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RE: Proposed Rule on Definition of Fiduciary, 75 Fed. Reg. 65263

The Investment Company Institute, the national association of U.S. investment companies, submits these comments on the Department of Labor's proposal to revise regulation 2510.3-21 covering the circumstances under which a person is an investment advice fiduciary under ERISA.

The current rule, adopted by the Department in 1975, effectively draws an important legal boundary – *i.e.* the line between *commonplace financial market interactions* in which fiduciaries and participants of ERISA-governed plans can freely obtain information or suggestions to consider in making their investment decisions, on the one hand, and *advisory relationships* in which those fiduciaries or participants engage providers to act on their behalf in evaluating or making investment decisions, on the other. By restricting application of the ERISA definition of advice and the fiduciary duties it triggers to actual advisory relationships the rule gives the clarity to the regulated community necessary for retirement savers to gather a range of market input into their decision making process and for other parties in the marketplace to avoid crossing into fiduciary activities.

We understand that after 35 years the Department might want to consider how to assure that the rule continues to delineate the relationships that Congress intended to subject to fiduciary responsibility under ERISA from other financial market interactions. We also understand that the Department believes it faces burden of proof issues in alleging fiduciary status under the current rule and would like to revise the rule to ameliorate the Department's problems. The Department, nevertheless, should proceed carefully in considering changes to the rule. While it is within the

Department's authority to revise its regulations, it cannot ease a burden of proof concern by reinterpreting ERISA beyond Congress' intent. There is ample evidence Congress did not intend ERISA to disrupt the functioning of the securities markets, prevent employee benefit plans from accessing investments, or turn the "ordinary functions of consultants and advisers" into fiduciary functions.<sup>1</sup>

Moreover, because the consequences and responsibilities of ERISA fiduciary status are considerable, any revised rule also must provide clarity to persons in the regulated community to keep them from unwittingly engaging in fiduciary acts.<sup>2</sup> The current rule allows parties to offer plans and individuals investments they need and want and to provide financial and investment information to plans and IRA investors. Any revisions should not impede fiduciaries and participants from interacting in the marketplace.

Any revisions to the rule should reflect these principles:

Persons who deal with plans and IRA investors must know whether or not they are fiduciaries. Fiduciary status is one of the highest burdens in the law and should be neither ambiguous by nature nor subject to second guessing. Moreover, because ERISA's prohibited transactions are *per se* rules, there is no relief for inadvertent violations. The rule should focus on situations where there is a *mutual* understanding that a real advisory relationship exists.

Simply selling an investment product cannot be a fiduciary act. Retirement plans and IRA investors need to have investment products available to them. The rules must recognize that while the process of selling an investment may involve an implicit recommendation by the seller, that does not mean a seller's activities constitute ERISA investment advice. The rule must be workable for sellers.

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<sup>1</sup> See ERISA Conference Report, P.L. 93-406, at 323 ("...the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions..."), *id.* at 309 (some otherwise prohibited transactions "nevertheless should be allowed in order not to disrupt the established business practices of financial institutions" and directing the Secretaries of Labor and Treasury to grant an administrative exemption for brokerage services). The Department suggests in the preamble to this proposal that the purpose of the 1975 rule was to "significantly narrow[]" the definition of investment advice from the plain language in section 3(21). 75 Fed. Reg. at 65264. We disagree. The purpose of all of the regulatory activity the Departments of Labor and Treasury engaged in shortly after the enactment of ERISA – including what became the current rule and Class Exemption 75-1 – was to ensure that "established business practices of financial institutions" in interacting with employee benefit plans, and the benefits flowing from these practices, were not disrupted.

<sup>2</sup> In addition, the new 408(b)(2) regulation requires service providers to state whether they expect to provide services as a fiduciary.

Fiduciary status should not apply where a reasonable person would not believe a position of trust and confidence exists. As proposed the rule would trigger fiduciary status in several situations we believe the Department did not intend to reach because the **circumstances do not suggest** ERISA’s protections are appropriate or necessary.

Plan fiduciaries may receive some general assistance from recordkeepers engaged to administer plan accounts that help fiduciaries make prudent decisions about **the plan’s** investment options. A plan’s **service provider** often is the only or best entity to provide this general assistance. Amendments to the rule should not force plan fiduciaries to hire independent fiduciaries or forgo any assistance rather than obtaining input from recordkeepers.

