

Comment Letter on ERISA Disclosure Obligations, January 2001

By Hand Delivery

January 9, 2001

Attention: Disclosure RFI
Office of Regulations and Interpretations
Pension and Welfare Benefits Administration
Room N-5669
U.S. Department of Labor
Washington, D.C. 20210

Re: Request for Information on Fiduciary Disclosure

Ladies and Gentlemen:

The Investment Company Institute (the "Institute")¹ respectfully submits its comments in response to the Department of Labor's notice of request for information concerning the disclosure obligations of fiduciaries governed by ERISA.² Institute members and their affiliates frequently provide recordkeeping and other administrative services to retirement plans, in addition to providing mutual funds in which plans and their participants invest.³ The mutual fund industry, which has long been a proponent of full and clear disclosure to all investors, appreciates the Department's efforts to ensure that participants are fully informed about their retirement plans.

As discussed in the Department's notice, there are two statutory sources of current disclosure practices. First, Part 1 of Title I of ERISA provides specific disclosure requirements to assure that relevant information about plan benefits is obtained by plan participants. The core disclosure document is the summary plan description (SPD), which the Department updated in regulations issued just seven weeks ago.⁴ Second, ERISA fiduciaries are subject to stringent standards that can give rise to additional obligations. As a general matter, we believe that these duties, coupled with the disclosures expressly required under ERISA, ensure that participants obtain sufficient information regarding their plans. Indeed, ERISA's existing rules have fostered a safe and secure pension plan environment for the past 26 years.

In certain respects, however, ERISA presupposes the world of 1974. In particular, Congress could not have foreseen the proliferation of participant-directed defined contribution plans, in which participants are responsible for making their own plan investment decisions from among an average of 11 investment options.⁵ To address the growth of participant-directed plans and their increasingly important role in retirement savings, the Department in 1992 promulgated regulations under ERISA section 404(c).⁶ These regulations have gone far to assure that participants responsible for directing their own plan accounts receive proper disclosure regarding their investment options.

Nonetheless, there remain gaps in the regulatory framework that unnecessarily limit the ability of employers to provide, and plan participants to obtain, the information and assistance that participants need to help them make informed, prudent decisions regarding their retirement assets. Thus, in its effort to review ERISA's disclosure requirements, the Department should seek to facilitate the delivery of such information and assistance. There are a number of specific areas where the Department's attention would be appropriate. First, participants in self-directed plans, such as plans that fall under ERISA section 404(c), should receive adequate information about all investment options available under their plan, rather than only those registered under the securities laws. Second, the Department should facilitate the delivery of investment advisory services to such participants by replacing current prohibitions with standards that rely on disclosure and strict fiduciary standards. Third, we urge the Department to embrace electronic delivery of plan information, consistent with the recently enacted "electronic signatures" legislation. Lastly, we caution the Department against duplicating or introducing inconsistency with existing federal standards. Each of these recommendations is discussed below.

First, as the Institute previously testified before the Department,⁷ participants in self-directed plans, such as section 404(c) plans,

should receive adequate information about each investment alternative in which they invest. For retirement plans that fall within the safe harbor of section 404(c), participants must be provided with or have the opportunity to obtain sufficient information to make informed decisions regarding investment alternatives. In order to meet the requirements of section 404(c), employers that offer a mutual fund product as an investment option in the plan must, among other things, provide a prospectus of the mutual fund to participants who invest in it.⁸ Thus, in the case of plans that comply with the section 404(c) safe harbor, plan participants automatically obtain full disclosure through the prospectus of all relevant information regarding the mutual funds in which they invest, including information on fees and expenses.⁹ However, employees may not receive comparable information in the case of many other investment alternatives in the plan. The only disclosure about such products a plan fiduciary is required to deliver to participants under the section 404(c) regulations is a "general description" and an explanation limited to transaction-related fees. Furthermore, plan fiduciaries are required to deliver information about operating expenses of an investment vehicle, which are disclosed in a mutual fund's prospectus, only upon request by a participant. Many participants will not know that they should ask for this information and, hence, never receive it.

The Institute has consistently asked the Department to address this matter so that participants are fully—and automatically—informed of relevant information about each of their investment options, not only mutual funds. At a minimum, this requirement should apply to all plans that fall under the section 404(c) safe harbor, regardless of the nature of the investments being offered.

Second, the Department should facilitate the delivery of investment advisory services to participants that seek assistance in preparing for retirement by replacing current prohibitions with standards that rely upon disclosure and strict fiduciary standards. In addition to materials now provided under the Department's Interpretive Bulletin 96-1, many participants need or want investment advice in directing their plan investments.¹⁰ Yet, existing rules largely prohibit participants from obtaining this advice. In lieu of these rigid and unnecessarily restrictive prohibitions, a disclosure-based regime, coupled with ERISA's stringent fiduciary requirements, would enable participants to obtain advice from a broad range of qualified, regulated providers, including those financial institutions managing their plan's investment options and often already providing investment "education" to them. The Institute supported such a proposal in testimony last year before the House Subcommittee on Employer-Employee Relations¹¹; Representative John Boehner introduced a similar proposal — H.R. 4747.¹² We also believe that the Department has the authority to provide for such relief through a class exemption.¹³

