Retirement Industry Trust Association
Connecting companies in the self-directed retirement industry

MARY L. MOHR
EXECUTIVE DIRECTOR

January 26, 2011

<u>FILED ELECTRONICALLY</u>
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

Re: <u>Proposed Definition of Fiduciary</u>

Dear Sir or Madam:

The Retirement Industry Trust Association ("RITA") appreciates this opportunity to comment on the proposed regulation published by the Department of Labor (the "Department") on October 22, 2010, which would redefine who is a fiduciary for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the prohibited transaction provisions of the Internal Revenue Code (the "Code").[1]

RITA is a non-profit national trade group comprised of federally- and state-regulated banks and trust companies that engage in the custody or administration of more than 400,000 retirement accounts holding more than $55 billion in assets. RITA members generally act as directed custodians or non-discretionary trustees of self-directed IRAs and business retirement plans, many holding alternative assets that are not traded on public exchanges. Such assets may include real estate (domestic and foreign), private equity, private company debt, promissory notes, second trust deeds, limited liability company interests, limited partnership interests, tax liens, REITS and precious metals allowed by the Internal Revenue Code. Since

[1] 75 Fed. Reg. 65,263.

1987, RITA has provided its members with a forum to share best practices regarding the various rules and regulations of the Department and the Internal Revenue Service (the "IRS") in connection with the services RITA members provide to their clients. RITA and its members proactively participate in the regulatory process governing retirement accounts and have testified before the Department and the IRS. In that spirit, we are providing our input on your important proposal, which could be potentially harmful to our industry and the working Americans we serve.

The sole issue addressed in this letter is the extent to which directed custodians and non-discretionary trustees of self-directed IRAs and employer-maintained retirement plans should be treated as fiduciaries by reason of the valuation reports custodians provide to IRA owner and plan fiduciaries. As discussed more fully below, we urge the Department to clarify that directed custodians and non-discretionary trustees who use third-party valuations of hard-to-value plan assets to complete plan reports required under the Code are not fiduciaries by reason of such reporting. This clarification is critical to ensuring the ongoing viability of self-directed IRAs and retirement plans.

Services Performed by Custodians

As mentioned above, RITA members serve as directed custodians and non-discretionary trustees (collectively referred to herein as "Custodians"). As the names suggest, Custodians provide custodial and trustee services. Custodians do not provide, nor are they paid to provide, valuation services for their clients. Custodians act only at the direction of their accountholder or account fiduciary (*e.g.*, IRA accountholder, plan trustee, or investment advisor appointed by the accountholder or plan trustee). Custodians also do not provide investment advice and do not influence or affect the investment decisions made by IRA owners or plan fiduciaries.

Custodians are, however, subject to certain reporting obligations under the Code. Most notably, Custodians of IRAs must provide annual valuations in

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order to comply with reporting requirements of the Code.[2] These rules generally require the reporting of values for assets for which there is no generally recognized market and therefore for which there is no recognized fair market value. In order to satisfy these reporting obligations with respect to these hard-to-value assets, Custodians report values provided by third-parties, such as investment providers and investment managers. Custodians do not generate values, do not provide appraisals and do not review the values provided to them for reasonableness or accuracy. In this regard, the legally binding documents that govern the directed custodian or non-discretionary trustee relationship almost invariably reflect that the asset values to be reported by the Custodian must come from plan fiduciaries (*e.g.*, trustees or advisors) or the investment sponsors themselves. Custodians do not have the legal authority to demand from investment sponsors the information that would be required to independently perform valuations on alternative assets.

For these reasons, RITA members make a "best efforts" attempt to obtain valuations for all assets under custody and rely on the valuations provided by the investment product sponsors and issuers in order to comply with requisite reporting requirements. This process has been in place since the early 1990s and has been validated by the IRS.[3]

Implications of Proposed Rule for Custodians

The Proposed Rule suggests for the first time that Custodians who merely provide values on plan reports are acting as fiduciaries and have a fiduciary obligation with respect to such valuations. The Proposed Rule states that any person who "provides . . . an appraisal" and is otherwise a fiduciary, for example, by reason of being a directed trustee, is providing fiduciary investment advice.[4]

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[2] See Code §408(i); Treas. Reg. §§ 1.408-5 and 1.408-7. See also IRS Forms 5498 and 1099-R, and Revenue Ruling 59-60, 1959-1 C.B. 237.

[3] See Letter from A. Thomas Brisendine to RITA, dated August, 1993, which is attached as Exhibit A.

[4] DOL Prop. Reg. § 2510-.3-21(c)(1).