The Department should consider carefully the implications of the proposal for Americans saving for retirement in IRAs. Although IRAs held \$4.2 trillion at the end of the second quarter of 2010, the Department ignored them in its economic analysis.<sup>3</sup> The ways that firms sell investments in IRAs are not always the same as employer-based plans, and any revisions to the advice rule that implicate IRAs should reflect that.

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The Institute urges the Department to reexamine its proposal so that any final rule provides clarity on the activities covered, sufficiently exempts ordinary practices like selling investments or executing securities transactions that do not warrant the strict prohibitions imposed on fiduciaries, and does not chill the provision of useful investment information and education for fear of crossing a regulatory line. In addition, the Department should not solve a burden of proof problem by swinging too far in the other direction. Our comments explain where the Department must improve the proposed regulation to meet the principles we set out.

I. Framework of the proposal

Under the proposal, a person giving “investment advice” within the meaning of ERISA section 3(21), must satisfy both a “recommendation” and “status” test by both giving advice or making a

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<sup>3</sup> Brady, Holden, and Short, *The U.S. Retirement Market, Second Quarter 2010*, ICI Fundamentals, vol. 19, no. 3-Q2 (Oct. 2010), available at <http://www.ici.org/pdf/fm-v19n3-q2.pdf>.

recommendation as to the advisability of buying or selling securities or other property<sup>4</sup> and meeting one of four alternate status conditions, either directly or through an affiliate.<sup>5</sup> The proposal goes on to exempt certain persons otherwise meeting the tests if they satisfy enumerated conditions. Our comments focus first on the recommendation and status tests and the exceptions. We next provide comments on rollovers and IRAs and finally recommend that the Department repropose the rule given the significance of the issues and the importance of getting a new rule right.

## II. “Recommendation” part of the test

The recommendation part of the test should apply only to advice or recommendations individualized to the plan or participant. A person satisfies the recommendation test if the person provides advice to a plan or participant concerning the value of securities or other property or makes a recommendation as to the advisability of investing in, purchasing, holding, or selling securities or other property. The advice need not be individualized to the needs of the plan or participant or even *aimed* at a particular plan or participant.

As proposed, the provision sweeps too broadly. Any investment newsletter or expression of opinion and any column in a newspaper or financial publication, including one making general statements about classes of investments, could qualify.<sup>6</sup> For example, an investment newsletter that makes any recommendations regarding the advisability of one or a class of investments would appear to

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<sup>4</sup> Specifically, the proposal would require the person (1) provide advice, or an appraisal or fairness opinion, concerning the value of securities or other property; (2) make recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property; or (3) provide advice or make recommendations as to the management of securities or other property, to a plan, a plan fiduciary or a plan participant or beneficiary.

<sup>5</sup> The alternate status conditions, which can be satisfied either directly or indirectly through any affiliate, require that the person: (1) represents or acknowledges that it is acting as a fiduciary within the meaning of the ERISA with respect to providing advice or making recommendations; (2) is a fiduciary with respect to the plan within the meaning of section 3(21)(A)(i) or (iii) of the Act (*i.e.* is otherwise a fiduciary with respect to the plan); (3) is an investment adviser within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940; or (4) provides advice or makes recommendations pursuant to an agreement, arrangement or understanding, written or otherwise, between the person and the plan, a plan fiduciary, or a plan participant or beneficiary that the advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.

<sup>6</sup> This result would raise First Amendment concerns. In *Lowe v. SEC*, 472 U.S. 181 (1985), the Supreme Court held that the Advisers Act was enacted to regulate “the business of rendering *personalized* investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of *nonpersonalized* publishing.” *Id.* at 204 (emphasis added).

meet the proposal's test, even if the investment newsletter is written for the general public and the author has no connection whatsoever to the plan or participant.<sup>7</sup> We note that this activity would *not* make the person writing the newsletter an "investment adviser" under section 202(a)(11) of the Investment Advisers Act of 1940 ("Advisers Act").

