

May 20, 2011

The Honorable Phyllis Borzi  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Re: Need for Reproposal of Fiduciary Definition Rule

Dear Assistant Secretary Borzi:

In our comment letter and my testimony at the Department of Labor hearing on March 1, the Investment Company Institute<sup>1</sup> recommended that the Department issue a reproposal of its fiduciary definition rule before moving to a final rule. I stress that we make this recommendation not to deter or delay this project but because the Department, the retirement services and investment industries, plan sponsors, and retirement savers, all have a shared interest in getting this rule right.

**The consequences of being a fiduciary are significant and under the proposal could potentially affect the ability of thousands of firms and individuals to provide services and information to plans and IRA savers.** An ERISA fiduciary not only must act prudently and for the benefit of participants – as virtually all fiduciaries must do – but is subject to unique duties under the prohibited transaction rules, including restrictions on compensation that only apply to fiduciaries and not “parties in interest” under the ERISA statutory framework. Compensation arrangements that are common and legal for service providers that are parties in interest could become illegal, absent an exemption, if the service provider is deemed a fiduciary. The consequences of promulgating a final rule that inadvertently sweeps this far will be to restrict unnecessarily the ability of plans, participants and IRA savers to continue to obtain appropriate services and information. The Department should do all it can to avoid this result.

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$13.1 trillion and serve over 90 million shareholders.

**Comments on the rule show that the text is confusing, its scope is unclear, and its policy implications are controversial.** The Department received numerous suggestions for changes both by those supporting the rule and opposing the proposal. On this record, adopting a rule will require careful analysis and redrafting. The Department should explain the redraft and get another round of comments focused on making sure the rule is clear, technically correct, and appropriately achieves the Department's stated policy goals. Another round of comments is particularly important for IRAs, where the sweep of the new rule could be wide and unprecedented and the Department has not yet provided a policy rationale and economic analysis.<sup>2</sup> The regulated community always benefits from being able to comment on an agency's statement of the problems it sees and how a rule proposal would address them.<sup>3</sup>

**All of the appropriate prohibited transaction exemptions need to be in place and part of the comment process before the Department finalizes a rule.** The Department has stated it expects prohibited transaction exemptions to ameliorate any unfortunate consequences of turning parties in interest under the existing rule into fiduciaries under a revised rule, but the Department has not been specific on how it would do so nor has it actually proposed any exemptions. Unless the appropriate exemptions are in place, plans and participants may be without access to information and advice. The Department's first task after passage of ERISA was proposing and finalizing both the fiduciary regulation now under reconsideration and PTE 75-1 at the same time.<sup>4</sup> The Department should propose any PTE changes along with a redraft of the rule in order to vet fully the solutions to these complex and interrelated issues.

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<sup>2</sup> The economic analysis published with the proposal solely analyzes and addresses the impact of the contemplated revisions on employment-based plans. We underscore that it is important to solicit comments on a Department analysis of the IRA market even from those who support the proposal. For example, the Institute provided detailed comments on the Department's cost/benefit analysis of the participant disclosure proposal even though we strongly supported the proposal and believed it would have significant benefits. See <http://www.ici.org/pdf/22854.pdf>. In the final rule, the Department undertook to refine and strengthen its analysis and this resulted in a better final product. See 75 Fed. Reg. 64910, 64930 (Oct. 20, 2010).

<sup>3</sup> See *Connecticut Light and Power Co., v. Nuclear Regulatory Comm.*, 673 F.2d 525 (D.C. Cir. 1982) ("The purpose of the comment period [required under the Administrative Procedure Act] is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rulemaking. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.") (internal citations omitted).

<sup>4</sup> See 40 Fed. Reg. 50843, 50845 (Oct. 31, 1975).

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**The Department has repropose rules in the past to get them right.** In 1991, the Department appropriately used the reproposal process with the 404(c) regulation, concluding that because of the “significance of the changes” made to its first proposal, interested parties should be afforded an opportunity to comment on them prior to adoption of a final regulation.<sup>5</sup> The reproposal allowed the Department to adopt, the following year, a final 404(c) regulation that was clear, workable, and balanced and that has protected participants and encouraged the offering of 401(k) plans. That regulation worked well for many years and was updated only recently to make its disclosure rules consistent with the new participant disclosure regulation. The record before the Department on the proposed fiduciary definition rule supports both the need for significant changes – even in places where the Department may revise only to clarify its intent – and the need for another round of comments.<sup>6</sup>

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The Institute strongly recommends repropose this important rule. We pledge to study it carefully and provide timely comments. We share the Department’s interest in completing this rulemaking process with a final rule that is clear and workable and will serve plans and participants well for the next 35 years.

Thank you for your consideration of our views.

With very best regards.

Sincerely,



Paul Schott Stevens  
President and CEO  
Investment Company Institute

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<sup>5</sup> See 56 Fed. Reg. 10724 (Mar. 13, 1991) (reproposal); 57 Fed. Reg. 46906 (Oct. 13, 1992) (final).

<sup>6</sup> Adopting an “interim final” rule is not an appropriate substitute for issuing a reproposal. The Administrative Procedures Act contemplates interim final rules when it is impractical or unnecessary to seek comment. The Department has not identified any pressing emergency.