The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

COMMENT LETTER

December 9, 1998

Comment Letter on DoL Proposed Benefit Plan Claims Procedures, December 1998

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Office of Regulations and Interpretations
Pension and Welfare Benefits Administration
U.S. Department of Labor
200 Constitution Avenue. N.W.
Room N-5669
Washington, DC 20210

Attn: Benefits Claims Regulation

Ladies and Gentlemen:

On behalf of its mutual fund members, the Investment Company Institute1 (the "Institute") respectfully submits the following comments concerning the proposed regulation revising the minimum requirements for benefit claims procedures of employee benefit plans covered by Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). In addition to providing mutual fund products to retirement plans, many Institute members provide a variety of nondiscretionary recordkeeping and other administrative services to retirement plans. These services, which are described in more detail below, include the provision of information to and the processing of instructions received from plan participants, typically in participant-directed plans, such as 401(k) plans.

As a preliminary matter, the Institute questions the need to revise the current claims procedure regulation as applied to retirement plans. The requested clarifications discussed below, we believe, arise as a result of the Department's focus on health plans. Because the current regulation, like the legislative efforts that resulted in the passage of ERISA, was targeted primarily to retirement plans, the Department's current focus on health plans and their unique claims issues is entirely appropriate—especially in light of the fact, noted in the preamble to the proposed regulation, that the most dramatic changes since the current regulations were adopted have occurred in the health industry. With respect to retirement plans, however, the current claims procedures have worked and continue to work well. Changing these regulations as applied to retirement plans to reflect concerns unique to health plan claims would merely reverse the problem that the Department is trying to rectify.2 This needless change in the rules would come at great cost to employers, plans

and participants—with little benefit.3

The nature of the benefit provided by a health plan, of course, is substantially different from the benefit provided by a retirement plan. Health plan claims involve the provision of medical services. If a health plan claim is denied, the service frequently is not provided—and redress at a later date may be impossible. Because such claims might not be fairly resolved by the payment of money to a participant at a later date, there is some urgency to resolve these claims, including those that do not fall within the proposed regulation's "urgent care" definition, in a time frame that would enable meaningful redress of any wrongful denial of benefit. On the other hand, retirement plan claims always involve money, and can be adequately and fairly settled by providing money at a later date.

Additionally, the concept of a "claim" is much broader in the health care context, because almost every step in the processing of health care requests, such as pre-authorization or pre-certification of coverage, involves a unique case-by-case determination. The utilization review process, for example, often involves detailed examination of a participant's personal medical history and consultation with his or her personal physician as well as other medical experts. Retirement plan claims, on the other hand, are strictly mechanical and rule oriented. For example, most retirement benefit payment determinations are based upon the application of a stated formula set forth in the plan and Internal Revenue Code limitations to historical factors regarding the participant, such as age, years of service, and earnings history or account balance, in order to produce the benefit.

Similarly, the vast majority of tasks performed by third-party recordkeepers, whether the processing of benefit claims or other plan-related processing, involve the mechanical application of mathematical rules and algorithms to information supplied by the plan sponsor or administrator, or by participants themselves. Indeed, as the Department notes in the regulation's preamble, most advances in the retirement plan industry have involved technological advances that have revolutionized systems of communication. Such advances, in turn, have increasingly mechanized the administration of retirement plans—making much processing activity truly automatic and nondiscretionary.

In light of the differences between health and retirement plans, the Institute believes that the current regulation should continue to apply to retirement plans. To the extent that the Department revises the regulation with respect to retirement plans, however, we request certain clarifications and changes.

In particular, we seek clarification that participant inquiries and instructions to plan recordkeepers do not constitute "benefit requests" described in the proposed regulation. In the alternative, we seek clarification that participant information requests and transactional instructions directed to third-party recordkeepers are not communications of benefit requests "reasonably calculated" to be brought to the attention of a person responsible for making benefit claims determinations. Second, we suggest that the five-day time frame set forth in the regulation, within which plan administrators must respond to inadequately filed claims, should be extended for retirement plans. Third, the Department should clarify that notices and information that must be provided under the five-day rule may be provided orally.

Each of these points is discussed below.

The Department Should Clarify That Participant Inquiries And Instructions To Entities Serving As Plan Recordkeepers Do Not Constitute "Benefit Requests" Described In The Proposed Regulation.

