. Valuations are not Investment Advice

ACLI requests that the Department remove the provision of appraisal services from the rule. ERISA section 3(21)(A)(ii) provides that a person is a fiduciary if he or she "renders investment advice for a fee…" The determination of the current price of an asset is not "investment advice," i.e., it is not a recommendation to purchase or sell property or securities nor an opinion regarding the merits or value of investing in such property or security. The Department elaborated on the matter shortly after it issued the current rule in Advisory Opinion 76–65A, clarifying that the provision of valuation services is not "investment advice." The Department noted, absent an opinion as to the relative merits of purchasing a particular asset as opposed to some other asset or assets, the valuation of securities is neither investment advice, nor advice as to the value of securities.

There are good reasons for not treating appraisal services as investment advice. When a plan fiduciary directly engages an appraiser to obtain current prices on property or securities that are under consideration for purchase or sale or for assets already held by the plan, the fiduciary must act prudently in selecting and monitoring the appraiser. A plan's service arrangement with an appraiser is subject to the provisions of ERISA §408(b)(2). As for the Department's concerns regarding undisclosed conflicts of interests, the interim final rule under ERISA §408(b)(2) makes clear that to satisfy the prohibited transaction exemption under ERISA §408(b)(2), an appraiser who provides services for indirect compensation must disclose to the fiduciary any and all indirect compensation it expects to receive for services rendered to the plan. Thus, with respect to appraisals, there already is a plan fiduciary to ensure that appraisal activities are performed under an arrangement and in a manner that protects the interests of the plan and its participants and beneficiaries.

Extending fiduciary status to appraisers under this Proposed Rule would, at the very least, substantially raise the costs of what are already objective independent valuations for no discernible purpose. For appraisal work performed for insurance company separate accounts, it would make such appraisers fiduciaries to all ERISA covered plans that invest in these separate accounts. In general, these appraisers would have no direct relationship with or knowledge of these ERISA plans. ACLI members expect many appraisers to avoid ERISA plans and investment vehicles in which plans invest altogether if this Proposed Rule take effect. In that event, there would be severe market disruption for both plans seeking to invest in separate accounts and other non-publicly traded securities. At best, we anticipate fewer appraisers and increased valuation fees due to the reduction in the number of willing appraisers and the need for willing appraisers to insure against potential law suits, all of which are costs that will ultimately be borne by plans and their participants.

If the Department extends the definition to include appraisal services, we note that the limitation on the application of the Proposed Rule at (c)(2)(iii) raises two key concerns. First, the scope of the exclusion for "general reports…provided for purposes of compliance with the reporting and disclosure requirements" is too narrow. It is common for insurers to prepare and provide reports and statements more frequently than ERISA's minimum reporting requirements. For example, it is common to provide access to daily online account values to plan participants. It is also common for interim reports to be prepared for a plan's investment committee. Second, and more importantly to insurers, the rule's exclusion for reports on assets for which there is "not a generally recognized market" is quite problematic.

Both a plan's equity investment in an insurer's separate account (units of the separate account) and an undivided interest in the separate account's investment in other vehicles (e.g., units of the separate accounts investments in real estate funds, hedge funds, private equity funds) are "plan assets." Accordingly, any party passing along information to the separate account investment manager (the insurer or its affiliate) on the value of the separate account's investment in the underlying investment vehicles (units in the underlying fund) or on assets of that vehicle that are used in computing unit values of that vehicle is potentially a fiduciary under the Proposed Rule because it is giving advice on the value of securities or other property owned or to be purchased by a plan. This would be true whether the underlying investment vehicle invests in publicly offered securities or in non-public assets (with values determined by appraisal). The parties swept into the fiduciary definition include investment managers of underlying investment vehicles, custodians or sub-custodians and appraisers.

Many insurers offer real estate separate accounts and hire appraisers to determine the values of separate account holdings. Those values are used for client reporting purposes and to set unit values used for a plan's purchase or sale of separate account units. The Proposed Rule would impose fiduciary status and liability on real estate appraisers to separate accounts in which ERISA plans invest. By valuing the underlying properties of a real estate fund, an appraiser would be advising the real estate fund manager on the value of fund units, an ERISA "plan asset," because the appraisal is for an underlying asset of the insurer's separate account.

Units of a non-registered separate account are not publicly offered securities. This is true even when the underlying assets of the separate accounts are registered securities. Under the Proposed Rule, establishing separate account unit values would be a fiduciary act of "advice," leading an insurer to become a fiduciary for purposes of the valuation. Insurers typically hire sub-custodians who have no direct contact with any plan investor to handle recordkeeping as well as the calculation of separate account unit values. The Proposed Rule would make these sub-custodians ERISA fiduciaries.