Requiring personalized investment advice in order to trigger ERISA fiduciary status will assure that the rule only applies where a reasonable person would believe a true advisory relationship exists. No reasonable person would believe that statements or recommendations written for the general public about investments or the financial markets create an advisory relationship of trust and confidence between the publisher and every plan fiduciary or participant that might consider the information in making decisions.<sup>8</sup>

The proposal should expressly require that advice be given for a fee or other compensation. There is a technical issue with the way the proposal is drafted. Paragraph (c)(1) states that a person provides investment advice for a fee or other compensation to an employee benefit plan if the first and second tests are satisfied. But neither of these tests requires that there be a fee or other compensation. This glitch could not be intended because ERISA clearly requires there be a fee or other compensation for investment advice. The Department should fix this oversight with a technical correction to the lead-in language of paragraph (c)(1).<sup>9</sup>

### III. "Status" part of the test

The Department should reconsider and modify the status test. In addition to concerns we discuss below about specific elements of the status test, we first question whether the rule should give weight to a person's particular status if the status is unrelated to how the person and the fiduciary or participant interact. In determining whether someone is giving advice under ERISA, the inquiry should look at the interaction itself and not whether that person (or an affiliate not even interacting with the fiduciary or participant) might be an adviser under the Advisers Act or an ERISA fiduciary for

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<sup>7</sup> An investment newsletter is one example, but there are others. For example, firms often publish generic "buy/sell/watch" lists. Firms also sponsor client conferences, and their employees speak at conferences, at which general market information is discussed before an audience.

<sup>8</sup> For the same reason, we believe it is clear the proposal is not intended to and should not be read to apply to valuation services provided to a mutual fund and its adviser or to the process of a mutual fund "striking" its daily net asset value. We suggest DOL confirm this reading. A contrary reading would mean that simply investing in a mutual fund would create a fiduciary relationship, which ERISA makes clear is not the case. *See* ERISA section 3(21)(B).

<sup>9</sup> Fixing the compensation oversight does not eliminate the need also to require individualized advice to trigger fiduciary status, as we urged above.

some other reason. Courts and DOL have consistently described ERISA's fiduciary definition as a "functional" test.<sup>10</sup> While it certainly could simplify the Department's job in litigation to show that somewhere in the enterprise there is an investment adviser or ERISA fiduciary, that simply does not transform any interaction between a plan and another part of the enterprise into an advisory relationship.

Fiduciary status particularly should not be triggered merely because any affiliate or employee of a firm meets the definition of investment adviser in the Advisers Act. The status test of the proposal is met if the person is directly, or indirectly through an affiliate, an investment adviser within the meaning of section 202(a)(11) of the Advisers Act. Effectively this could be read to mean that any entity described in section 202(a)(11) and every affiliate and employee of that entity automatically satisfies the status test. This sweeps much too broadly. Substantially all financial services enterprises include an affiliate registered with the SEC as an investment adviser.<sup>11</sup> The definition of investment adviser in section 202(a)(11) of the Advisers Act generally applies to any person engaged in the business of providing advice to others or issuing reports or analyses regarding securities for compensation.<sup>12</sup> Thus, for example, every financial services firm and all its employees who interact with a plan or participant would find themselves to be fiduciaries under the rule if any affiliate in the enterprise serves as an adviser to a mutual fund.

The Department states that it included this broad provision because the courts and the SEC have determined that investment advisers owe an affirmative duty to their clients of utmost good faith, full and fair disclosure of all material facts, and an obligation to employ reasonable care to avoid misleading their clients. This duty, however, *only applies to the investment adviser's clients – i.e.* those institutions or individuals for whom the adviser has undertaken to provide investment advisory services for compensation.<sup>13</sup> It does not apply to each and every person with whom the adviser, any of its

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<sup>10</sup> In the Department's recent webchat on its regulatory agenda, the Department stated that "[t]he primary focus of the proposal is on function – providing investment advice and recommendations – and not labels such as lawyers, accountants and brokers." We agree that should be the focus.

<sup>11</sup> Had Congress wanted every firm meeting the definition of investment adviser under the Advisers Act to be subject to ERISA's duties in interacting with plans, it would have incorporated that definition into section 3(21). We know that Congress was aware of the Advisers Act in drafting ERISA because it incorporated the Advisers Act into the definition of "investment manager" in ERISA section 3(38).

<sup>12</sup> The definition includes a series of exceptions the Department details in the preamble to this proposal.

<sup>13</sup> See, e.g., 17 C.F.R. § 275.203(b)(3)-1 (defining client for purposes of section 203(b)(3) of the Investment Advisers Act).

affiliates, or any of its employees interacts.<sup>14</sup> In addition, as a practical matter, compliance with the Advisers Act would not necessarily satisfy ERISA, nor would compliance with ERISA satisfy the Advisers Act. A firm subject to the Advisers Act would need another robust and ongoing compliance program if it were potentially subject to ERISA, even if it did not have to make any significant changes in the way it does business.

