(This Treasury decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).)

DONALD C. ALEXANDER,
Commissioner of Internal Revenue.

Approved: October 24, 1975.

CHARLES M. WALKER,
Assistant Secretary of the Treasury.

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Title 29—Labor

CHAPTER XXV—OFFICE OF EMPLOYEE BENEFITS SECURITY

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

Definition of the Term "Fiduciary"

On August 8, 1975, notice was published in the FEDERAL REGISTER (40 FR 33561) that the Department of Labor (the Department) had under consideration a proposal to adopt a regulation, 29 CFR 2510.3-21, designed to clarify the definition of the term "fiduciary" as set forth in section 3(21)(A) of the Employee Retirement Income Security Act of 1974 (the Act). Notice was also published on August 8, 1975 in the FEDERAL REGISTER (40 FR 33560) that the Internal Revenue Service (the Service) had under consideration a proposal to adopt a similar regulation, 26 CFR 54.4975-9, designed to clarify the definition of the term "fiduciary" set forth in section 4975(e)(3) of the Internal Revenue Code of 1954 (the Code).

All interested persons were invited to submit written data, views and arguments with respect to the proposed regulations. In addition, pursuant to a notice published in the FEDERAL REGISTER on August 8, 1975 (40 FR 33563), a public hearing was held on August 26, 1975 with regard to the proposed regulation, the regulation proposed by the Service, and proposed exemptions from the prohibited transaction provisions of section 406 of the Act and section 4975 of the Code respecting certain classes of transactions involving employee benefit plans and certain broker-dealers, reporting dealers and banks (40 FR 33564). The Department has considered all of the written data, views and arguments received and the testimony given at the public hearing, and has determined to adopt the proposed regulation, as modified, in the form set forth below.

Section 3(21)(A) of the Act provides, as here relevant, that a person is a fiduciary with respect to an employee benefit plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he 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, or (iii) he has discretionary authority or discretionary responsibility in the administration of such plan.

The regulation adopted herein is designed to clarify the applicability of the definition of the term "fiduciary" set forth in section 3(21)(A) to persons who render investment advice to employee benefit plans and to persons who execute securities transactions on behalf of plans.

Paragraphs (a) and (b) of the regulation are reserved.

Paragraph (c) of the regulation provides, generally, that a person will be deemed to be a fiduciary with respect to a plan by reason of rendering investment advice to such plan only when such person provides advice to the plan concerning investments in securities and other property under circumstances where such person has discretionary authority or control with respect to the investment of plan assets or where such person on a regular basis provides advice designed to meet the particular investment needs of the plan and, pursuant to an agreement, arrangement or understanding between such person and the plan or a fiduciary with respect to the plan, it is expected that such advice will serve as one of the primary bases for the investment of plan assets. In response to several written comments, paragraph (c)(1) has been modified to make it clear that for a person to be a fiduciary under paragraph (c)(1)(ii)(B), any such agreement, arrangement, or understanding to provide such advice must be mutually agreed upon, arranged or understood by the person providing such advice and the plan or the fiduciary.

It was also noted in the letters of comment that advice on the availability of securities or other property or of purchasers or sellers of securities or other property is often merely an integral part of the execution of transactions rather than the provision of investment advice. Accordingly, paragraph (c)(1) of the regulation has been modified to remove this type of information from the definition of the term "investment advice."

Paragraph (c) further provides that a person who is a fiduciary with respect to a plan by reason of rendering investment advice to such plan shall be deemed to be a fiduciary with respect to only those assets of the plan for which such person, directly or indirectly, renders investment advice or has any authority or responsibility to do so. Thus, a person who renders investment advice with respect to only a specified portion of the assets of a plan shall not be deemed to be a fiduciary with respect to the investment, disposition or management of any other assets of the plan.

However, even though a person may be a fiduciary with respect to only a specified portion of plan assets, under the regulation such person will still be a party in interest (as defined in section 3(14)(B) of the Act) with respect to all of the assets of the plan and will continue to be subject to the provisions of section 405(a) of the Act relating to cofiduciary liability for fiduciary breaches by other fiduciaries with respect to any of the assets of the plan.

A question was raised in the letters of comment regarding what constitutes a fee or other compensation, direct or indirect, for the rendering of investment advice to a plan within the meaning of section 3(21)(A)(ii) of the Act. Although this matter is still under consideration by the Department and the Service, as a general guideline until a more definitive statement is issued, a fee or other compensation, direct or indirect, for the rendering of investment advice to a plan by a fiduciary, within the meaning of section 3(21)(A)(ii) of the Act, should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered. This may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.