The Department should not use this proposed rule to attempt to extend the definition of fiduciary under ERISA 3(21)(A)(ii) to persons providing appraisal services because such services do not constitute the rendering of investment advice. This portion of the proposal along with the "limitation" in the Proposed Rule at (c)(2)(iii) should be dropped. If the Department finds it necessary to study valuation issues more broadly, ACLI suggests that Department issue a Request for Information.

11. Effective Date

ACLI believes that an effective date of at least one year following the publication of a final rule is necessary and reasonable. The Proposed Rule states that final rule would be effective 180 days following publication. As indicated in our comments above, the implications of the new rule would require significant changes. Our members will need sufficient time to fully understand and address a new regulatory regime, particularly given that any violations would result in a prohibited transaction. Should the Rule be implemented as proposed, in addition to time required for compliance review, there may be significant changes required to information technology infrastructure, sales processes and compensation arrangements and other agreements.

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On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,

Walter C. Welsh
Executive Vice President,
Taxes & Retirement Security

James H. Szostek
Vice President,
Taxes & Retirement Security

Shannon Salinas
Counsel
Taxes & Retirement Security

TESTIMONY OF

TOM ROBERT

ON BEHALF OF

THE AMERICAN COUNCIL OF LIFE INSURERS

BEFORE THE

EMPLOYEE BENEFITS SECURITY ADMINISTRATION

U.S. DEPARTMENT OF LABOR

HEARING ON

DEFINITION OF FIDUCIARY – INVESTMENT ADVICE

TUESDAY, MARCH 1, 2011

Introduction

Good morning. My name is Tom Roberts and I am Chief Counsel at ING Insurance U.S., testifying on behalf of the American Council of Life Insurers. ACLI member companies represent more than 90% of the assets and premiums of the US life insurance and annuity industry, and offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a nonqualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

We appreciate this opportunity to offer our views of the proposed rule with the Department. ACLI submitted written comments describing eleven key concerns. Today, I focus on three of them: the importance of the seller's limitation; our suggestions to ensure all interested parties clearly understand when advice is subject to ERISA; and our concerns regarding the proposed rule's applicability to IRAs and the need for further inquiry on the nature of these programs and the products and services offered to support them.

The Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply. It substantially broadens the concept of rendering "investment advice for a fee."

ACLI appreciates the Department's concern that under some circumstances the current rule impinges the Department's ability to bring enforcement actions in situations that are clearly abusive. We share the Department's interest in seeing that plans and participants who seek out and are promised advice that is impartial ultimately receive advice that adheres to the rigorous standards imposed by ERISA. At the same time, we are concerned that the Proposed Rule's pursuit of this objective interferes with investment sales and distribution practices that are customary in the marketplace, well understood, and commonly relied upon by financial services providers, plans and participants alike. We are concerned that these changes will result in plans, plan participants, and IRA owners having less access to investment information and or increased costs. Our comments seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

Seller's Limitation on fiduciary status

In the preamble to the proposed rule, the Department notes that, in the context of selling to a purchaser, communications with the purchaser may involve advice or recommendations and that such communications ordinarily should not result in fiduciary status. This point is critical to the development of a workable rule. Persons engaged in the sale and distribution of investment product and services need to have confidence that ordinary course sales recommendations will not, in hindsight, be subjected to a fiduciary standard that disallows the payment of sales commissions and other traditional forms of distribution-related compensation. Parties engaged in transactions with ERISA plans and IRAs need clear, unambiguous rules by which to determine their duties and obligations.

Financial institutions such as life insurers and their sales representatives should not be treated as fiduciaries under ERISA when they are engaged in selling activities and are clear that they are acting in a sales capacity.

As written, the wording of the seller's limitation, which describes sellers and their agents, raises some uncertainties about the availability of the seller's limitation for other distribution channels, such as independent insurance agents, insurance affiliated and unaffiliated broker-dealers and registered investment advisers that offer life insurer products, whether exclusively or as one of many other products from a variety of different product manufacturers. These parties must be covered by the limitation.

The seller's limitation is only available when the recipient of the advice knows or has a basis for knowing that the interests of the selling firm and its distributors are "adverse" to the interests of the plan and its participants. We think that the word "adverse" is not right word to explain that a seller is not impartial. While the seller of a financial product has a financial interest in the outcome of a transaction, we think it is inappropriate to describe that financial interest as necessarily entailing broad adversity of interest. As responsible providers, we have an interest in seeing that our customers are well served, are happy with our products and services, and that our customers find them useful to the attainment of their financial goals.

We believe the seller's limitation should make the point that a seller of an investment or an investment product has a financial interest in the transaction it is recommending. So long as purchasers are provided with that information, they will have the requisite basis for evaluating the recommended transaction in light of the seller's financial interest, and will be in a position to understand that the selling firm's recommendation is not impartial.