The overbreadth of the Department's approach will impact and likely chill commonplace market interactions in which retirement savers seek information and ideas on investing. For example, a mutual fund company commonly receives calls from individuals interested in opening an IRA and investing either contributions or rollover amounts in the firm's funds. The call center representative may state that, while he or she cannot provide specific individualized advice, X fund is designed to meet a particular investment objective, or Y fund is a target date fund designed for individuals who expect to retire around a particular date. This very common and routine interaction in the market could be caught by the rule—it includes a conversation about the advisability of purchasing an investment and is made by someone who is (or has an affiliate who is) an investment adviser under the Advisers Act. We believe the Department did not intend this result, and in any event we would urge that no fiduciary standard attach under these circumstances.

The Department should delete paragraph (c)(1)(ii)(C) to fix this problem. The test in section 202(a)(11) is largely duplicative of the proposal's requirement on giving advice and making recommendations, and accordingly the alternative condition is not necessary. At a minimum, if the Department retains the alternate condition, it must narrow it so that it applies only where a plan fiduciary or participant are clients within the meaning of the Advisers Act – *i.e.* those with whom the entity has established a real and personalized advisory relationship.

In addition to fixing the overbreadth problem and effectuating Congress' intent not to disrupt ordinary business practices, eliminating the section 202(a)(11) alternative also makes sense in light of the Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). That law directed the SEC to study the standards of care applicable to broker-dealers and investment advisers giving personalized investment advice and then adopt any needed rules on standards of care including rules making the standard of conduct for all broker-dealers and investment advisers providing personalized

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<sup>14</sup> For example, while the adviser of a mutual fund owes a fiduciary duty under the Advisers Act to the fund itself and generally to the fund's shareholders, it does not owe a fiduciary duty to *each and every* shareholder. It is not required, for example, to opine to every shareholder whether the fund is appropriate for that shareholder's needs. Similarly, many broker-dealers are dually registered both as investment advisers and broker-dealers, while others are not. Just because a broker is dually registered does not mean it provides advisory services to every client and it should not be swept into the rule when another broker would not be, despite providing the same services to plans and IRA owners.

investment advice identical to the standard under the Advisers Act.<sup>15</sup> Thus, until the SEC resolves the issues of who must meet the fiduciary standards under the Advisers Act, and what that standard means, the Department is not in a position to know, and commenters cannot provide views on, the policy and business implications of incorporating the Advisers Act definition in this rule.

The rule should not cover incidental fiduciaries who are not in a relationship of trust and confidence with plan fiduciaries or participants. The proposal also would cover any interactions if the person is, directly or indirectly through an affiliate, a fiduciary under one of ERISA's other fiduciary tests – *i.e.*, because the person or an affiliate either exercises discretionary authority or control over the management of the plan or its assets or has discretionary authority or responsibility for the administration of the plan. This aspect of the proposal conflicts with the long-settled ERISA principle that a person is a fiduciary *only with respect to* those functions over which the person has the necessary authority or control or takes the actions ERISA designates for fiduciary status, and only for those plan assets to which the authority, control, or actions apply.<sup>16</sup>

While the Department may have assumed that information on the advisability of buying, holding, or selling an investment seems more compelling when it comes from a person who otherwise occupies a fiduciary position with respect to the plan, that assumption is not correct. Persons can be fiduciaries with respect to a plan in ways that clearly do not suggest they are acting in a position of trust and confidence. For example, some plans use a directed trustee within the meaning of ERISA section 403(a)(1) that is affiliated with a plan service provider such as the plan's recordkeeper. Traditionally plan recordkeepers do not charge a significant incremental fee for this service. Directed trustees by definition do not exercise independent authority and must follow the lawful directions of the other plan fiduciaries.

In some cases the plan's recordkeeper or its affiliate is acting only as a *custodian* of plan assets, in which case the Department's rule could lead to a different result. So long as they do not represent

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<sup>15</sup> The study mandated by Dodd-Frank was sent to Congress on January 21, 2011. *See* <http://sec.gov/news/studies/2011/913studyfinal.pdf>. We are evaluating the recommendations in the study. The study reflects the view of the SEC staff only and it is unclear at this time which of the recommendations, if any, the SEC will adopt.