Third, in contemplating any modifications relating to ERISA's disclosure requirements, the Department should consider the potential burdens that could be placed on plan sponsors and service providers, and in particular, encourage the effective use of electronic delivery with respect to any such changes. The Department already has taken substantial steps in this regard through its proposed rule on electronic media, which was published in 1999.¹⁴ In finalizing this rule, the Department should take additional steps to facilitate the use of electronic media, particularly in light of the Electronic Signatures in Global and National Commerce Act (E-SIGN). For instance, the Department should revisit the proposed requirement that participants be able to print documents from the electronic medium. The Department also should permit electronic delivery to individuals, including beneficiaries and retirees, regardless of whether electronic access to documents is at the worksite or elsewhere.¹⁵ Furthermore, the Department should eliminate outdated regulatory requirements that would, either expressly or by inference, require "paper-based" delivery of information, such as a "first class mailing" requirement.¹⁶

Finally, the Department should ensure that any changes to ERISA's disclosure requirements avoid inconsistencies and redundancies with existing laws and regulations that already provide adequate disclosures and protections to retirement plan participants. Financial transactions relating to plan investments, including investments in mutual funds, often are extensively regulated under securities, banking and other laws. To the extent that these rules and regulations effectively address policy concerns in the non-retirement environment, the Department should avoid creating inconsistent or duplicative regulatory regimes that would only serve to place unnecessary burdens and costs on employers, service providers and ultimately, plan participants.

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The Institute appreciates the Department's consideration of our comments. If you have any questions, please do not hesitate to contact Russ Galer at (202) 326-5835, Kathryn Ricard at (202) 218-3563 or me at (202) 326-5837.

Sincerely,

Thomas T. Kim

Assistant Counsel

ENDNOTES

¹ The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,433 open-end investment companies ("mutual funds"), 491 closed-end investment companies and 8 sponsors of unit

investment trusts. Its mutual fund members have assets of about \$6.796 trillion, accounting for approximately 95% of total industry assets, and have over 83.5 million individual shareholders.

² 65 Fed. Reg. 55858 (Sept. 14, 2000).

³ According to Institute statistics, about \$777 billion, or 45 percent of 401(k) plan assets, were invested in mutual funds as of year-end 1999; approximately \$281 billion of 403(b) assets and \$38 billion of 457 plan assets were invested in mutual funds. In sum, retirement plan assets comprise about 35 percent of total mutual fund assets.

⁴ 65 Fed. Reg. 70226 (Nov. 21, 2000). There are, of course, other disclosures expressly required by ERISA, e.g., the summary annual report (SAR) and summary of material modification (SMM).

⁵ 43rd Annual Survey of Profit Sharing and 401(k) Plans, Profit Sharing/401(k) Council of America (2000).

⁶ 29 C.F.R. 2550.404c-1.

⁷ Statement of Matthew P. Fink, Investment Company Institute, on 401(k) Plan Expenses before the Pension and Welfare Benefits Administration, U.S. Department of Labor (Nov. 12, 1997).

⁸ Under section 404(c), a participant must be provided, among other things: (1) "a description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative, including . . . the type and diversification of assets comprising the [alternative's] portfolio"; (2) "a description of any transaction fees and expenses which affect the participant's . . . account balance in connection with purchases or sales . . . (e.g., commissions, sales loads, deferred sales charges, redemption or exchange fees)"; and (3) "in the case of an investment alternative which is subject to the Securities Act of 1933 . . . a copy of the most recent prospectus . . ." 29 C.F.R. 2550.404c-1.

⁹ In the case of mutual funds, all fees and expenses related to the mutual fund are set forth in a standardized fee table at the front of each fund's prospectus as required by federal securities laws. The fee table includes the fund's overall expense ratio, individual categories of fees and the effect of fund expenses on a hypothetical investment. The prospectus also includes other information, such as investment objective and historical investment return information, that employers and participants need to determine whether a fund is an appropriate investment for them.

¹⁰ See, e.g., Remarks by Leslie B. Kramerich, Acting Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor (Sept. 15, 2000).

¹¹ Statement of the Investment Company Institute submitted to the House Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, Hearing on "A More Secure Retirement for Workers: Proposals for ERISA Reform" (March 9, 2000).

¹² H.R. 4747, 106th Cong. 2d Sess. (June 26, 2000) (introduced by Rep. John Boehner).

¹³ The Institute previously made a similar recommendation to the Department. See Institute Letter to U.S. Department of Labor, Pension and Welfare Benefits Administration, Office of Exemption Determinations, dated May 5, 2000.

¹⁴ 64 Fed. Reg. 4506 (Jan. 28, 1999).

¹⁵ The Institute made these recommendations in its letter responding to the Department's proposed rule on electronic media. See Institute Letter to U.S. Department of Labor, Pension and Welfare Benefits Administration, Office of Regulations and Interpretations (March 26, 1999).

¹⁶ See, e.g., U.S. Department of Labor Prop. Reg. 2520.105-2(h) (regarding delivery of benefit statements under ERISA section 105).