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September 24, 2015

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D11712
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, DC 20210

Re: RIN 1210-AB32: Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice/ZRIN 1210-ZA25: Proposed Best Interest Contract Exemption

Dear Sir/Madam:

The Investment Company Institute[1] appreciates the opportunity to supplement our July 21 comment letters on the Department of Labor's (the "Department") proposed rulemaking regarding the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA").[2]

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[1] The Investment Company Institute is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $18.2 trillion and serve more than 90 million U.S. shareholders.

[2] *See* Notice of Proposed Rulemaking—Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 21928 (April 20, 2015) ("Fiduciary Rule Notice"), and Notice of Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (April 20, 2015) ("BIC Exemption Notice"). The Institute provided previous comment on the proposed Conflict of Interest Rule and proposed Best Interest Contract Exemption ("BIC Exemption") respectively, pursuant to the undersigned's letters of July 21, 2015, available at www.ici.org/pdf/15_ici_dol_fiduciary_def_ltr.pdf and www.ici.org/pdf/15_ici_dol_fiduciary_best_interest_ltr.pdf. The Institute filed a separate supplemental letter on the Regulatory Impact Analysis supporting the proposed Conflict of Interest Rule and proposed Best Interest Contract Exemption ("BIC Exemption"), available at www.ici.org/pdf/15_ici_dol_ria_comment.pdf.

The Institute also appreciates having had the opportunity to testify at the Department's public hearing on its proposed rulemaking. We found the openness of the dialogue to be constructive and helpful.

As described in the Institute's testimony at the public hearing and in detail in our July 21 letters, the Institute is deeply concerned that the Department has proposed a fiduciary definition (the "Proposed Fiduciary Rule") that is excessively and inappropriately broad, and with exceptions that are too limited. The result is that activities that trigger fiduciary status are unclear and, in many circumstances, contrary to the expectations and interests of employee benefit plans, plan fiduciaries, plan participants or beneficiaries, IRAs, and IRA owners (collectively, "Retirement Investors").[3]

Moreover, the proposed "Best Interest Contract Exemption" or "BIC Exemption" that is critical to facilitate the continued availability of existing compensation structures under an expanded fiduciary definition[4] simply is not workable in its current form. It will result in Retirement Investors losing the ability to access information and assistance they receive today from advisers and financial institutions. The result is that, without significant modification, the Department's rule proposal will significantly limit the ability of Retirement Investors—in particular, low and middle-income individuals and small businesses—to receive the investment assistance that they need to make informed investment choices.

It is our view, quite regrettably, that the Department's proposal, as currently drafted, fails to serve Retirement Investors' "best interests." Our testimony and our comment letters advanced several constructive suggestions for improving both the Proposed Fiduciary Rule and the BIC Exemption to meet the Department's goal of mitigating perceived conflicts of interest. Our suggestions are not intended to create a loophole in the Department's rules, but rather to help the Department craft the rules in a manner that does not impede Retirement Investor choice over products and services more appropriate to their needs.

This letter supplements our previous suggestions and responds to certain questions raised by representatives of the Department during the public hearing.

I. Rule Proposal – Fiduciary Definition

Department officials asked us at the public hearing whether the counterparty carve-out described in the Proposed Fiduciary Rule would continue to be necessary if the Department revised the

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[3] The definition of the term "Retirement Investor" in the proposed Best Interest Contract Exemption generally is limited to a participant or beneficiary of an ERISA plan, the beneficial owner of an IRA, or a plan sponsor of a non-participant-directed ERISA plan with fewer than 100 participants. 80 Fed. Reg. 21960, 21988. For purposes of this letter, we generally use a broader definition of "Retirement Investor" as the context dictates.

[4] Fiduciary Rule Notice, 80 Fed. Reg. 21928, 21929.

fiduciary definition to draw a clearer line between fiduciary advice and non-fiduciary marketing, sales and educational activities.[5] A related question of another witness focused on whether the counterparty carve-out should be modified to cover product sponsor and wholesaler services.[6] Finally, in the course of another witness' testimony, the Department asked whether clarification regarding the activities of call center employees who are not paid any extra compensation with respect to advice would be helpful.[7] We respond to each of these questions below.

