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November 28, 2023

Submitted electronically to <https://www.regulations.gov>

Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: *Retirement Security Rule: Definition of an Investment Advice Fiduciary; Request for Release of Study Used to Support RIA (RIN 1210-AC02)*

To Whom It May Concern:

The Investment Company Institute (ICI)¹ submits this letter to the Department of Labor (the “Department”) with respect to its recent proposal, the Retirement Security Rule: Definition of an Investment Advice Fiduciary (the “Proposal”).² The Proposal represents fundamental and far-reaching changes to the existing regulatory framework for advice to retirement plans and IRAs that will impact access and choice for retirement savers. In the Regulatory Impact Analysis (RIA) supporting the Proposal, the Department cites an unpublished study relating to the timing of trades by mutual fund investors. ICI urges the Department to make this study publicly available immediately.

¹ The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$30.6 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$8.8 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](https://www.ici.org/global).

² The Proposal would amend the regulation defining the term Investment Advice Fiduciary, published at 88 Fed. Reg. 75890 (November 3, 2023). The Proposal is accompanied by proposed amendments to prohibited transaction exemption (PTE) 2020-02, published at 88 Fed. Reg. 75979 (November 3, 2023); proposed amendments to PTE 84-24, published at 88 Fed. Reg. 76004 (November 3, 2023); and proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1 and 86-128, published at 88 Fed. Reg. 76032 (November 3, 2023).

Specifically, the Department's RIA cites a Department-sponsored study, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds*.³ The study purports to illustrate the impact of broker conflicts of interest on mutual fund investors' returns. ICI has attempted to obtain this study but it is not publicly available. It is well established that a federal agency has an obligation under the Administrative Procedure Act (APA) to make information relied upon in connection with a proposed rulemaking publicly available. *See, e.g., Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2007) (APA requires agencies to "identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules" (quoting *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982))); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) ("[T]he [APA] requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."); *Conn. Light & Power*, 673 F.2d at 530-31 ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (proposed rule must provide sufficient information to permit informed "adversarial critique"); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006) ("Integral to an agency's notice requirement is its duty to 'identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.'" (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991))).

It is simply not possible for the public to substantively evaluate the purported costs, benefits, effects, and economic baseline on which the Proposal is based if the Department uses information that is unavailable to the public. The Proposal merely sets out the Department's own description of the research. Without access to the study, we cannot evaluate critical aspects of the study, such as whether the Proposal fairly describes the complete conclusions of the authors or whether the underlying research itself represents a full and reasonable analysis of the issues for which the study is used in the RIA.

Concurrent with the submission of this request, ICI is submitting a request under the Freedom of Information Act (FOIA) that the study be made public.⁴ In lieu of responding to the FOIA request, ICI urges the Department to voluntarily release the study to facilitate broader review of the information prior to the close of the Proposal's public comment period.

As explained in a November 8, 2023 letter from ICI and several other organizations, the Proposal's 60-day comment period is insufficient to allow the public adequate time to provide meaningful input on the Proposal. The task of evaluating the Proposal is further adversely impacted by the unavailability of the study which the Department relied upon in issuing the

³ Constantijn Panis & Karthik Padmanabhan, Intensity, LLC (August 14, 2023). The study is cited at footnote 414 of the Proposal. 88 Fed. Reg. at 75943.

⁴ A copy of the FOIA request is attached to this letter.

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Proposal. Accordingly, the prompt release of the study is of immediate and critical importance. We urge the Department to release the requested information without delay.

Sincerely,

/s/ Susan Olson

/s/ Elena Chism

Susan Olson
General Counsel

Elena Chism
Deputy General Counsel–Retirement Policy

cc: Lisa M. Gomez, EBSA Assistant Secretary
James Butikofer, Division of Regulatory Policy Analysis

November 28, 2023

By Website Submission at foiarequests@dol.gov

EBSA FOIA Officer
US Department of Labor
Employee Benefits Security Administration
Public Disclosure Room
200 Constitution Ave NW
Suite N-1515
Washington, DC 20210

Re: *Information Regarding an Unpublished Study Relied upon by the Department in Proposing Investment Advice Fiduciary Rulemaking*

To Whom It May Concern:

I. INTRODUCTION

This is a request under the Freedom of Information Act (FOIA).¹ As described in greater detail below, the Investment Company Institute (ICI)² requests that the Department of Labor (the “Department”) provide ICI with certain information relied upon and referenced in the Department’s recent proposed rulemaking—the Retirement Security Rule: Definition of an Investment Advice Fiduciary (the “Proposal”) under the Employee Retirement Income Security Act of 1974 (ERISA). As described in Section III below, the request is for an unpublished Department-sponsored study, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds*, which is referenced in the Proposal’s Regulatory Impact Analysis (RIA). ICI is not requesting that the study be provided in a manner that would include any personally

¹ 5 U.S.C. 552 *et. seq.*

² The [Investment Company Institute](#) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$30.6 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$8.8 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](#).

identifiable information. We do not believe the study contains such information. ICI believes that the use of a non-public study is highly problematic in connection with a proposed rulemaking because the public cannot meaningfully comment on the Department's analysis and conclusions. Providing the unpublished study used in the RIA would help facilitate the public's review and validation of the Department's economic analyses without disclosing any information that should remain confidential. ICI encourages the Department to make the study publicly available on a voluntary basis to facilitate broader public review of the relevant data.

