March 1, 2012

Mr. Joseph S. Piacentini
Director
The Office of Policy and Research
Employee Benefits Security Administration
U.S. Department of Labor – Room N-5718
200 Constitution Ave., NW
Washington, DC 20210

Dear Mr. Piacentini:

We are writing in response to your request for data related to the economic analysis the Department of Labor (the "Department") is required to undertake in order to re-propose regulations that would substantially modify the definition of a fiduciary under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 ("ERISA") .

In your original request for data, which we received in late December 2011[1], you noted that the Department was trying to develop a more appropriate "expanded" regulatory impact analysis that would assess the impact of the re-proposal on both ERISA-covered plans and Individual Retirement Accounts ("IRAs") subject to the prohibited transaction provisions of section 4975 of the Internal Revenue Code of 1986. You requested a significant amount of information that covered every client account, and every trade in every account, including investment returns in these accounts, over the last ten years. Further, you requested information about current and former ERISA plan and IRA account holders' economic attributes, financial literacy, length of time with their broker or adviser and various other points of personal information about each account holder and his broker or adviser.

As we have explained to the Department in numerous discussions (including at a meeting on January 24 that was attended by our trades and several others that received the Department's December data request), none of our trade associations maintains an electronic or hard-copy database containing the information the Department has requested. Nor have we ever undertaken the type of costly and extensive survey and system build that would be required to obtain and collate this vast amount of data. At the Department's request, and in light of our sincere belief that an appropriately structured regulatory impact analysis will support our belief that the any regulatory revision to the definition of the term "fiduciary" consistent with the Department's October 2010 proposal will be extremely costly to participants and service providers, with little tangible benefit, we have reached out to several hundred member companies to determine what, if any, data responsive to the Department's request, might be available and in what format (electronic, searchable, PDF, paper, *etc*.). We address what our member companies are telling us concerning this request below.

In light of our conversations with our members we also would like to make the following points with respect to the data request itself.

[1] Letter sent to Timothy Ryan, President and CEO, SIFMA, dated December 15, 2011 and received December 22nd, 2011. Letters also sent to IRI and FSR.

The Department Does Not Seem to be Requesting Useful Data

Our members are extremely concerned that the Department is neither looking for the "right" type of data to complete an appropriate regulatory impact analysis, nor do we believe that if it were to receive all of the data it has requested, it could analyze it in a manner that controls for outside variables. While the Department so far has declined our request that it share with us the methodology it plans to use to analyze the data it collects, we would like to make the following observations. First, if the Department would like to use the data to try to determine the relationship, based on individual investor experience, between (a) the "quality" of advice being provided, (b) the aggregate or investment-specific fees being charged, and (c) the account performance (or the performance of any particular asset), we believe the data requested will be of little use to the Department. The request does not differentiate between non-fiduciary advice and fiduciary advice, raising the question of accurate comparisons against a "control group" population. If the Department would like to use the data to compare fees and performance in non-fiduciary accounts and accounts where a financial representative agrees it is acting as a fiduciary, we also do not think the data requested will be helpful because it would not differentiate between the two groups, and does not control for whether, in a non-advised account on any particular transaction, a recommendation was or was not made, and if one was made, whether it was followed. It also does not take into account the situation where an investor has multiple account types, one or more of which may be used for more aggressive and riskier investing.

We also question how focusing on investor attributes (a key data component requested by the Department) correlates, if at all, with the existence of or quality of the investment advice rendered by the financial institutions being surveyed, either in a brokerage context or where the financial institution, or an affiliate, serves as a fiduciary to a client in a non-discretionary capacity. As we have stated many times, we believe that, in order to determine the true economic impact of a regulation like the one proposed by the Department in 2010, of turning virtually all conversations between brokers (and other service providers) into fiduciary "investment advice", the Department needs to focus on the very real potential negative cost to plans and individual account holders if they do not have access to meaningful retirement planning.

Should the proposal move forward as proposed, individuals will no longer have access to asset allocation assistance or guidance regarding the benefits of raising their deferral rate. There will be limited retirement planning help, as well as the guidance necessary to educate about the tax consequences of taking a withdrawal, loan or hardship distribution. Even simple discussions regarding saving in the appropriate retirement plan or helping clients make pre-tax or post-tax distribution decisions will become cost prohibitive or obsolete. These are education efforts undertaken by many advisors which could turn them into fiduciaries under the Department's proposal which will then limit the availability of these services. This will impact individual retirement savings and needs to be assessed by the Department to determine the cost of the proposal. Unfortunately we do not see any evidence in the request that the Department sent to us that the Department is even remotely considering these costs. Of course, if the Department already understands and concedes these costs, perhaps it has determined that no further data is necessary.