<sup>16</sup> *See* ERISA section 3(21)(A) (a person is a fiduciary “to the extent” the person meets the enumerated test); *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12 (1st Cir. 1998) (“[F]iduciary status is not an all or nothing proposition; the statutory language indicates that a person is a plan fiduciary only ‘to the extent’ that he possesses or exercises the requisite discretion and control.”). The Department obviously agrees because it built this principle into this proposed regulation. *See* paragraph (c)(5).

themselves as providing fiduciary advice to participants or other plan fiduciaries, directed trustees occupy no greater position of trust or confidence than they would if they were acting solely as custodians of plan assets or simply as a recordkeeper or other service provider to the plan. Accordingly, the provision in the rule is overbroad.

The provision also is unnecessary because another element of the status test already prevents the problem the Department is trying to address – *i.e.*, the status test is satisfied if the person represents that it is a fiduciary with respect to the advice or recommendations being provided. The Department should retain this condition (paragraph (c)(1)(ii)(A)) and eliminate the “otherwise a fiduciary” condition (paragraph (c)(1)(ii)(B)).

The fourth alternative for satisfying the status test should make clear that the parties must have a *mutual* agreement concerning both the role of the advice in making decisions and its individualized character. The fourth alternate condition applies if the advice or recommendations are made “pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.”

The proposal removes the requirement for a *mutual* agreement between the parties in the current rule that the advice will be considered in making investment decisions. The Department’s intent in proposing the change is unclear.<sup>17</sup>

That there be a “meeting of the minds” – objectively determined – is of critical importance if persons who deal with plans and IRAs are to know whether or not they are fiduciaries. Parties dealing with plan and IRA customers in good faith do not want to be in a position of being forever in doubt about their status, or open to a claim there was an undertaking to provide individualized investment recommendations that will be relied upon when in fact there was not. The Department should revise paragraph (c)(1)(ii)(D) to apply only when there is a mutual agreement, arrangement, or understanding.

#### IV. Exceptions

The Department should clarify the exception for selling an investment product. The proposal exempts transactions that might contain advice if it can be demonstrated the recipient knows,

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<sup>17</sup> Basic contract law suggests that any agreement “between” parties must be mutual in nature.

or under the circumstances should know, that the person is providing the advice “in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.” We strongly support the exemption but think it needs to be clarified.

If ERISA plans and IRA investors are to have access to investment products, it is critically important to ensure that selling an investment product is not a fiduciary act. Selling an investment almost always involves a *recommendation* that the seller believes the buyer should purchase the investment. Investment firms offer a product to the market believing the investment is a good one and believing the investment should be purchased when its objectives meet an investor’s needs. Moreover, adults commonly understand fully that salespersons are not undertaking to and do not provide impartial advice. The Department’s exception appears to recognize this but contains ambiguities in important respects.

First, the Department needs to make clear that the exception is available potentially to a broad range of sellers and agents. Department officials have stated informally that they intend this exception to cover a situation in which, for example, the owner of a piece of property communicates with a potential buyer. The exception should not be limited to that situation and the Department should make that clear.

For example, when mutual funds offer their shares to the public, the fund’s underwriter (itself usually a broker-dealer) and independent broker-dealers act as agents in selling the fund’s shares. The exception should cover both so-called “direct-sold” mutual funds as well as those sold through independent broker-dealers. We see no reason a mutual fund sold directly by the fund company or its affiliated underwriter or distributor should qualify for the exception while a mutual fund sold through a broker-dealer acting solely in that capacity does not.

Second, we disagree that the exception should apply only when the seller is “adverse.” While a mutual fund adviser or underwriter earns fees for its services to the fund, the sale of a mutual fund is not a zero-sum game where one side benefits only at the expense of the other side.<sup>18</sup> Although the interests of a mutual fund company are not adverse to the interests of its shareholders, the proposed rule effectively requires the company to so characterize itself to ensure it can rely on the exception.<sup>19</sup>

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<sup>18</sup> All mutual funds must be offered at net asset value with fees described in the prospectus.

<sup>19</sup> The Department faced a similar issue with the 408(b)(2) regulation. The proposed rule required service providers to disclose whether they had various “conflicts of interest,” which many commentators noted was simply duplicative of the

The relevant question is not whether the parties' interests are "adverse" but rather whether in the context of the transaction it would be clear to a reasonable person that the seller is acting as or on behalf of a seller and is not holding itself out as providing impartial investment advice. The Department should delete the reference to "adverse" from the exception.