A. Significance of Counterparty Carve-Out

The Institute agrees, in theory, that the counterparty carve-out should be unnecessary if the Department draws "the line [between fiduciary advice and non-fiduciary marketing, sales and educational activities] in the right place." In this respect, in our testimony and in our July 21 letter, we urged the Department to provide clear and unambiguous thresholds for determining when fiduciary advice is being provided and to allow service providers to continue to offer meaningful investment education to retirement savers and plan sponsors without inadvertently triggering fiduciary status. The Institute made several recommendations to achieve this goal, including constructive revisions to the fiduciary definition designed to provide greater assurances that the functional part of the fiduciary definition would apply only to advice or recommendations individualized to the plan or participant.[8] We also explained that the Department's approach of setting forth an overly expansive fiduciary definition and then "carving out" activities that are not "fiduciary" in application presents an unnecessarily cumbersome approach. We proposed an alternative formulation of the fiduciary definition that addresses the importance of determining fiduciary status on the totality of the content, context and presentation of the communication.[9]

[5] *See* Public Hearing Transcript (August 10, 2015) at p. 142: "MR. HAUSER: So if I'm hearing you right—just correct me if I'm wrong. If we've drawn the line in the right place as between what's advice and education in the first place, you don't really need an additional, you know, seller's carve-out. Is that right?"

[6] *See* Public Hearing Transcript (August 12, 2015) at pp. 1039-1042.

[7] *See* Public Hearing Transcript (August 14, 2015) at pp. 1156-1158.

[8] The Institute's recommendations included, among other things, removing the words "specifically directed to" from the operative definition and other modifications intended to clarify that personalized investment advice is required in order to trigger ERISA fiduciary status. The Institute also recommended reinforcing the remaining functional definition by adding a "reliance" or "materiality" concept to substitute for the ambiguous "for consideration" element of the test. Finally, we urged the Department to adopt relevant standards developed by the Financial Industry Regulatory Authority ("FINRA") (f/k/a "NASD") in defining communications that rise to the level of a recommendation for purposes of applying the operative definition. We offered specific language to accomplish this needed change.

[9] Specifically, we suggested that the Department delete the currently proposed functional test found in 29 CFR 2510.3-21(a)(2)(ii) and replace it with the following –

> (ii) Renders the advice in a manner where an advice recipient reasonably believes that such person is acting in their best interest in providing such advice and is not acting in an educational, marketing or sales capacity. This

Inclusion of counterparty carve-out would provide certainty in circumstances where a fiduciary relationship is not intended or wanted – Even if the Department adopts the proposed alternative formulation of the fiduciary definition recommended by the Institute, we believe that including the counterparty carve-out for recipients of sales and marketing information would still be helpful in facilitating access to education, marketing and sales related information and avoid inadvertently creating a fiduciary relationship. Compliance with any formulation of the fiduciary definition, including the Institute's proposed definition, will involve some degree of fact-based analysis. Consequently, a level of uncertainty will exist as to whether a fiduciary relationship might be inadvertently created in any engagement involving a Retirement Investor and service provider. This uncertainty will cause many service providers to choose to treat even sales pitches as fiduciary engagements. Retirement Investors diligently "shopping" for products and services or seeking a response to a request for proposal ("RFP") may find it burdensome and overly time consuming to enter into a fiduciary contract before a potential service provider can be responsive to such a request for information. They may prefer to simply acknowledge their understanding that no fiduciary relationship is intended to apply to the exchange of information in order to avoid the inefficiencies that would result in such circumstances. For this reason, even if the Department were to "draw the line in the right place," retaining the counterparty carve-out would still be helpful in facilitating access to education, marketing and sales related information. Such a carve-out could be conditioned on the provision of a disclaimer that the purveyor of the products and services is not providing impartial investment advice. Such a disclaimer would put the receiving party on notice – although it should be abundantly clear already – that no fiduciary relationship is intended.