Challenges with providing the millions of pieces of data requested

While we continue to encourage the Department to re-focus its efforts on the cost impact to individual investors, we are working to be responsive to the Department's request by trying to determine what data our members might be able to provide. Our member firms have collectively spent a tremendous amount of time over the past several weeks working with their technology, operations and business partners to determine what data from the Department's request is available and in what form, as well as the resource and cost impact in providing that data. Initial cost estimates from some of our member firms in providing even a portion of the data runs in the hundreds of thousands of dollars. As stated above, not only is this type of cost and resource expenditure substantial, we do not believe it would yield any meaningful data that could be analyzed by the Department or that could offer any practical utility in connection with the Department's regulatory impact analysis.

First, while certain of our member firms theoretically could provide PDFs of monthly account statements for particular accounts, all of those PDFs would need to be "sanitized" for personal information, which itself might take thousands of hours, and it is entirely unclear to us what the Department would do with this paper information for millions of accounts that cannot be collated or organized or analyzed other than manually. Our members cannot simply deliver to the Department unredacted documents containing client data without individual client consent. Most firms are understandably reluctant to ask their clients to consent to provide their personal financial information to a governmental agency, and even with that consent, we cannot identify under what FOIA exception you would be able to protect this material from public disclosure. Indeed, at our January 24 meeting, you were unable to address the industry's confidentiality concerns. Not only would disclosure raise concerns under other applicable laws, it could put clients' financial privacy at risk and endanger our members' relationships with their clients. As noted above, to attempt to remove client-specific information from a PDF file or system feed would be costly, labor intensive, and would still leave behind confidentiality concerns because enough trading information and possible other data might make a client identifiable.

While our members do maintain some of the information that the Department requested, as the Department may or may not be aware, firms keep the data in a variety of forms (which may differ from firm to firm and even from department to department within a firm). For example, some of the information that is specifically listed on the Department's request may be available only in PDF format at many member firms. Further, conditions exist that may call into question the quality of the data. For example the financial representative responsible for an account may have changed over time or the account type may have changed over time, and there may be no way to identify or flag those changes.

Moreover, the systems maintained across and even within our members were created in anticipation of certain foreseeable business or regulatory requests, but were never designed with the type of broad large scale survey request that the Department now makes. Indeed, a data request of the type requested by the Department is particularly challenging in light of changes over time to our members, such as system changes due to mergers, acquisition, or spin-offs as part of broader financial industry consolidation. There are also different systems between firms and within firms due to upgrades to programs, servers or other hardware. None of our members could merely push a button and pull the ten years of data the Department has requested.

Finally, different firms have different practices which lead to the retention of different information in different storage media and for different timeframes. The codes, categories and titling vary greatly among firms. All these challenges make it difficult or impossible to gather and compare data across firms without taking steps to make sure the data is uniform across firms. We see nothing in the Department's data requests that suggests how the Department might seek to do that and we assume the Department is not suggesting that we undertake the expense and time commitment to develop and implement a manual process that might seek to do that.

For all of these reasons, the specific data requested by the Department is not easily accessible or available to provide to the Department without significant cost both in expense and resources.

Potential Sources of Data

In recent years, SIFMA has begun a joint research project maintained by the Investment Company Institute called The IRA Investor Database™. This database includes certain account-level information on more than 10 million IRA investors; however, this database has certain limitations in the scope of the information. ICI submitted a recent letter to the Department explaining the database and those limitations, as well as the wealth of information that can be found within this database. We would encourage the Department to take a look at the material and reports prepared by the ICI in reliance on the database.

Data Retained in Database Format

We continue to work with our members to find information that is kept in database format, common across firms and could be manipulated for data analysis by the Department. Once we determine what information is kept in database format and is accessible across multiple organizations with common sourcing or titling, we will still have challenges regarding the aggregation of this data, the potential format of the data and the scope of the data request (timeframe, etc.).

To that end, we have found common ground among our members in their daily trade blotters which include the amount of assets being bought or sold on a particular day, the price it is being sold at that day, the quantity and the trade date. Some firms have additional information, including CUSIP and commission; however, it appears that most firms hold that additional information on a different blotter, or in a different database that does not necessarily cross with the main daily trade blotter. As a result, the clear common categories we have identified are:

- An account number[2]
- A buy/sell order
- A price
- Quantity
- Trade date
- Ticker Symbol

[2] All account numbers would need to be masked before any data could be provided.