The Department should clarify that the exception for information related to platform investments covers certain incidental assistance that recordkeepers provide to plan fiduciaries who are making decisions on plan menu investments. Paragraph (c)(2)(ii)(C) exempts the provision of general financial information and data in offering a platform of investments to assist a plan fiduciary's selection and monitoring of plan investment alternatives, so long as the plan fiduciary is told in writing the person is not undertaking to provide impartial investment advice. This exception is essential because 401(k) recordkeepers routinely offer a range of services – not involving impartial investment advice – that assist fiduciaries in making decisions regarding plan menus.

Indeed, there are numerous ways in which recordkeepers provide assistance designed to help fiduciaries manage their decision making process. For example, in responding to a plan's Request for Proposals, a 401(k) recordkeeper may provide a sample plan line-up not as a recommendation but rather as a way of giving the plan fiduciaries a sense of the overall cost of a recordkeeping arrangement and a sense of the funds available in the recordkeeper's platform. Recordkeepers also may work with the plans they serve to develop objective screens that the recordkeeper can use for the plan to narrow the universe of available funds for initial selection and monitor over time the funds fiduciaries select for the menu. While the recordkeeper might suggest a set of criteria (*e.g.*, peer performance in top quartile, manager tenure over a certain number of years, a minimum Morningstar or similar rating) used by other clients, the decision on what criteria to use is for plan fiduciaries. Once established, these criteria are largely mechanical. Fiduciaries often look to the plan recordkeeper for screening assistance because the recordkeeper has experience in what other clients use and has all the necessary data on its platform investments.

Also, when a plan is replacing a fund on a plan menu, it may ask the recordkeeper to suggest funds that are reasonably similar to the one being removed, to assist the plan in replacing the fund or mapping the assets in accordance with ERISA section 404(c)(4). Our members report receiving these

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requirement to disclose the direct and indirect compensation that the service provider may receive. The Department removed the requirement in the interim final regulation. With the 408(b)(2) regulation in place, the Department has required certain key service providers to inform plans and participants about their compensation, and this disclosure will make an "adverse" interest apparent.

requests even if the fund company is not the platform provider. The decision to replace a fund, or how to map assets, always remains with plan fiduciaries and their advisers.

We believe the Department intended the exception in paragraph (c)(2)(ii)(C) to cover these situations. Because of the importance of the flow of this information to plan fiduciaries as they select and monitor plan investments, the Department should clarify that these situations are indeed encompassed in the exception. Many plan fiduciaries would not have the tools to perform these tasks themselves. Were recordkeepers to withdraw from providing assistance because of uncertainty about the rule, plans would have to forgo this information or hire an independent fiduciary at considerable cost.

The exceptions in the proposal for individual account plans should be extended to IRAs.<sup>20</sup> The proposal sets out three exceptions—providing investment education under Interpretative Bulletin 96-1, marketing or making available a platform of investments, and providing general financial information and data in connection with the platform—for activities in connection with individual account plans defined in section 3(34) of ERISA. Because the 3(34) definition does not include non-employment based IRAs,<sup>21</sup> the proposed exception would not cover IRAs. It should. The same types of activities routinely occur in connection with IRAs and there is no policy reason they should not be covered also by the exceptions.

IRA custodians, for example, often provide investors with the types of information and education described in Interpretative Bulletin 96-1, including general investment information on risk and return, diversification, dollar cost averaging and the like, as well as asset allocation models and interactive materials similar to those provided to 401(k) participants. The Department has not articulated any policy reason, and we submit there is none, that providing this type of information and education should trigger fiduciary status only in the context of an IRA.<sup>22</sup>

Similarly, just as 401(k) recordkeepers offer a platform of investments from which plan fiduciaries can select the 401(k) plan's designated investment alternatives, many firms offer IRA

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<sup>20</sup> Code section 4975 applies to IRAs and certain other individual accounts, including Archer medical savings accounts, health savings accounts, and Coverdell education savings accounts. In this letter any references to IRAs should be deemed to include all the savings vehicles described in Code section 4975(e)(1) that are not governed by ERISA.

<sup>21</sup> Section 3(34) incorporates the term “pension plan,” which ERISA section 3(2)(A) defines to mean a plan established or maintained by an employer or employee organization, or both.