We want to be clear, however, that the current fiduciary definition in the Proposed Fiduciary Rule does not appropriately draw the line between fiduciary advice and non-fiduciary marketing, sales and educational activities with the result that small plans and IRA owners will be excluded from access to the education, marketing and sales related information that they need to make informed investment choices. As we testified at the public hearing, in the event the Department fails to clearly exclude marketing and selling from the expansive definition of fiduciary advice, it must extend the counterparty carve-out to cover small plans and IRAs. In this respect, we explained that there was little logic in the Department's presumed rationale that large plans are sophisticated procurers of financial services while small plans and IRA owners are not, and that status as a plan—and status as a large plan in particular—is a valid proxy for sophistication.

The Department should modify the counterparty exception to cover product sponsor and wholesaler services – If the Department continues to limit the counterparty carve-out to only investors it presumes to be "sophisticated," it must revise the carve-out to include within its coverage other

determination is based on the relevant facts and circumstances as applied to a reasonable person. Under this clause, relevant factors include the individualized nature of the advice provided, the intent that it be relied upon, the reliance placed on it by the advice recipient and any disclosures provided to the advice recipient; however, no single factor is determinative.

sophisticated recipients of "selling" engagements. For example, in our July 21 letter, we noted that the carve-out should include IRA owners with large balances, such as an "accredited investor" as defined by the federal securities laws,[10] within the coverage of the counterparty carve-out. We explained that there is no rational reason for restricting larger balance and sophisticated IRA investors from access to the education, marketing and sales related information that they need to make informed investment choices. We also urged the Department to clarify that the carve-out would apply to the sales of services, including asset management services, and selling activity for a plan acting through an agent. We now ask that the Department modify the carve-out further to cover product sponsor and wholesaler services.

As noted in our letter, product sponsors and securities wholesalers have legitimate concerns about the potential "daisy-chain" effect of the Department's proposed fiduciary definition.[11] The ambiguous language defining who is a fiduciary could be construed to make them fiduciary advice providers under ERISA simply by providing needed product sponsor and wholesaler services to those financial intermediaries who would be fiduciaries by virtue of the application of the expanded fiduciary definition contemplated by the Proposed Fiduciary Rule.

As described in detail in our July 21 letter, the ambiguous nature of the proposal's fiduciary definition appears to capture informational materials prepared by investment product sponsors and mutual fund wholesalers for use by financial intermediaries in assisting consumers, who could include Retirement Investors, in understanding their products. Such materials help ensure that the investment policies, risks and other material information relevant to their products are properly conveyed to the investing public. Moreover, wholesalers service independent financial advisers, providing needed education and support, including services designed to educate such advisers in understanding the specific mutual fund offerings available from the fund family and the appropriateness of such products to different classes of investors. Like product sponsors, mutual fund wholesalers typically have no connection with the particular 401(k) plan or IRA owner being serviced by the independent financial adviser.

To ensure that Retirement Investors do not lose the benefit of needed information in all the critical materials referenced above, we urge the Department in the strongest possible terms to better tailor the final rule in accordance with our recommendations. We also urge the Department to expressly reference the important services provided by product sponsors and securities wholesalers in the preamble to the final rule, noting that it does not intend to extend fiduciary status to such service and product providers solely by virtue of the provider's distribution to financial intermediaries of

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[10] Rule 501 of regulation D of the Securities Act of 1933.

[11] Section (a)(1) of the Proposed Fiduciary Rule broadly extends not only to IRA owners and 401(k) plans, but also to fiduciaries to 401(k) plans. The independent financial adviser would typically be a 401(k) plan fiduciary under the Department's proposal to the extent that the independent financial adviser works with any 401(k) plan clients. Because of the breadth of the definition, the mutual fund wholesaler who engages in the wholesaling activities described above when interacting with an independent financial adviser could be treated as having provided fiduciary advice under the proposed rule.

informational and educational services or provision of wholesaler services. Rather, fiduciary status is intended to be placed on the party interacting directly with the Retirement Investor in such circumstances.

