

MEMO# 14947

July 22, 2002

INSTITUTE TESTIFIES AT ERISA ADVISORY COUNCIL MEETING ON ORPHAN PLANS

[14947] July 22, 2002 TO: PENSION COMMITTEE No. 27-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 47-02 RE: INSTITUTE TESTIFIES AT ERISA ADVISORY COUNCIL MEETING ON ORPHAN PLANS The Institute recently testified at a meeting of the ERISA Advisory Council's Working Group on Orphan Plans.¹ The Working Group, which is currently studying these plans, held the meeting to address various aspects of the orphan plan problem, including the magnitude of the problem, major concerns that arise from these plans, and possible approaches to resolving such issues. Other witnesses that testified at the meeting were representatives from the Department of Labor, the Internal Revenue Service, Fidelity Investments, T. Rowe Price, the American Council of Life Insurers, Millennium Trust Company, and Consulting Fiduciaries, Inc.² A copy of the Institute's testimony is attached. The Institute's testimony generally described "orphan" or "abandoned" plans as those for which there is no longer an employer or other plan fiduciary to administer the plan or authorize distributions to participants. The testimony noted that Institute members may discover that a plan has been orphaned under a variety of circumstances, and generally observe that there do not appear to be a large number of orphan plans. A large segment of members, however, do report that they are dealing with such plans and that the issues raised by them cause significant legal and practical difficulties. Furthermore, as prototype plans are being amended for "GUST," it is very likely that additional orphan plans will be discovered. The testimony also identified a number of significant issues raised by orphan plans. First, because Institute members generally do not act in a fiduciary capacity with respect to retirement plans, they are not authorized to make distributions to orphan plan participants in the absence of direction from a plan fiduciary. Second, fund companies often lack the necessary

¹ The ERISA Advisory Council, established by section 512 of ERISA, consists of representatives appointed by the Secretary of Labor to advise and develop policy recommendations with respect to the implementation of ERISA. ² The following individuals testified on behalf of their respective organizations: Virginia Smith, Director of Enforcement, Pension and Welfare Benefits Administration, DOL; Joyce Kahn, Manager, Employee Plans Voluntary Compliance, IRS; Gary Yerke, Associate General Counsel, Fidelity Investments; Regina Pizzonia, Vice President and Associate Legal Counsel, T. Rowe Price; Sanford Koepfel, Vice President, Legislative and Regulatory Affairs, Prudential Insurance Company of America, who testified on behalf of the American Council of Life Insurers; James Boyd, Millennium Trust Company; and David Heald, Consulting Fiduciaries, Inc. 2 plan and participant information to even ascertain whether a distribution would be appropriate for a particular individual. Third, orphan plans often have qualification and other regulatory defects because plan fiduciaries have been unavailable to maintain the plans. In light of the

legal and practical issues raised by these plans, the Institute's testimony suggested that DOL and the IRS jointly work towards developing a program along the following broad guidelines. Under the program, plan service providers could follow one of two approaches at their option. First, service providers voluntarily could make distributions to orphan plan participants to the extent that they have sufficient information concerning the plan, participants, accrued benefits, and other relevant information. By following the program's specified guidelines, the service provider's actions would be nondiscretionary in nature, and thus, would not give rise to fiduciary status under Title I of ERISA. Alternatively, the plan service provider could submit the available information relating to an orphan plan to a government-established clearinghouse. The government entity could then "bundle" such plans and seek an independent fiduciary to authorize distributions. The testimony further recommended that to the extent that the program builds upon DOL's current orphan plan efforts operated through its regional offices, DOL should develop uniform, publicly available guidelines that will (1) facilitate the referral of orphan plans to DOL without imposing burdensome requirements on providers, and (2) expedite the delivery of distributions to participants. Finally, the program would address an orphan plan's qualification deficiencies under the Internal Revenue Code in a manner that does not penalize participants for the absence of the plan sponsor. Additionally, the testimony noted that the Institute would be interested in exploring other approaches to addressing the orphan plan problem as well. Any such program, however, should be based on the following policy objectives. First, the program should emphasize the efficient delivery of distributions to orphan plan participants. Second, to the extent that service providers are permitted to deliver distributions under the program, program rules should reduce potential liability for such activities, refrain from imposing requirements that fall outside the scope of their duties as service providers, and account for the diverse factual situations encountered by them, including the varying degrees to which plan and participant information is available to them. Third, the program should minimize the administrative costs of the program. Finally, the testimony noted that legislative clarification in the context of orphan plans in bankruptcy, such as legislation providing that a bankruptcy trustee's duty includes the authorization of distributions to participants, would be helpful. Thomas T. Kim Associate Counsel Attachment Attachment (in .pdf format) 3