



STATE STREET

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Via e-mail: [e-ORI@dol.gov](mailto:e-ORI@dol.gov)

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Definition of Fiduciary Proposed Rule  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: RIN 1210-AB32, Definition of Fiduciary Proposed Rule**

Dear Sir or Madam:

State Street Corporation<sup>1</sup> (“State Street”) appreciates the opportunity to submit comments on the Department of Labor’s proposed rule (RIN 1210-AB32) relating to the definition of the term “fiduciary” under ERISA (the “Proposed Rule”) and, in particular, redefining what constitutes “investment advice” for purposes of that definition.

As of December 31, 2010, State Street provided custodial/directed trustee services with respect to more than \$21.5 trillion of institutional assets, including more than \$764 billion of “plan assets” of employee benefit plans that are subject to Title I of ERISA (“ERISA Plans”). In addition, State Street provides a wide variety of other services and products to institutional clients, including many ERISA Plans.

State Street believes the Proposed Rule, while intended to address legitimate concerns, is overly broad and ambiguous. Overall, we agree with and support the detailed comment letters submitted by the American Benefits Council and other industry associations. Our purpose in this letter is to highlight a

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<sup>1</sup>With \$21.5 trillion in assets under custody and administration and \$2.0 trillion in assets under management at December 31, 2010, State Street is a leading specialist in meeting the needs of institutional investors worldwide. Our customers include mutual funds, collective investment funds and other investment pools, corporate and public retirement plans, insurance companies, foundations, endowments and investment managers. Including the United States, we operate in 26 countries and more than 100 geographic markets worldwide.

specific issue with respect to the Proposed Rule that is relevant to providers of custody and institutional trustee services and their ERISA clients.

As custodian or directed trustee, we frequently report valuations to ERISA Plans, which are intended and understood by our clients to be ministerial in nature and not investment advice. Under this service, we receive pricing feeds from various pricing services and use those prices to prepare reports for our clients and calculations of the aggregate portfolio values. The clients do not retain us to exercise any judgment as to the valuations being provided by the pricing services or any advice with regard to the purchase, retention or sale of the priced securities. The pricing vendors used under this service are established pricing vendors and are used on a fully disclosed basis to the underlying plans.

The proposed expansion of the definition of “investment advice” to include “advice, or an appraisal or fairness opinion, concerning the value of securities or other property” creates an ambiguity whether a service of this nature is within the scope of the definition. While clearly not within the plain meaning of investment advice, the language used in the Proposed Rule raises concerns for State Street and other custodians that all services that relate to valuation, whether substantive or ministerial, may be treated as investment advice. This concern is only heightened by the limited exception in the Proposed Rule for reporting valuations, which is only available for reporting required to comply with regulatory requirements, and which is unavailable for values of assets for which there is not a generally recognized market, and which serve as a basis on which a plan may make distributions. As drafted, this exception appears to exclude (and therefore deem a fiduciary activity) numerous typical ministerial functions performed by custodians and directed trustees.

The inclusion of values of plan assets in the reports that a custodian/directed trustee generates with respect to an ERISA Plan is a ministerial and administrative function that should not give rise to fiduciary status, even if that report is provided for purposes other than regulatory compliance or includes valuations of assets for which there is not a generally recognized market. Accordingly, State Street requests that the Department revise the final rule to make it clear that the mere inclusion by a custodian/directed trustee of the value of a security or other property in a report or any other communication to a plan sponsor, plan fiduciary or plan participant (or an agent or representative of any of the foregoing) does not constitute investment advice as long as:

- (i) such value relates to an asset for which there is a generally recognized market,
- (ii) such value has been provided to the custodian/directed trustee by a third-party pricing service, on a basis that is not individualized to the particular ERISA Plan, or
- (iii) such value has been provided to the custodian/directed trustee by a fiduciary of the ERISA Plan or by a person designated by such a fiduciary for that purpose (*e.g.*, an investment manager, an appraiser, a swap counterparty or the manager, general partner, trustee, etc. of an entity in which such ERISA Plan holds an interest, regardless of whether the underlying assets of such entity are plan assets).

In each of the foregoing situations, the custodian/directed trustee is merely utilizing and reporting a value as to which it has not exercised any subjective judgment.

In the case of assets for which there is a generally recognized market, the market price will determine the value of the asset.

In the case of a value provided by a pricing service, the value will have been generated by the pricing service for general use by many parties; it will not be individualized to the needs or specific facts and circumstances of any particular ERISA Plan and should not be viewed as advice to a plan fiduciary. The relevant plan fiduciary can accept or reject any such general valuation that has been made available to it and may seek, and direct the custodian/directed trustee to utilize, an alternative valuation from another source. In addition, depending upon the asset class, State Street generally proposes a standard list of pricing vendors to be used with respect to the ERISA Plan, but allows the fiduciary to the ERISA Plan to select alternative pricing vendors.

In the case of a value provided by a plan fiduciary or another person designated by a plan fiduciary for the purpose, the utilization of such value by the custodian/directed trustee is clearly a ministerial, administrative function and should not constitute a fiduciary action.

Without the changes suggested above, the Proposed Rule will require custodians and directed trustees to significantly alter the services they provide to ERISA Plans, to the detriment of plan sponsors and participants. For many asset classes, and particularly for hard-to-value securities, the custodian or directed trustee has neither the resources nor expertise to provide valuations, and would not be in a position to assume the fiduciary duty which could result from the Proposed Rule. As a result, custodians or directed trustees would likely be placed in the position of eliminating reporting of valuations of such securities, requiring plan sponsors to develop alternative reporting systems for such assets, or significantly increasing the cost of custody or directed trustee services in order to establish sufficient expertise in validating valuations and managing this new fiduciary function. Custodians and directed trustees would have to evaluate the feasibility from a risk and cost perspective of continuing to offer various analytics and risk reporting services to plans with hard-to-value securities, as well as their ability to even hold such assets as a custodian or directed trustee; changes to the current service model such as these would have detrimental impact and result in increased complexity and costs for plan sponsors in administering ERISA Plans.

Since the relevant plan fiduciary is already responsible for monitoring these valuations, placing this new fiduciary duty on custodians and directed trustees is redundant, unnecessary, and, given the inevitable cost implications, not in the best interests of ERISA Plans or plan participants.

State Street appreciates the opportunity to comment on the Proposed Rule. Please feel free to contact me with any questions.

Sincerely,



David C. Phelan

cc: Jeffrey N. Carp, State Street Corporation, EVP and Chief Legal Officer  
Stefan M. Gavell, State Street Corporation, EVP and Head of  
Regulatory, Industry and Government Affairs