We continue to believe that making the changes and clarifications described in the preceding paragraph is the best way to ensure the continuation of these important services. In the event that the Department does not make these changes and clarifications, however, the Department should preserve the continuation of such important services through the counterparty carve-out. In this respect, the Department should modify the carve-out to apply also to financial intermediaries – clearly sophisticated parties – who are the recipients of services provided by product sponsors and wholesalers.

B. The Department Should Make Clear that Call Center Employees, and their Employers, Are Not Fiduciary Advice Providers if They Do Not Receive Additional Compensation In Connection With Their Responsibilities

During the question and answer portion associated with Panel 22, the American Benefits Council witness was asked for clarification regarding the application of the "fee or other compensation" part of the fiduciary definition in connection with the services provided by call center employees. More specifically, the witness was asked if it would help for the Department to clarify that call center employees who are not paid any extra compensation with respect to advice are not giving fiduciary advice because they are not receiving "a fee or other compensation" for any advice given.[12] The witness encouraged such a clarification noting that it would be extremely helpful if it could be clarified that if call center personnel who simply receive their normal compensation and do not receive additional compensation that is based on the choices that participants make or for referring participants to an investment product or service, are not considered to be receiving "a fee or other compensation" and thus are not giving fiduciary advice. The witness explained that call center assistance is very important to plan sponsors who rely on those services to explain to participants the terms of the plan, its available investments, and other information relevant to their plan participation, and consequently a clarification of the type implied by the Department would provide great help.

We wholeheartedly agree that the Department must clarify that call center employees (and their employers) are not fiduciaries in the circumstances described above. It simply is critically important to Retirement Investors that they have the ability to talk to a representative by phone, or in person, about the market events and about investments in general. Risking elimination or significant reduction in the types of guidance provided in those interactions would be severely damaging, particularly where the representative receives no direct additional compensation from any investment or sale resulting from the interaction.

[12] *See* Public Hearing Transcript (August 14, 2015) at pp. 1156-58. These circumstances were distinguished from those where call center personnel receive additional compensation based on referrals of participants to providers or specific investment products.

The clarification we call for is consistent with our suggestion made in our July 21 letter that, to prevent leakage, the Department should provide a carve-out for activities such as rollover advice (rollover to a particular IRA, or plan) in which there is only a *de minimis* compensation interest that should not affect the service provider's judgment. We explained that such a carve-out would apply only in situations where a call center representative does not receive any additional compensation for either the number or size of the rollovers achieved. We also noted that, while there might be a *de minimis* interest in the call center representative's employer receiving or retaining the assets under management, such an interest alone should not give rise to an impermissible conflict of interest.

II. BIC Exemption

With respect to the application of the BIC Exemption, testimony at the public hearing included a discussion of, among other things, the Exemption's contract requirement, the implications of treating the selling of one's own advisory services as fiduciary investment advice, and the need for additional guidance on the treatment of pre-existing accounts currently being serviced under commission-based models. We discuss each of these issues below.

A. Written Contract Requirement

Based on the content of certain questions raised by the Department during the hearing and on other informal statements made by its representatives, it appears that the Department is sympathetic to concerns regarding the timing of the BIC Exemption's contract requirement, *i.e.*, that the adviser and financial institution must enter into a written contract with the Retirement Investor *prior to* making a covered recommendation.[13]

We continue to believe that the best way to resolve these issues is for the Department to discard any written contract requirement. As discussed in our July 21 letter, a condition that the adviser affirmatively undertake, orally or in writing, to act in the Retirement Investor's best interest is broadly enforceable by that investor and should suffice to meet the Department's goals. Specifying that the undertaking be included in a contract is elevating form over substance. If the Department determines to retain the proposed contract requirement, it must permit the contract to be effected by implied consent (*i.e.*, without the signature or acknowledgement of the advice recipient) and before the time the transaction resulting from the advice relationship occurs – not prior to the time the recommendation occurs. This would generally allow the Retirement Investor to consider all relevant information before