Please note that while these categories are common across most of our members who replied to this survey for data available in electronic form, the time frame over which the data is so maintained does not uniformly extend to the 10-year period the Department contemplated in its data request. There may be a handful of additional categories that multiple firms have in common; however, of the additional 226 categories identified, the same category did not appear on more than five firms' blotters. It is possible that some of the categories identified the same type of information but utilized different naming conventions; however, we were unable to make that differentiation in the short timeframe provided.

Even if the account information can be aggregated and provided to the Department in a format that would be practical for analysis and not overly costly and burdensome for the industry, we would like to understand the methodology the Department would use. We sincerely believe the Department has now correctly decided that before proposing a potentially costly and disruptive change to the definition of "fiduciary" under ERISA, it needs to undertake a thoughtful analysis to determine what the costs and benefits of any proposed changes and potential alternatives will be. Furthermore, some of our members question the timing and motivation behind this data request, which, when added to recent public statements by senior officials at the Department (e.g., "I didn't anticipate there would be an entire industry that without a statutory basis think they are above the law") raises concerns that, rather than undertaking an unbiased analysis, the Department merely is seeking to opportunistically pick amongst terabytes of data to provide a justification for changes it long ago decided to make.

Accordingly, we truly need to understand the Department's analytical framework and methodology before moving forward with a possible large-scale undertaking. Knowledge of the intended analysis could also inform the data points that would be useful to the Departments analysis. Having this information would also provide us an opportunity to work with the Department on its data request so that any information we agreed to provide would be directly related to the Department meeting its stated goal.

The SIFMA Oliver Wyman Study[3]

In October 2010 SIFMA and Oliver Wyman submitted a study to the U.S. Securities and Exchange Commission (SEC) on the impact of implementing a harmonized fiduciary standard of conduct, which is attached. The study is also available at http://www.sifma.org/issues/item.aspx?id=21999. On November 17, 2010, SIFMA made a supplemental submission to the SEC to address the methodology of the study and the robustness of the data, among other things. The supplemental submission is available at http://www.sifma.org/issues/item.aspx?id=22336.

A key concern for the securities industry in implementing a harmonized fiduciary standard is how to better protect investors while preserving their choice of relationship, product access, and affordability of advisory services. The key insight from the SIFMA /Oliver Wyman study is that broker-dealers play a critical role in the financial services industry that cannot be easily replicated with alternative services models. Wholesale adoption of the Investment Advisers Act

[3] Please note that this Oliver Wyman Study is distinct from a later study coordinated by the Davis & Harman law firm, not commissioned by SIFMA, focused on the Department's change to the definition of fiduciary and submitted to the Department on April 12, 2011.

of 1940 for all brokerage activity is likely to have a negative impact on consumers (particularly smaller investors) across each of the following dimensions: choice, product access, and affordability of advisory services. Oliver Wyman collected data from a broad selection of retail brokerage firms to assess the impact of significant changes to the existing standard of conduct for broker-dealers and investment advisers.

We are currently investigating the ability to provide the Department with certain underlying data relating to this study. While certain data may no longer be accessible, certain other data may still be available. We will let you know as soon as we have identified the underlying information from that study that is still available.

Conclusion

As the Department determines the utility of the particular information that current systems might capture and whether such a survey will assist the Department in determining the merits of any proposed rule, it is important to note that systems generally capture facts at a particular point in time, and not the conversation between the parties or the sophistication of the client, its guidelines, its risk parameters, *etc.* Investment ideas appropriately provided to a person at age 50 will be entirely different than those given to that same person at age 70. Investment ideas appropriately provided to an owner of a $50,000 IRA with no other investible assets are different from those given to an IRA owner of a $50,000 IRA with a significant 401(k) plan balance, a pension from a defined benefit plan, and substantial other assets. None of this context would be evident from the information the Department has requested.

We would also like to suggest that if the Department would share its work plan for the study with industry consultants and member firm IT personnel, together the parties might be able to identify a subset of data that would allow the Department to more quickly and economically achieve its goals.

We are committed to working with the Department to provide useful information for its economic impact analysis. We believe a mutually cooperative working environment between the Department, the trade organizations and our member firms is essential to ensure that any reproposal of the definition of "fiduciary" both sufficiently protects investors and can be implemented by those in the financial services industry without interrupting their ability to help those same investors make critical retirement decisions.

Please contact any of the undersigned if we can be of further assistance. In order to avoid potential timing issues associated with mailing correspondence, we provide our email addresses below, which we request you use in the future.

Sincerely,

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