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The Proposed Rule includes an exception that further raises the possibility that Custodians would be treated as plan fiduciaries. The exception provides as follows:

> *For purposes of paragraph (c)(1)(i) of this section, the term "advice, or appraisal or fairness opinion" shall not include the preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries.*[5]

The inference created by this exception is that preparation of a general report or statement that reflects the value of an asset for which there is no generally recognized value would be considered fiduciary investment advice.

<u>Reasons for Requested Clarification</u>

RITA strongly believes that the final regulations should be revised to clarify that Custodians who furnish valuation information developed by third-parties in order to satisfy reporting and disclosure requirements under the Code are not plan fiduciaries by reason of such reporting.

As discussed above, Custodians do not have the authority or discretion to review, modify or perform valuations. Custodians merely serve as conduits between persons who perform the valuations and IRA owners and retirement

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[5] DOL Prop. Reg. § 2510.3-21(c)(2)(iii).

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plan fiduciaries. It is axiomatic that a person without discretionary authority is not acting as a fiduciary. In fact, the very notion of extending fiduciary status to Custodians is at odds with ERISA's functional definition of fiduciary. A person is a fiduciary only to the extent that person is performing a fiduciary function[6] and the mere transmittal of valuation information is not a fiduciary function. Similarly, one can fairly characterize the role Custodians serve in satisfying the reporting obligations of the Code as a mere ministerial role, which again is a type of role that ERISA clearly views as non-fiduciary.

Moreover, to impose fiduciary status in this context would be to fundamentally transform the nature of the relationship between a Custodian and an IRA or plan. As a fiduciary with respect to a valuation of a hard-to-value asset, a Custodian would have to engage in a rigorous process to satisfy its duty of prudence and loyalty.[7] The precise nature of the fiduciary process would be highly fact-specific but it would certainly entail inquiries into the underlying nature of a wide universe of alternative investments. This is simply not the role that a Custodian serves, and it would be wholly inappropriate for ERISA to dictate the nature and character of the relationship between Custodians and IRAs and plans.

Imposing a fiduciary status on Custodians would also not serve the policy concern that is motivating the Department. Custodians do not operate under any conflict of interest, nor are they in a position to exert any influence over plan decisions when they furnish plan reports to satisfy tax law requirements. The Custodian is merely compiling the information provided by third parties.

Imposition of fiduciary status could also have enormous consequences. According to a May 2010 report from the Investment Company Institute, IRAs hold more than $4.2 trillion in retirement assets, which represents more than one-quarter of all U.S. retirement wealth. It is critically important that Custodians continue to offer cost-effective administrative services to millions of Americans diligently saving for retirement. Extending fiduciary status to the

[6] Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993).

[7] ERISA § 404(a).

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furnishing of valuation reports would result in higher costs and potentially fewer service providers to self-directed IRAs. Custodians do not currently carry fiduciary insurance and, more than likely, would be unable to obtain it, even at a high cost. Some Custodians could even exit the industry, leaving fewer providers to administer retirement plans – and at higher costs to consumers. This, in turn, could result in fewer investment choices, less investment diversification, and, therefore, higher investment risk for Americans savers.

We realize that the Department has at times raised questions about whether the fiduciaries of some ERISA-covered retirement plans are satisfying their obligations and taking the appropriate steps to reasonably ascertain the value of assets for which there is no generally recognized market. However, it is clear that any such perceived problems are not attributable to Custodians, and it would be wholly inappropriate to impose fiduciary responsibility upon Custodians in order to address such an issue.

Investment Education for IRA Owners

We also note that the Proposed Rule would exempt from the definition of "investment advice" certain common practices of defined contribution plans, including the provision for educational materials and making available through a platform a variety of mutual funds and other securities. These are both valid exemptions and should also apply to IRAs. Owners of self-directed IRAs should not be deprived of the educational materials available to plan participants. Also, a directed IRA custodian that makes available through a platform a variety of mutual funds and other securities should not be considered a fiduciary. Otherwise, such account owners will be forced to deal with other service providers that may indeed be trying to sell particular investments.

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Conclusion

For the reasons discussed above, we urge the Department to modify the final regulation to explicitly provide that Custodians who furnish valuations of hard-to-value assets prepared by third-parties on plan reports are not investment fiduciaries. The absence of such a clarification would have enormous implications for our retirement system.

Thank you for your consideration of our views and request. Please contact us at 941 724 0900 or mlmohr.e.d.rita@comcast.net with any questions.

