TESTIMONY OF EDWARD FERRIGNO,
VICE PRESIDENT, WASHINGTON AFFAIRS,
PROFIT SHARING / 401k COUNCIL OF AMERICA

DEPARTMENT OF LABOR HEARING ON THE PROPOSED RULE ON THE DEFINITION OF THE TERM "FIDUCIARY"

MARCH 1, 2011

Thank you for this opportunity to comment on behalf of the Profit Sharing / 401k Council of America (PSCA). PSCA is a 64-year old nonprofit association representing companies that sponsor profit sharing, 401(k), and similar plans. PSCA's members range in size from very small firms to conglomerates with hundreds of thousands of employees.

PSCA supports the Department's initiative, with some reservations that are discussed later in this testimony.

The elimination of the subjective "regular basis" and "primary basis" tests will reduce uncertainty for plan sponsors, participants and beneficiaries, and service providers. Today, the potential exists for plan fiduciaries and participants to believe that they are receiving impartial advice while the provider believes that ERISA's fiduciary standards are not applicable. PSCA believes that removing this misunderstanding by applying the fiduciary standard regardless of the regularity of the advice or to what degree the recipient will consider it is a very positive development.

PSCA urges the Department to reverse its position that a recommendation to take a distribution, even when combined with a recommendation as to how the distribution should be invested, does not constitute investment advice. The decision by a participant or beneficiary to request a distribution of their account assets, and how to subsequently invest those assets, can profoundly affect an individual's retirement. We believe the public policy benefit of our position is self evident and that a recommendation to take a distribution constitutes a recommendation to sell a particular investment.

The expansion of activities that will be considered advice under the proposed rule raises concerns that the provision of marketing, informational, and educational materials will be constrained by new liability concerns. PSCA believes that the Department shares our concerns, as evidenced by provisions in the proposed rule relating to limitations for selling activities, actions pursuant to Interpretive Bulletin 96-1, and marketing and assistance provided under a platform arrangement. We have several suggestions in this regard.

- The Department should clarify in the preamble and the body of the final rule that educating participants about distribution options, including discussions of the advantages and disadvantages of seeking a distribution and managing retirement assets outside the plan, does not constitute advice. As long as these communications do not include a clear recommendation to seek a distribution, they should not be treated as advice.

- Education, information, and advice regarding the tax effects of taking a distribution should not constitute the provision of advice under the proposed rule. This important information is

frequently sought by or provided to plan participants that are contemplating taking a distribution of their plan assets.

- In the course of the Department's joint inquiry with the Department of the Treasury on lifetime income products, the agencies requested comments regarding the provision of information to help participants make choices regarding management and spend down of retirement benefits. PSCA and several other organizations identified the expansion and clarification of Interpretive Bulletin 96–1 to explicitly apply to the provision of information to help participants and beneficiaries make better-informed retirement income decisions. We urge the Department to take this action in conjunction with the development of this rule.

- PSCA believes that the limitation in subparagraph (c)(2)(i) for selling activity should be referred to as the provision of a sales proposal, not the provision of advice. A plan fiduciary who makes a decision regarding the investment of plan assets pursuant to a sales proposal is not acting in response to "advice." Our concern is that a plan fiduciary that acts on conflicted advice may be liable for a fiduciary breach. We suggest, for purposes of clarity, that the language in paragraph (c)(2)(i) be amended to read, "knows or, under the circumstances, reasonably should know, that the person is providing **a sales proposal** in its capacity as a purchaser or seller of a security or other property ..."…

- The proposed rule specifies in subparagraph (c)(2)(ii)(B) that marketing or making available securities or other property from which a plan fiduciary may designate investment alternatives under a fund platform or similar arrangement does not constitute the provision of advice if certain disclosures are made. Subparagraph (c)(2)(ii)(C) provides that general financial information and data to assist a plan fiduciary's selection or monitoring of such securities or property does not constitute the provision of advice if certain disclosures are made. PSCA strongly supports these provisions and urges the Department to retain and expand them in the final rule. The relief provided for the provision of general financial information and data is currently limited to information provided in conjunction with a platform arrangement. It should be available for all plans, regardless of whether or not it is offered in conjunction with a platform arrangement.

- It is common for a fund investment manager to provide newsletters, economic market analyses, and forecasts to plan fiduciaries. For example, the recent worldwide debt crisis and its effect on capital markets, the economic impact of political crises in the Middle East and Africa, or reports about emerging markets such as China or Brazil might be discussed in these reports. Another common topic of analysis is the Washington political environment and its potential impact on industries and markets. These reports and analyses may influence a plan fiduciary's decision about the selection and monitoring of plan investments. PSCA believes that the Department does not intend that these activities constitute the provision of advice. We request that the final rule include specific provisions that clarify our interpretation.

Under the proposed rule, the provision of advice, or an appraisal or fairness opinion, concerning the value of securities or other property of an employee benefit plan constitutes the provision of advice. The Department simultaneously announced that the proposed rule supersedes its position in Advisory Opinion 76-65A, where it held that making valuations to be used in establishing an ESOP does not establish a fiduciary relationship because a plan did not yet exist, and that advice provided to an existing ESOP regarding the value of employer securities also does not constitute the provision of advice.

These changes will result in creating a new fiduciary relationship for a large group of service providers that provide valuation and appraisal services for all types of retirement plans. According to the preamble of the proposed rule, "The Department would expect a fiduciary appraiser's determination of value to be unbiased, fair, and objective, and to be made in good faith and based on a prudent investigation under the prevailing circumstances then known to the appraiser." PSCA supports this standard of conduct and generally supports the assumption of fiduciary status by plan service providers that deal with plan investments. However, we also share the significant concerns in the retirement plan community about the increased costs that may result from the proposed changes. For example, questions have been raised if the Department's standard of impartiality is consistent with a fiduciary duty of loyalty. The magnitude of the costs and the willingness of providers to provide valuation services under the proposed rule are, we believe, undetermined. We expect that additional information about the costs and benefits of this proposed change will be provided in this hearing, and are hopeful that a clearer understanding of the impact of this proposal will result.

At a minimum, valuations, fairness opinions, and appraisals of assets traded on "generally recognized markets" should never be considered the provision of advice.

Additionally, the Department's position in Advisory Opinion 76-65A that "Where a plan is not yet in existence, a fiduciary relationship within the meaning of section 3(21)(A) cannot be established" is widely recognized as established law that applies to all retirement plans subject to ERISA. We urge the Department to clarify that it is not superseding this particular finding in the Advisory Opinion.

Thank you for considering my comments.