The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
Washington, DC // Brussels // London // www.ici.org

ICI Comment Letter on Proposed Filing Requirements, August 2005

July 28, 2005

The Honorable Victoria A. Lipnic
Assistant Secretary of Labor
Employment Standards Administration
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Form LM-10

Dear Assistant Secretary Lipnic:

On behalf of the Investment Company Institute,[1] we thank you and your colleagues for meeting with us on July 26 to discuss our members' serious concerns about the Department's recent policy statement suggesting that retirement plan service providers might be subject to Form LM-10 filing obligations. In particular, our members question (1) the Department's legal authority under the Labor-Management Reporting and Disclosure Act to enforce such a reporting requirement; (2) the retroactive application of the requirement; and (3) the lack of advance notice and public comment concerning the requirement.

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Legal Authority

As we discussed at our meeting, this action by the Department contradicts both the purposes of the LMRDA and long-standing interpretations of the scope of its reporting requirements. A central issue here is whether service providers to Taft-Hartley plans fall within the category of "employers" required to report certain payments under section 203(a) of the LMRDA. We recognize that the definition of "employer" under the Act if read expansively could cover any entity with at least one employee. However, we submit that the structure of the statute as a whole indicates that it was intended to cover only payments by employers having some connection to their own employees.

If Congress intended to cover service providers to retirement plans for unionized employees rather than the employers of such employees, then the statutory reporting requirements would not have relied on the employer-employee relationship, but instead would have more closely targeted service providers. Even under the Department's contrary construction, only those service providers that employ employees would be required to file, and those service providers that do business as sole proprietors would have no filing responsibilities. If the statute were intended to apply to service providers, Congress presumably would not have limited its scope to those service providers that are also employers.

Moreover, the acontextual construction proposed by the Department would lead to absurd results. For example, if a union official won a sweepstakes prize worth more than $25, the sweepstakes operator (assuming it had an employee) would have to file Form LM-10 or face criminal sanctions. Yet, the sweepstakes provider likely would have no knowledge of the winner's position, and there is no nexus between the payment and organizational or collective bargaining activity. The same would be true of many events routinely sponsored by service providers, including our members.

Retroactive Application

Until June 22, 2005, neither the statute, the regulations, the Form LM-10, nor any other guidance from the Department gave any indication that service providers must file Form LM-10. Service providers simply have not kept the records necessary to provide the level of detail that the form appears to require. For example, the June 22 website posting discusses various situations in which a service provider must report labor officials' attendance at receptions following conferences. Service providers hosting such events typically do not track which invitees actually attended such an event, and may not be aware of which of the attendees fall within the category of union officials that would trigger Form LM-10 reporting.

Even with respect to identified labor officials, the types of records required to complete the form are not readily available, and would require time-consuming and burdensome efforts to reconstruct. Furthermore, the consequences of filing an incomplete or incorrect form are severe, and could include criminal penalties. We therefore request that any new filing requirement applicable to service providers be applied prospectively, no earlier than fiscal years beginning on or after January 1, 2006.

Notice and Comment

Even if the Department proposed this new filing requirement only prospectively, service providers and other new filers should be entitled to advance notice of the change in interpretation and be given the opportunity to comment upon the legal, policy and practical ramifications of such a change. Our members have raised numerous substantive and interpretive questions concerning the website posting, and should be afforded a formal process in which these questions are aired and addressed in a public forum. This process would also allow the Department to conduct the various analyses of the new rule under the requirements of Executive Order 12866, the Regulatory Flexibility Act, and the Paperwork Reduction Act. The required analyses would allow affected industries to comment on the costs and burdens of establishing the systems necessary to capture and report this information before the requirements become effective. As noted above, service providers currently do not identify which of their clients may be union officials, and do not track which attendees at large functions fall within this category. One potential option for ameliorating the reporting burdens of the new rule, for example, might be to raise the $25 de minimis level, and therefore limit the reporting burden to more significant amounts. Public comment would allow a complete record on which the Department could examine the costs and potential benefits of any proposed new rule.

Thank you again for meeting with us on this important issue. Please feel free to contact me with any questions at (202) 326-5824.

Sincerely,

Amy B.R. Lancellotta
Senior Counsel

cc: The Honorable Howard M. Radzely

ENDNOTES

[1] The Investment Company Institute is the national association of the American investment company industry. More information is available about the Institute at the end of this letter.

The Investment Company Institute is the national association of the American investment company industry. ICI members include 8,521 open-end investment companies (mutual funds), 651 closed-end investment companies, 144 exchange-traded funds, and 5 sponsors of unit investment trusts. Mutual fund members of the ICI have total assets of approximately $8.036 trillion (representing more than 95 percent of all assets of US mutual funds); these funds serve approximately 87.7 million shareholders in more than 51.2 million households. Many of the Institute's investment adviser members render investment advice to both investment companies and other clients. In addition, the Institute's membership includes 190 associate members, which render investment management services exclusively to noninvestment company clients. A substantial portion of the total assets managed by registered investment advisers is managed by these Institute members and associate members.