The rule should provide an example or examples of circumstances in which a person reasonably demonstrates that the recipient of information knows that a recommendation is being made by a "seller." For example, a written representation would suffice if it clearly notes that the person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation for the selection of the product and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected. This type of representation would provide a clear indication to the plan, plan fiduciary or participant that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest.

The Department should clarify that the seller's limitation covers all aspects of both an initial sale and the subsequent ongoing relationship between a plan, plan fiduciary or individual and an investment provider or any agent, broker, and/or registered investment adviser involved with the sale of the investment provider's products and services. This would include information and recommendations regarding the use of a product, for example, advice regarding the choice of investments available under a product's menu of investments. It is common for defined contribution plans to request of potential investment providers a sample menu of investments from among a provider's available investments which, in the opinion of the provider, best match the plan's current investment options. There should be no expectation that any such recommendation is impartial or that the plan seeks advice upon which it will rely for its investment decisions. The nature of this relationship should not change after a sale. A product provider, agent, broker, and/or registered investment adviser may continue to make recommendations regarding products and services. There should be no expectation that these recommendations differ in nature following the initial sale.

Written Representations

In its preamble, the Department expresses the belief that explicitly claiming ERISA fiduciary status, orally or in writing, enhances the adviser's influence and forms a basis for the advice recipient's expectation that the advice rendered will be impartial. The Proposed Rule reflects that view by applying fiduciary status to all persons affording those acknowledgments and disallowing the availability of the seller's limitation to such persons.

We think prudence dictates that where a plan, plan participant or individual seeks out impartial, disinterested advice delivered in a manner consistent with ERISA's fiduciary standard of conduct, then the plan, plan participant or individual should obtain the appropriate acknowledgment in writing in order to secure the acknowledgement in a permanent form. We are concerned about the potential proof issues inherent in claims that an adviser provided oral representations of fiduciary status. Advisers may be hard put to dispute erroneous or otherwise fictitious claims that oral assurances of fiduciary status were provided.

For these reasons, we request that the rule be modified to apply only to persons who represent or acknowledge *in writing,* electronic or otherwise, that they are acting as a fiduciary within the meaning of ERISA with respect to the advice they are providing to the person or persons for whom they are so acting. This concept is consistent with the recently promulgated section 408(b)(2) regulations that require that a service provider acting in a fiduciary capacity acknowledge such in writing.

Separately Consider Rule for IRAs

ACLI requests that the Department take additional time to study the IRA and self-employed plan markets and carefully consider the economic impact of the Proposed Rule on both individuals and providers of products and services. The Department is separately considering welfare benefit plans under the recently issued 408(b)(2) regulations. We ask the Department to do likewise for IRAs and self-employed plans and hold them apart from the scope of a final rule. The Department should take time to consider the IRA and Keogh market place, and the economic impact a change to the current rules would have on this retail marketplace.

In addition, the Department should consider changes in the regulatory environment affecting retail products. In particular, there are regulatory efforts are underway by the Securities and Exchange Commission regarding the standard of care under the securities laws for broker-dealers and investment advisers that provide personalized investment advice about securities to retail customers. On January 21, 2011, the SEC issued a study on broker-dealers and investment advisers. It is important that the SEC and DOL efforts lead to rules that are complimentary in nature. We urge the Department to provide the public sufficient opportunity to consider the SEC's regulatory efforts and offer additional comments on the Proposed Rule.

The Department should consider a meaningful investment education safe harbor tailored to this marketplace. The Department should also clarify the application of existing exemptions and/or issued new exemptions tailored to this marketplace.

As we read the proposed regulation, the seller's limitation applies to IRAs. It is common for advisors and agents to engage customers and prospective customers on their particular goals and objectives to better understand their product and service needs. Based on these conversations, an advisor might explain the pros and cons of various investment vehicles including variable annuities, mutual funds, brokerage accounts, banking products, fixed annuities, alternative investments and several types of advisory accounts. Within each of these types of securities and property, advisors/agents can usually recommend several different specific securities that may have different features. The compensation paid by product and service will vary. For instance, compensation charged for executing a stock trade will differ from compensation received for selling an annuity. The seller's limitation, with an appropriate indication of the seller's interest, makes it possible to recommend products and services to customers.

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I want to thank the Department again for holding this hearing, and for inviting ACLI to testify. I am happy to answer any questions you may have.