[13] As explained in our letter, it simply is not realistic to require a signed, written contract before a client relationship has been established, especially in the context of recommending services for the Retirement Investor or any other investor to consider. Among other things, this requirement runs counter to the simple fact that the parameters of the relationship must be understood before a written contract can be executed. A Retirement Investor diligently "shopping" for an adviser, for example, would be unwilling to enter into a fiduciary contract every time he or she speaks with a potential adviser. Moreover, the scope of the anticipated relationship (*e.g.*, mandate, investment purpose and goals) is most likely unknown before there is at least some discussion and therefore cannot adequately be documented in a pre-relationship contract.

authorizing or otherwise agreeing to enter into a business relationship or otherwise implement the adviser's recommendation. In such a situation, the service provider's fiduciary status could be retroactive to the time of the recommendation much like other conduct standards already used in the financial services industry.[14]

B. The BIC Exemption Should be Clarified to Allow Inclusion of Service Limitations

Even if the Department modifies the contract requirement to require a pre-transaction rather than a pre-recommendation contract, it must provide additional clarity regarding the ability of service providers to identify limitations in the scope of services and product offerings.

The Department must clarify that negotiating limitations to the scope of services and product offerings is not a fiduciary act – The Proposed Fiduciary Rule's inclusion of services within the coverage of the fiduciary definition raises questions about the ability of service providers to negotiate limitations to the scope of their services and product offerings. If the conduct of negotiating investment management services is also considered a fiduciary act, then a question arises about the ability of a purveyor of such services to limit such services both in terms of scope and use of proprietary products. This runs counter to decades of legal precedent holding that fiduciaries do not have fiduciary responsibilities with respect to the terms of their own engagement,[15] a principle that was acknowledged and embraced by the Department in its explanations of § 408(b)(2).[16] Imposing fiduciary duties on firms who sell their own services in these circumstances would put the provider in the untenable situation of accepting fiduciary responsibility for all aspects of the Retirement Investor's investment, including the terms under which the services are to be performed, or declining to provide such services altogether. We believe that the only appropriate way to resolve this issue is to clarify that selling one's own advisory services should not be considered fiduciary investment advice. The recommendation of one's own advisory services is clearly selling activity and Retirement Investors are capable of understanding that an advisor is not providing impartial investment advice in recommending its own services.

Financial institutions that limit investment products must have ability to disclose those limitations prior to time of transaction – Section IV(b)(3) of the BIC Exemption requires advice providers who limit the range of investment options offered to Retirement Investors to provide "clear

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[14] *See, e.g.*, FINRA Regulatory Notice 12-55.

[15] *See McCaffree Fin. Corp v. Principal Life Co.*, 2014 WL 7060336 (S.D. Iowa Dec. 10, 2014). *See also Renfro v. Unisys Corp.*, 671 F. 3d 314, 324 (3d Cir. 2011) (citing *Hecker v. Deere*, 556 F.3d 575, 583 (7th Cir. 2009) (a party "does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms.").

[16] *See* DOL Reg. section 2550.408b-2(f), Example 1 (treating a fiduciary advisor's recommendation of its own additional portfolio evaluation services as a non-fiduciary recommendation).

written notice of the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA." The Department must clarify the application of this requirement in the event that it modifies the BIC Exemption's contract requirement. In this regard, the same difficulties that arise in connection with a pre-recommendation contract would apply to a requirement imposing written notice of Asset limitations. Until the Retirement Investor and service provider have had an opportunity to meet and discuss the Investor's preferences and goals, it is unlikely that the scope of a service offering, including any limitations in the investments that might apply, could be made.

We are concerned that, in the absence of the clarifying language discussed above, a product sponsor would need to be clairvoyant to pre-suppose the product offerings that would be responsive to the needs of the Retirement Investor and consistent with the agreed to scope of responsibilities prior to having any opportunity to meet with the Retirement Investor and engage in discussions necessary to make such determinations.