<sup>22</sup> IB 96-1 by its terms applies only to participant-directed individual account plans. This oversight needs to be remedied now because the proposal's definition of investment advice impacts IRAs for purposes of Code section 4975.

products with a described number of investments, such as the firm's proprietary investments.<sup>23</sup> Although the provider may view the funds offered as presenting an appropriate range of investments for most retirement savers, the platform is not individualized to each IRA investor.

Finally, IRA providers often make general financial information and data available to assist IRA investors in selecting their investments among those offered in the IRA product. The exception in paragraph (c)(2)(ii)(C) should apply to this information and data as it would for an employer-based individual account plan.

#### V. Issues related to rollovers and IRAs

The Department should retain its position that a recommendation to take a distribution does not constitute investment advice. In Advisory Opinion 2005-23A, the Department concluded that a recommendation to take an otherwise permissible distribution, even when combined with a recommendation as to how to invest distributed funds, is not investment advice with respect to the distributing plan. The Department asked whether it should overturn that conclusion in the final rule. The Department should not alter its views.

A recommendation to take a distribution from a plan, like a recommendation to contribute to the plan in the first place, is not *investment* advice.<sup>24</sup> A participant terminating employment may decide to take a distribution from the 401(k) plan for a variety of reasons having nothing to do with the specific investments in the plan—most commonly to consolidate savings and avoid leaving an account with an employer with which the individual no longer has any connection.<sup>25</sup>

If simply recommending that a participant take a distribution from his or her plan and invest it elsewhere is ERISA investment advice, then the Federal Thrift Savings Plan is an ERISA fiduciary to

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<sup>23</sup> As an initial matter, we question whether any exception is needed for the creation of a platform either in the plan or IRA context. Creating a product that is brought to market, even one that offers less than a full universe of possible investments, could not reasonably be thought to be a fiduciary act. We acknowledge, however, that because of the breadth of the Department's proposal, some may be concerned whether the platform a plan recordkeeper offers might be viewed as a recommendation regarding the investments on (and not on) the platform.

<sup>24</sup> It might be tax advice or financial planning advice. For example, the statutory notice given to participants under Internal Revenue Code section 402(f) contains information about the options available to participants and the tax implications of various distribution decisions, but it could not be considered *investment* advice. In fact, IRA providers who assist individuals with their rollovers often do not know what investments individuals have in their 401(k) plans.

<sup>25</sup> In addition, the recommendation on how to invest a distribution is subject to a variety of protections in addition to Code section 4975. The SEC and FINRA routinely bring actions against advisers and brokers who mislead their clients.

many private 401(k) plans and IRAs. On its website,<sup>26</sup> the TSP tells eligible federal workers: “If you have a TSP account and you also have money in a traditional IRA, 401(k), or other eligible employer plan, there are benefits to consolidating your accounts with the TSP.” It states that consolidating retirement accounts with TSP leads to simplification and that the TSP investments are advantageous because of their low fees—in fact the TSP sends agencies a poster to display advising federal workers to “[f]ree yourself from high fees.”<sup>27</sup> TSP is not purporting to provide a recommendation on the value of any particular investment option in any particular private 401(k) plan or IRA. What TSP is doing is opining on the benefits of a distribution and consolidation of accounts and explaining the value, in its view, of its investments—just as any IRA provider would do.

The Department should revise its economic analysis to account for the effect of the proposal on IRA investors. Although the proposal by its terms applies to non-employer based IRAs, the Department’s economic analysis does not consider the costs of the proposal on IRA investors and providers. The data the Department uses comes solely from Form 5500, which is not filed for IRAs. Similarly, in the Department’s discussion of its rationale for the proposal, the Department notes no widespread problems in the IRA market, nor does it make any attempt to recognize the non-ERISA laws that apply to investors in retail accounts like IRAs. We recommend that the Department consider the costs and benefits of the proposal with respect to IRAs, and that it do so with a few basic principles in mind.

While IRAs are not subject to the ERISA fiduciary rules, they are subject to the prohibited transaction rules in Code section 4975. The Department should analyze whether the proposed rule will change how advisers in the IRA market are compensated and whether this will ultimately harm or benefit IRA investors. For example, while it is uncommon for front-end commissions to be charged in 401(k) plans, they are used routinely in retail accounts. If the Department’s rule requires financial advisers to move from a commission structure to a wrap fee in the IRA market, this may, in many cases, result in *higher* fees to IRA investors, especially given the long-term nature of their IRA investments.