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April 12, 2011

Office of Regulations and Interpretations
Attn: Public Hearing on Definition of Fiduciary
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC, 20210

Subject: Public Hearing on Definition of Fiduciary

Greetings:

On behalf of the American Council of Life Insurers[1] ("ACLI"), we write to you today on the proposed rule promulgated under Section 3(21)(A)(ii) of the Employee Retirement Income Security Act ("ERISA"), which was published at 75 Fed. Reg. 65263 (October 22, 2010) ("Proposed Rule" or "Rule") and to offer a response to questions raised at the March 1st hearing by DOL staff to our witness Thomas Roberts.

Clarification of Seller's Limitation

In our February 3rd comment letter and in our testimony, we asked that the proposal be modified to provide examples of circumstances that would reasonably demonstrate that the recipient of information knows that a recommendation is being made by a "seller." One example would be a representation that:

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[1] The American Council of Life Insurers is a national trade organization with more than 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension, 401(k) and 403(b) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

> *The person is a seller of products and services, that the person and, if applicable, its affiliates, will receive compensation in the event the plan, plan fiduciary or participant/individual selects the products and services, and that such compensation may vary depending upon which product is purchased or which investments under a product or products are selected.*

The proposed regulation provides that the seller's limitation is not applicable to a person "who represents or acknowledges that it is an ERISA Fiduciary." Our letter states that this constraint on the seller's limitation should only apply if the seller has represented or acknowledged in writing (electronic or otherwise) that it was a fiduciary.

During our testimony it was suggested that the seller's limitation might be protected by some form of disclosure stating that the seller was not an ERISA Fiduciary. Such a disclosure could be added to the representation (described above) that the "person is a seller . . . ."

In addition to examples, the rule could include one or more safe harbor model notices. For example:

> *I, (Name), am a representative of (Agency/Company). I would like to be of assistance to you. Before we proceed, I need to be clear with you that my firm and I may have a financial interest in the sale of any product or transaction that we might recommend to you. Our financial incentive to recommend a particular product or investment may vary by asset class, investment choices or product type, or according to the particular investments available within a given asset class or product type. My firm and I do not agree to act as your ERISA fiduciary investment advice provider. An ERISA fiduciary is not permitted to take its own financial interests into account when making a recommendation.*

In certain circumstances, it may be appropriate to bifurcate this disclosure to make clear that, while the selling firm does not agree to serve as an ERISA fiduciary investment advice provider in connection with recommendations made by the particular representative making the disclosure, it may agree to serve as an ERISA fiduciary investment advice provider in connection with recommendations made outside of the scope of the relationship between the representative and the plan, plan fiduciary or participant/individual to whom the disclosure is made. In such cases, the disclosure should be revised to remove all references to the selling firm and add the following:

> *I also need to be clear with you that my firm may have a financial interest in the sale of any product or transaction that I might recommend to you and my firm does not agree to act as your ERISA fiduciary investment advisor in connection with any of my recommendations.*

This type of representation would provide a clear indication to the plan, plan fiduciary or participant that the person is a non-impartial seller of products and services. It would also address the Department's stated concern about undisclosed conflicts of interest.

As you are aware, regulatory efforts are underway by the Securities and Exchange Commission ("SEC") regarding the standard of care for broker-dealers and investment advisers that provide investment advice about securities to retail customers. Depending upon the SEC's actions, there may be a need to expand this "seller's" disclosure to describe the seller's status and obligations under federal securities law including whether the seller is a fiduciary under federal securities law.

Finally, the Department should clarify that, for purposes of the seller's limitation, the "recipient" of advice or recommendations may be the plan, the plan's sponsor or other plan fiduciary, plan participant, plan beneficiary or an individual (*in the case of an individual retirement arrangement*).

Proposed Rule and Exemptive Relief

In light of the substantive comment letters and testimony at the hearing, we expect that the Department will make a number of useful revisions to the Proposed Rule. With substantive revisions, the Department should provide the public with an opportunity to review and comment on the next iteration of the rule before a final rule is promulgated. The current Proposed Rule would dramatically enlarge the universe of persons who owe duties of undivided loyalty to ERISA plans and to whom the prohibited transaction restrictions of ERISA and the Internal Revenue Code would apply, by re-defining and substantially broadening the concept of rendering "investment advice for a fee" within the meaning of ERISA Section 3(21)(a)(ii).

At the hearing, we were asked about compensation disclosure and noted that the Prohibited Transaction Exemption 84-24 requires such disclosure. We note this exchange to emphasize the need for the Department to confirm the status of current exemptions and solicit public input on whether amendments are needed to existing exemptions and/or whether new exemptions are in order.

We ask that the Department issue a new proposal together with any proposed changes to or confirmations of exemptive relief. We believe it is important to review and comment on these together. We remain committed to offering comments that seek to preserve the Department's enforcement objective while avoiding unnecessary disruption and negative impacts to plans, participants and individuals.

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On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,

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