C. Transitioning From Commission-Based Accounts

The Institute's comment letter and testimony focused on the need for additional guidance on the treatment of pre-existing IRA investors who are currently serviced by registered representatives of broker-dealers. Specifically, we suggested including a grandfather rule for hold recommendations on pre-existing commissionable investments, such as mutual funds that pay 12b-1 fees to broker-dealers. Without an appropriate grandfather rule, we believe the proposal will unnecessarily disturb millions of existing brokerage relationships by requiring either compliance with the BIC Exemption – which will not be used – or, the more likely scenario, the conversion of the relationships to fee-based advisory solutions.

At the hearing, a witness testifying on behalf of the Capital Group was asked whether a grandfather rule for hold recommendations is needed if the final rule treats a recommendation to move from a pre-existing commissionable account to a fee-based account as fiduciary investment advice.[17] The implication was that such a rule would create a level playing field because advisors would ordinarily have to comply with the BIC Exemption for transitions to fee-based programs as well as continuations of pre-existing commissionable arrangements.

The Institute agrees with the testimony of the witness that, in the absence of a grandfather rule for hold recommendations, IRA investors currently receiving commission-based brokerage services will be at risk of losing access to their current advisor and forfeit their pre-paid right to ongoing advice at very moderate cost. Many financial advisors have indicated that the BIC Exemption, as currently proposed, would make it impracticable to offer commission-based brokerage services for IRA investors.

[17] *See* Public Hearing Transcript (August 12, 2015) at pp. 1022-1025.

Thus, without a grandfather rule, investors who do not meet the relevant threshold for their advisor's fee-based advisory program will lose access to their financial advisor.

Because the Fiduciary Rule Proposal treats recommendations of an investment adviser as fiduciary recommendations, we are concerned that the proposal can be read to treat a recommendation to shift from a commission-based account to a fee-based program as fiduciary investment advice – a conclusion that would exacerbate the disruption caused by the absence of a workable grandfather rule. In this respect, requiring compliance with the BIC Exemption for transitions to fee-based arrangements will essentially add an additional barrier to the ability of existing advisors to continue to service their pre-existing clients.

The foregoing concern adds credence to the Institute's position above that selling one's own advisory services should not be considered fiduciary investment advice. We understand from the Department's questioning during the public hearing, that, even if the Department does not treat an advisor's recommendation of its own advisory services fiduciary selling activity, the Department would still likely consider a related sell recommendation on a commissionable investment in order to move to a fee-based solution as fiduciary investment advice. The Department appears to be concerned in this regard that such a recommendation could have the effect of moving some investors into more costly fee-based arrangements without a commensurate benefit from enhanced services. As a result, we understand that the Department is of the position that the sell recommendation would need to satisfy the BIC Exemption because the advisor's compensation would be affected by the sale.

We are troubled that the BIC Exemption, as currently proposed, would be required to affect transitions from commission-based to fee-based advice. As discussed above, fee-based programs may be the only viable alternative for many investors and the final rules should not make such transitions unnecessarily onerous. At a minimum, the Department should tailor the exemption to transitions to fee-based solutions. Thus, for example, a separate exemption focused on disclosures distinguishing the respective fees and services associated with the existing and proposed compensation arrangements should be sufficient to protect the interests of Retirement Investors in such situations.

Significantly, in our view, regardless of the approach the Department settles on for transitioning from a pre-existing commissionable account to a fee-based account, this issue only heightens the need for a grandfather rule for hold and other similar recommendations.

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We hope you find the foregoing additional comments helpful to your review of the Proposed Fiduciary Rule and BIC Exemption and their role in protecting the interests of Retirement Investors. If you need additional information or you have questions regarding our comments, please feel free to contact either David Abbey, Deputy General Counsel – Retirement Policy, at (202) 326-5920 or david.abbey@ici.org, or David Blass, General Counsel, at (202) 326-5815 or david.blass@ici.org. We welcome the opportunity to discuss these comments further or to provide additional information to you and your staff as you work on this important issue.

Sincerely,

/s/ David M. Abbey	/s/ David W. Blass
David M. Abbey Deputy General Counsel – Retirement Policy	David W. Blass General Counsel