II. BACKGROUND

On November 3, 2023, the Department published the Retirement Security Rule: Definition of an Investment Advice Fiduciary (the "Proposal").³ In the Proposal's RIA, the Department makes reference to a Department-sponsored, unpublished study, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds*, that examined how investors timed the purchase and sale of mutual funds between 2007 and June 2023.⁴

III. TERMS OF THE REQUEST

ICI requests that the Department email the study as a Word or PDF document to Susan Olson at solson@ici.org and also that it post the study on its website to be accessible to other interested parties. While the citation in the Proposal indicates that the study is an "unpublished draft," the Department is relying on it and citing to it. This information is necessary to effectively evaluate the Department's analysis in the Proposal.

IV. LEGAL BASIS FOR THE REQUEST

ICI respectfully requests the above-described information pursuant to 5 U.S.C. Section 552(a), which generally requires, among other things, that a federal agency must make its records available to any person pursuant to the statute unless an exception or exclusion applies. A federal agency is generally required to determine whether to comply within 20 business days of receipt of such a request.

ICI does not believe that an exemption or exclusion for withholding the study applies. The study, sponsored by the Department and conducted by outside consultants, appears to be intended for eventual publication. We do not expect it to include any personally identifiable information. Nor

³ The Proposal would amend the regulation defining the term Investment Advice Fiduciary, published at 88 Fed. Reg. 75890 (November 3, 2023). The Proposal is accompanied by proposed amendments to prohibited transaction exemption (PTE) 2020-02, published at 88 Fed. Reg. 75979 (November 3, 2023); proposed amendments to PTE 84-24, published at 88 Fed. Reg. 76004 (November 3, 2023); and proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1 and 86-128, published at 88 Fed. Reg. 76032 (November 3, 2023).

⁴ Constantijn Panis & Karthik Padmanabhan, Intensity, LLC (August 14, 2023). The study is cited at footnote 414 of the proposed amendments to the regulation defining the term Investment Advice Fiduciary, 88 Fed. Reg. at 75943.

would it reveal trade secrets or privileged or confidential commercial or financial information subject to an exemption from public disclosure under FOIA.⁵

Finally—and most importantly—this information is essential to enable meaningful comment on the Proposal, and it has been well established by courts that a federal agency, such as the Department, has an obligation under the Administrative Procedure Act (APA) to make information relied upon in connection with a proposed rulemaking publicly available. *See, e.g., Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2007) (APA requires agencies to “identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules” (quoting *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982)); *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (“[T]he [APA] requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.”); *Conn. Light & Power*, 673 F.2d at 530-31 (“An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (proposed rule must provide sufficient information to permit informed “adversarial critique”); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006) (“Integral to an agency’s notice requirement is its duty to ‘identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.’” (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991))).

It is simply not possible for the public to substantively evaluate the purported costs, benefits, effects, and economic baseline on which the Proposal is based if the Department uses information that is unavailable to the public. The Proposal merely sets out the Department’s own description of the research. Without access to the study, we cannot evaluate critical aspects of the study, such as whether the Proposal fairly describes the complete conclusions of the authors or whether the underlying research itself represents a full and reasonable analysis of the issues for which the study is used in the RIA.

V. FEES

Generally, the Department charges certain fees in fulfilling FOIA requests, as described in the Department’s Guide to Submitting Requests Under the Freedom of Information Act (the “Guide”).⁶ A waiver or reduction of fees may be appropriate if the disclosure of the requested records is in the public interest because (1) it is likely to contribute significantly to public understanding of the operations or activities of the government and (2) the disclosure is not primarily in the commercial interest of the requester.⁷ ICI asks that any fees be waived regarding

⁵ 5 U.S.C. 552(b)(4).

⁶ The guide is available on the Department’s website, available at <https://www.dol.gov/general/foia/guide>. See also 29 CFR § 70.

⁷ Section IX of the Guide. 29 CFR § 70.41(a)(1)(i) and (ii).

this request because ICI believes the request is consistent with these considerations. The subject of the requested records concerns information used to support a proposed Department rulemaking that, if adopted, would directly impact ICI members and other parties involved in the retirement plan and IRA marketplace—from asset managers and investment advice providers to employers and plan participants. Disclosure of the requested records is likely to significantly contribute to the public’s understanding of the Proposal because it will be used to help understand and analyze the Department’s rationale behind the Proposal as well as the purported benefits, costs, and effects the Proposal will have on the retirement market. Moreover, as the discussion in Part IV above makes clear, courts have long recognized there to be a compelling public interest and requirement under the Administrative Procedure Act⁸ that a federal agency, such as the Department, identify and make available technical studies and data used in reaching the decisions to propose particular rules.⁹

To the extent it is determined that any fees should be paid, ICI agrees to pay the applicable fees up to a total amount of \$250. If the Department believes the fees for this request will exceed this amount, ICI requests that you please contact ICI at the e-mail address provided below to discuss the costs.¹⁰

* * *

Please do not hesitate to contact ICI at solson@ici.org or at elena.chism@ici.org should you have any questions about this request. Thank you.

Sincerely,

/s/ Susan Olson

Susan Olson
General Counsel

/s/ Elena Chism

Elena Chism
Deputy General Counsel—Retirement Policy

⁸ 5 U.S.C. 553(b)-(c).

⁹ *Connecticut Light & Power Co.*, 673 F.2d at 530-31.

¹⁰ 29 CFR § 70.42.