

# Public Investors Arbitration Bar Association

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

February 3, 2011

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: Definition of the Term “Fiduciary,” RIN 1210-AB32

Dear Mr. Wong:

On behalf of the Public Investors Arbitration Bar Association (“PIABA”), I thank you for the opportunity to comment on the Department of Labor’s proposed broadened definition of the term “fiduciary” under the Employee Retirement Income Security Act. This expansion of the term “fiduciary” specifically seeks to protect beneficiaries of pension plans and individual retirement accounts by including those individuals, who give advice to either an employee benefit plan or to such a plan’s participants, in said definition and responsible to the resulting regulations.

PIABA is a national, not-for-profit bar association comprised of attorneys, including law school professors and regulators, both former and current, who devote a significant portion of their practice to the representation of public investors in securities arbitrations. As a result, PIABA and its members take great interest in any action that seeks to alter investor protection.

PIABA generally supports the proposed regulation to the extent that it broadly defines who would be considered a fiduciary under ERISA. Specifically, we support the expansive definition of investment advice that will ensure that persons providing advice to both plan participants and beneficiaries are subject to the standards of fiduciary conduct.

Despite the aforementioned holistic support, PIABA would seek to revise certain particular exclusions still within the proposed expanded term “fiduciary.” The Department has requested specific comment on the following maintained position. Under the current definition of fiduciary status, as a general matter, a recommendation to a plan participant to take an otherwise permissible plan distribution does not constitute investment advice within the meaning of the current regulation, even when that advice is combined with a recommendation as

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to how the distribution should be invested. PIABA believes that the regulation should include this advice as investment advice. There is no reason to exempt this specific type of advice from the protections of the regulation. Notwithstanding the fact that this advice may be covered by other rules or regulations, retirement funds provide for the care of our aging population, and all available means should be employed to protect those funds. This type of advice is fraught with potential for abuse. Specifically in this situation, the individual offering the advice may be recommending that the plan participant take a distribution and inappropriately invest the money. This is precisely the type of advice the regulation should protect against.

As a whole, the adoption of the proposed amendment will increase investor protection through its broadened scope of fiduciaries and the resulting standards to which the affected advisors shall be held. Accordingly, PIABA requests that the Department adopt the proposed amendment; however, in the adoption process, PIABA maintains that additional amendments that would protect the investing public in the interest of the current regulation should be considered. We thank you for the opportunity to comment on this proposal.

Respectfully submitted,

PUBLIC INVESTORS ARBITRATION  
BAR ASSOCIATION

/s/

Peter J. Mougey  
President

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