Respectfully submitted,

Tom W. Anderson, President, RITA
Mary L. Mohr, Executive Director, RITA

Enclosure

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Internal Revenue Service

Department of the Treasury

P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Exhibit A

Person to Contact:
Cheryl E. Press
Telephone Number:
202-622-6030

Refer Reply to:
CC:EBEO:1 TR: 39-00396-93

Date: AUG 6 1993

Mr. Mike Posey, President
Retirement Industry Trust Assoc
c/o Sterling Trust Company
4547 Lakeshore Drive, Suite 4
Waco, Texas 76710

Dear Mr. Posey:

This is in response to your letter of May 20, 1993, concerning the reporting of the fair market values ("FMV") for nonpublicly traded securities within Individual Retirement Accounts ("IRA") to the taxpayer on Form 5498. We appreciate the comments and concerns expressed in your letter on this subject and hope the following information is helpful to you.

Section 408(i) of the Internal Revenue Code of 1986 ("the Code") requires the trustees or issuer of an IRA to report certain information both to the individuals for whom the plan accounts are maintained and to the Internal Revenue Service ("IRS"). One of the items that must be furnished to both the IRS and the Taxpayer is the FMV of the assets held in the account at the end of each calendar year. In the case of the required reporting to the account holder, this reporting obligation must be satisfied no later than January 31 of the calendar year following the calendar year to which such reports relate. Trustees are also required to report the December 31 FMV information on the annual Form 5498, which is filed with the IRS by May 31 of the following year. The statement of value to an account holder need not be reported on a Form 5498

Trustees must furnish the FMV information each year, even if no contributions were made for that year However, if the trustee or issuer furnished a statement of the FMV to the account holder by January 31, and no contributions were made by the participant for the reporting year, the trustee or issuer need not furnish another statement (or Form 5498) to the account holder to report zero contributions.

A trustee who fails to satisfy these reporting obligations is subject to penalties under section 6693(a) of the Code in the amount of $50 for each such failure. As you know, there are presently no specific guidelines (regulations, revenue procedures, or otherwise) informing trustees how to satisfy the IRS's reporting requirements regarding the value of assets held by IRA's, and there are no specific definitions of FMV for the various underlying investments that must be used by the trustee or issuer in order to comply with IRS guidelines. Rather, trustees and issuers are expected to be reasonable in their determination of FMV, but they are not required to follow specific IRS guidelines, and are not penalized at this time for any variations in the methods they use to report FMV.

In most cases, the lack of regulations in this area is not a problem. For example, publicly-traded stock will have a specific value on December 31. A bank account will have a specific balance at any given time. Participants in these instances will generally be able to determine the current and fair value of their IRA's based on their accessibility to this information. However, it is more difficult for individuals to determine the market value of their IRA investment when this information is not listed on an established security exchange or is not available to them at the bank or elsewhere.

There has been some discussion at the IRS on the problem of the reporting of FMV of investments that are not listed on a public exchange, but no specific action has been taken. In order to prepare guidelines for the reporting of FMV of limited partnership interests, for example, we must first decide how we are going to define FMV for this issue, and how often we will require a valuation determination. In order to determine these issues, we would have to have substantial discussion with those people, like yourself, who are involved in the limited partnership market, and who raise equity capital for investment through the partnership vehicle. Moreover, while the reporting obligation belongs to the trustee or issuer, generally only the limited partnership's general partners have the necessary information to determine the FMV of those interests accurately. So long as the trustee reports the information that it receives from the partners, it is under no obligation to appraise the investment independently. However, if this information is unreasonable on it's face, a trustee may want to re-evaluate whether to continue in a fiduciary relationship with the partnership.

The information returns are for the benefit of the taxpayers. However, taxpayers who invest their IRA funds in non-publicly traded partnerships know that they have invested in risky ventures. Even if the general partners are not forthcoming with the fair market value information, the trustees who are obligated to report FMV do not have to determine value independently to fulfill their obligation under the Code.

In the absence of guidelines from the IRS, some industry groups have come up with their own guidelines for determining FMV. These guidelines require a good faith effort by general partners to provide reasonable fair market value information to trustees, which the trustees may use to satisfy their reporting obligations. If the trustees so desire, they are free to arrive at their own determination of FMV. Generally, a new appraisal is required every three to five years. As you state in your letter, the industry that markets these investments believe that the public will only invest with them in the future if the public has the ability to determine the worth (or lack thereof) of their investments. Moreover, trustees who call the IRS seeking information on how to get a

reasonable FMV from uncooperative general partners are told not to deal with these people on a fiduciary basis in the future unless the partnership agrees to re-appraise its assets periodically, under written contract. Investors should seek the same kind of assurances.

Unfortunately, because there are no specific rules or regulations dealing directly with this issue under the Code, we cannot answer each question posed individually We do, however, appreciate your comments on this issue, and hope that the general information provided in this letter will be helpful to you. If you have any further questions, please call Cheryl Press of my staff at (202) 622-6030.

Sincerely,

A Thomas Brisendine

A. Thomas Brisendine
Chief, Branch 1
Office of the Associate
Chief Counsel
(Employee Benefits and
Exempt Organizations)