Paragraph (d) of the regulation sets forth guidelines under which a broker-dealer, reporting dealer or bank may execute transactions in securities on behalf of employee benefit plans without becoming a fiduciary with respect to such plans. These guidelines provide limitations on the discretionary authority that may be accorded to such a broker-dealer, reporting dealer or bank in the execution of securities transactions if such a person is not to be deemed a fiduciary under section 3(21)(A) of the Act.

In this regard, pursuant to suggestions in several letters of comment, specific limitations and conditions have been added relating to the purchase and sale by plans of securities issued by investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.) since the price at which such securities are purchased and sold is subject to restrictions imposed under the rules and regulations of that Act.

Questions were also raised in the letters of comment as to when a broker-dealer, reporting dealer, or bank ceases to be a fiduciary, if he has become a fiduciary solely by reason of the exercise of discretionary authority or control in the execution of a securities transaction for a plan under circumstances which do not conform to the guidelines set forth in paragraph (d)(1). It is the view of the Department that such a broker-dealer, reporting dealer, or bank continues to be a fiduciary with respect to a plan until such transaction, or related series of transactions, is completed. For guidance regarding when a securities transaction may be deemed to be completed, reference should be made to Rule 15c1-1 under the Securities Exchange Act of 1934 (17 CFR 240.15c1-1).

Several letters of comment also noted that it is a common practice in the execution of securities transactions for plan fiduciaries who are investment managers with respect to plan assets not to disclose to broker-dealers, reporting dealers or banks that a particular transaction is being performed by them on behalf of an employee benefit plan. In this regard, it is the view of the Department

that, as a general matter, a person is not a fiduciary with respect to a plan if he does not know, and has no reason to know, that he is acting with respect to a plan. It should be noted, however, that a plan fiduciary may not delegate such discretionary authority to a broker-dealer in the execution of a securities transaction as to make such broker-dealer a fiduciary with respect to the plan within the meaning of section 3(21)(A) of the Act and paragraph (d) of this regulation without disclosing to such broker-dealer that it will be acting as a fiduciary with respect to the plan in such transaction.

Under paragraph (d)(2), even if a broker-dealer, reporting dealer or bank becomes a fiduciary with respect to a plan by reason of the exercise of discretion in the execution of securities transactions on behalf of such plan under circumstances not meeting the guidelines of paragraph (d)(1) of the proposed regulation, such broker-dealer, reporting dealer or bank will be deemed to be a fiduciary with respect to only those assets of the plan with respect to which the broker-dealer, reporting dealer or bank, directly or indirectly, has executed, or has agreed to execute, transactions in securities.

As stated in the notice of August 8, 1975, questions have been raised as to whether broker-dealers who merely clear securities transactions involving plan assets when such transactions are initiated by other broker-dealers are parties in interest with respect to the plan. It is the view of the Department that such clearing broker-dealers are not parties in interest with respect to plans solely by reason of providing such services, if such transactions are initiated by another broker-dealer unrelated to the clearing broker-dealer.

Paragraph (e) defines the terms "affiliate" and "control" for purposes of the regulation.

In addition to the changes noted above which have been made in the regulation as adopted pursuant to suggestions made in the written comment letters, other minor changes intended to clarify the provisions of the regulation have also been made based on the comments which were received and the testimony given at the hearing.

Accordingly, Part 2510 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended by adding a new § 2510.3-21 to read as follows:

Sec. 505, Pub. L. 93-406 88 Stat. 894 (29 U.S.C. 1135).

§ 2510.3-21 Definition of "Fiduciary."

(a) [Reserved]

(b) [Reserved]

(c) *Investment Advice.* (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:

(i) Such person renders 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; and

(ii) Such person either directly or indirectly (e.g., through or together with any affiliate)—

(A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) Renders any advice described in paragraph (c)(1)(i) of this section 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.

(2) A person who is a fiduciary with respect to a plan by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

(d) *Execution of securities transactions.* (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act, with respect to an employee benefit plan solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify (A) the security to be purchased or sold, (B) a price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.), a price which is determined in accordance with Rule 22c-1 under the Investment Company Act of 1940 (17 CFR 270.22c-1), (C) a time span during which such security may be purchased or sold (not to exceed five business days), and (D) the minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or the management or disposition of plan assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition, of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

(e) *Affiliate and control.* (1) For purposes of paragraphs (c) and (d) of this section, an "affiliate" of a person shall include:

(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person;

(ii) Any officer, director, partner, employee or relative (as defined is section 3(15) of the Act) of such person; and

(iii) Any corporation or partnership of which such person is an officer, director or partner.

(2) For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, D.C., this 24th day of October, 1975.

JAMES D. HUTCHINSON,
Administrator of Pension and Welfare Benefit Programs.

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