Congress, the SEC, state agencies, and self-regulatory bodies have a range of laws, regulations, and rules that protect investors in retail accounts, including IRAs, and that regulate investment advisers and broker-dealers.<sup>28</sup> These laws, regulations, and rules are too numerous to list here. Before the

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<sup>26</sup> See <https://www.tsp.gov/planparticipation/transfers/benefits.shtml> (visited Jan. 28, 2011).

<sup>27</sup> See <https://www.tsp.gov/PDF/bulletins/10-5.pdf>.

<sup>28</sup> Congress’ massive undertaking that culminated in the Dodd-Frank Act shows that Congress is active in ensuring there are laws that protect individuals who save outside ERISA-governed plans. Congress enhanced legislation affecting nearly every financial product available in the market, in one way or another. For information on the various protections that apply

Department comes to the conclusion that investors are unprotected when investing in their IRA or other retail account, the Department should seek the views of the SEC, FINRA, state securities regulators, state insurance commissions, and federal banking regulators and discuss its concern, analysis and conclusions.

In addition, although most U.S. households are eligible to make IRA contributions, few do so. Only 15 percent of U.S. households contributed to any type of IRA in tax year 2009, as was the case in tax year 2008.<sup>29</sup> This suggests there is a need to continue to explain the benefits of contributing to an IRA, and financial services firms are on the front lines in doing so. The Department should consider whether this proposal will discourage firms from marketing IRAs and providing robust education and assistance to savers and if so, what effect this will have on the use of IRAs and Americans' retirement preparedness.

Finally, we are concerned the Department made no attempt to gauge the effect of its proposal on Americans who use financial advisors for a range of financial planning services that may include incidental recommendations about an IRA. If these financial planners refuse to provide any assistance related to IRAs because of the associated compliance and monitoring burden, there will be some cost to individuals who must make decisions without this assistance.

Before adopting any final rule that affects IRAs, the Department should complete and publish an analysis of the costs of the proposal on IRA investors and providers so that interested parties can provide meaningful comment to the Department.<sup>30</sup> The Department should publish and explain its IRA economic analysis when it repropose the rule, as we urge below.

## VI. Need for reproposal

Because the entire ERISA compliance structure turns in large part on fiduciary status, getting the advice regulation right is crucial. The problems we have identified with the proposal require the

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under IRS, SEC, banking, and FINRA rules, *see* Statement of Sarah Holden, Senior Director, Retirement Research, Before the ERISA Advisory Council Working Group on Approaches for Retirement Security in the United States (Sept. 17, 2009), available at [http://www.ici.org/pressroom/speeches/09\\_erisa\\_tmny](http://www.ici.org/pressroom/speeches/09_erisa_tmny).

<sup>29</sup> Holden and Schrass, *The Role of IRAs in U.S. Households' Saving for Retirement, 2010*, ICI Fundamentals, vol. 19, no. 8 (Dec. 2010), available at <http://www.ici.org/pdf/fm-v19n8.pdf>.

<sup>30</sup> President Obama's recent Executive Order emphasized the importance of providing "an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings." Executive Order, Improving Regulation and Regulatory Review (Jan. 18, 2011).

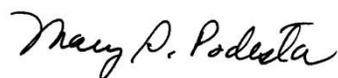
Department to take a step back and make sure the proposal adequately provides certainty so that persons who deal with ERISA plans and IRA investors can know whether or not they are fiduciaries. The Department will have to make significant changes to the proposal to address the concerns we have detailed and those of other commenters. The Department also will have to consider – and allow the regulated community to comment on – how any proposal to amend the Department’s rule interplays with forthcoming actions by the SEC and other regulators to implement the Dodd-Frank Act.

Accordingly, the Department should repropose a new version of the rule in order to assure that the final rule is clear and workable. The current rules have worked well for 35 years. The Department’s goal should be to assure that they also work well for the next 35 years.

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We appreciate that the Department has stated it will take comments on the proposal seriously. Please feel free to contact the undersigned at 202.326.5826 ([podesta@ici.org](mailto:podesta@ici.org)) or Michael Hadley at 202.326.5810 ([mhadley@ici.org](mailto:mhadley@ici.org)) with any questions.

Sincerely,



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