INVESTMENT COMPANY INSTITUTE

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The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Perez:

On behalf of the Investment Company Institute,[1] I am writing to express deep reservation over the direction the Department may be heading in connection with its pending re-proposal of a rule that would redefine the term "fiduciary" in the context of providing investment advice under the Employee Retirement Income Security Act of 1974 ("ERISA"). The Institute has never sought to unnecessarily delay this project, but, rather has repeatedly offered information, data and insight in a shared interest in getting this rule right. Unfortunately, we are concerned that the Department may issue a re-proposal that is substantially similar, in scope and breadth, to its original proposal and that the Department may be arguing that the impact of a new fiduciary definition will be mitigated by the issuance of corresponding "prohibited transaction exemptions." As we and many others have expressed, an overly expansive definition of investment advice fiduciary will—as a practical matter—severely limit and, in many cases, entirely eliminate access to meaningful investment services for millions of retirement savers. We do not believe that any package of prohibited transaction exemptions will address these concerns.

The unintended consequences of an overly expansive definition of investment advice fiduciary will be significant. Our concern is more than conjectural, but stems from the uniquely prescriptive nature of the ERISA statute itself. In this respect, ERISA expressly prohibits an ERISA "fiduciary" from engaging in many routine transactions. Most importantly, ERISA prohibits a fiduciary from performing services as a fiduciary that effects the compensation that the fiduciary receives. A broad definition of fiduciary, for example, could prohibit a financial services firm from selling its own

[1] The Investment Company Institute (ICI) is the world's leading association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $17.4 trillion and serve more than 90 million U.S. shareholders.

products to a customer who solicits and is provided information about the products. The practical ramifications of such a prohibition perhaps is more apparent were it to be applied to other common relationships. Thus, for example, imagine seeking a recommendation from a cardiologist as to whether a heart valve procedure the cardiologist specializes in is suitable for your condition. After an examination, the cardiologist tells you that, in fact, he does recommend the procedure, but, because he would be paid a fee for performing the surgery, he is precluded from taking the case. The consequences of promulgating a rule that sweeps this far will be to unnecessarily restrict the ability of American workers to obtain the guidance, products and services they need to adequately prepare for their retirements through retirement plans and individual retirement accounts ("IRAs").

Maintaining common sense criteria in any re-proposed fiduciary definition is crucial. While we appreciate the desire of the Department to review its rule in light of changes to how Americans save for retirement, it must be understood that the current rule incorporates simple commonsense criteria intended to ensure that fiduciary status should attach only to genuine advisory relationships as intended by Congress. In this respect, the current rule extends fiduciary status when the guidance being communicated is individualized to the plan or participant and where there is a mutual understanding that the recipient will use the guidance as the primary basis for making an investment decision. The absence of this simple check – which was not included in the original proposal – results in all manner of ordinary business interactions being swept in to ERISA's prohibited transaction regime. Simply making information on the markets available by newsletter or on a website, for example, that offers guidance as to the likely impact of interest rates on stock valuations, could raise the question of whether the information provider is a fiduciary. Similar questions are raised by a call center employee responding to questions about a 401(k) or a potential rollover describing the investment objectives of a particular fund, or that a specific target date fund is designed for investors who plan to retire around a certain date. No reasonable person would believe these sorts of interactions create or should create a fiduciary relationship subject to prohibited transaction rules that prohibit a financial services provider from being able to sell its products to the individual receiving such needed but non-individualized information.

Prohibited transaction exemptions alone are not a panacea for an overly expansive and crushingly burdensome expansion of the fiduciary definition. The Department has stated it expects prohibited transaction exemptions to ameliorate any unfortunate consequences of an expansive fiduciary definition, but this puts the cart before the horse by facilitating an overly broad definition of "fiduciary" with the promise of exemptive relief. Our experience is that no package of exemptions will remedy the harm caused by an overly expansive fiduciary definition. Exemptions impose conditions on those seeking to rely on them. Our experience is that the Department's exemptions are often prescriptive and would be unworkable in the context of how most working Americans obtain investment information.

For example, "offsets" of fees paid and written approval of any future changes in an acquired investment product may be required. *See* PTE 77-4. We are concerned that exemptions of the type historically issued by the Department will stifle innovation in financial products and could render ERISA plans and IRAs second class citizens compared with the types of financial services available to retail accounts which are comprehensively regulated under the federal securities laws.

We are also concerned that the conditions imposed by exemptions are often incompatible with the manner in which investors seek and obtain information. In this respect, parties intending a fiduciary relationship typically enter into a written agreement setting forth the intended scope of the arrangement, including any limitations that apply, as well as any acknowledgements necessary to comply with the conditions of the exemptions that will necessarily be relied upon in connection with the relationship. Proceeding with an overly expansive fiduciary definition will lead to a system where information about financial products is transmitted only after a written agreement is entered into clarifying the nature of the relationship. Such a requirement will not only lead to additional costs, but will have a chilling effect on the free and wide availability of information upon which investors now take for granted.

Finally, the potential breadth and vagueness of the fiduciary definition will lead to uncertainty as to whether a financial institution is required to try to rely on any exemption. For example, the lack of a mutuality criterion in the fiduciary definition will make it difficult for a prospective fiduciary who may be subject to ERISA's restrictive prohibited transaction regime to comply with the conditions of any applicable exemptions. Clearly a person who does not know that an investor is relying on generalized information to make an investment decision would not be in a position to satisfy the conditions of a prohibited transaction exemption.

The need for an overly expansive fiduciary definition must be substantiated by a comprehensive cost-benefit analysis. Given the concerns outlined above, we have repeatedly stressed the importance of ensuring that any regulatory expansion of the types of services and relationships covered by ERISA's prescriptive provisions be preceded by a comprehensive cost-benefit analysis focused on showing, through quantitative as well as qualitative data, that any restriction on future access to guidance, products and services resulting from such a significant regulatory expansion is justified given the identification of a clear problem the expansive fiduciary definition is needed to solve, and the lack of less burdensome alternatives for remedying the problem.

Thank you for your consideration of our concerns.

As we have previously requested, we would deeply appreciate the opportunity to meet with you in person and to share our views in greater detail. Given the importance of the matter, we would like to meet in the near future. If you agree to meet, as we hope you will, your staff can coordinate details with Don Auerbach, co-head of our government affairs staff, at (202) 326-5894 or Auerbach@ici.org.

Sincerely,

Paul Schott Stevens
President and CEO
Investment Company Institute

cc: The Honorable Luis A. Aguilar
Commissioner
U.S. Securities and Exchange Commission

The Honorable Phyllis C. Borzi
Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration

The Honorable Daniel M. Gallagher
Commissioner
U.S. Securities and Exchange Commission

The Honorable Michael S. Piwowar
Commissioner
U.S. Securities and Exchange Commission

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

The Honorable Kara M. Stein
Commissioner
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The Honorable Mary Jo White
Chair
U.S. Securities and Exchange Commission

The Honorable Jeffrey Zients
Director, National Economic Council and
Assistant to the President for Economic Policy
The White House