The proposed regulation would impose new requirements upon the plan administrator's receipt of a "benefit request" that failed to comply with the requirements of the plan's procedures for making a claim. Additional rules would apply to a "claim for benefits." These terms are not clearly defined, but presumably requests and claims for a "benefit" under a plan follow from the purpose of the plan. Thus, under Section 3(2)(A) of ERISA, an employee benefit } plan is an "employee pension benefit plan" or a "pension plan" if it "(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." It follows that the "benefit" provided by such a plan is the payment of retirement income or of income deferred under the plan. The Department should clarify that, with respect to retirement plans, the terms "benefit request" and "claim for benefits" refer to requests and claims for retirement income under a retirement plan, and not to ancillary features that the plan may offer.

As noted above, the nondiscretionary recordkeeping and administrative services that Institute members typically provide to retirement plan participants fall into two broad categories: the provision of information to participants upon their request and the receipt and processing of transactional requests received from participants. These activities occur through various media, including the fielding of telephone calls, via the mail and facsimile transmissions, via automated voice-response units (VRUs) 24 hours a day, and, increasingly, via intranet and internet web sites. The Department should clarify that participant requests for information and their transactional instructions to recordkeepers are neither "benefit requests" nor "claims for benefits."

With respect to the first category, a participant, for instance, may contact the third-party recordkeeper either to request general plan information, such as whether the plan permits loans and how frequently the plan permits asset reallocation, or to request basic information relating to the participant's own individual account in the plan, such as the account balance and current asset allocation among plan investment options, amounts remaining due on a plan loan, the availability of amounts for loan, or the amount of employer contributions currently vested.

The second category of participant activity—transactional instruction—would include, for example, the following instructions: reallocating individual account assets among the plan's investment options, changing a salary deferral election percentage or its allocation among investment options, or initiating the processing of a loan.

Neither of these categories of participant activities involves a request for the payment of retirement or deferred income, and therefore neither constitutes a type of benefit request. [4] We therefore request that the Department confirm this analysis either in the final regulation or in its preamble.

Alternatively, The Department Should Clarify That Such Participant Activity Does Not Constitute A Communication Reasonably Calculated To Bring A Benefit Request To The Attention Of Persons Responsible For True Benefit Claim Decisions.

Even if the participant activities described above were considered to be "benefit requests," the Department should clarify that such requests would not trigger the application of the proposed regulation, because they would not be communicated in a manner that satisfies the regulatory standard. Specifically, under paragraph (b)(6) of the proposed regulation, a benefit request is not deemed received by the plan unless a claimant or his or her representative[5] "makes a communication reasonably calculated to bring the request to the attention of persons responsible for benefit claim decisions." As noted above, many retirement plan participants have access to plan recordkeepers' automated VRU systems or web sites, as well as telephone representatives. The Department should clarify that such contacts do not trigger its requirements.

In the case of automated systems, plan participants can accomplish a number of inquiries and transactions without any actual contact with or notification to a person. Under paragraph (b)(6) of the proposed regulation as currently drafted, it appears that such contacts would be not reasonably calculated to bring any kind of request to any person. We support this approach, but recommend that the Department specifically address automated systems in the preamble to the final regulation and clarify that they do not trigger the procedures set forth in the regulation.

In the case of inquiries and transactions that participants conduct via contact with a "live" telephone representative of the third party recordkeeper, the Department similarly should clarify that such inquiries and transactions are not communications reasonably calculated to bring the request to the attention of persons responsible for benefit claim decisions. Recordkeepers, as we have described, do not make—and have no authority to make—"benefit claim decisions." Indeed, under such arrangements, the plan fiduciaries have provided the recordkeeper no authority to do anything but automated processing under prescribed rules. Because the recordkeeper is merely applying nondiscretionary and mechanical rules prescribed by the plan fiduciaries, any issues involving the appropriateness of the rules and the recordkeeper's mechanical application of them must be addressed to these fiduciaries. Under such arrangements, no participant communication to the recordkeeper should be deemed "reasonably calculated to bring the request to the attention of persons responsible for benefit claim decisions." The Institute requests that the Department clarify this point in the final regulation or its preamble.

The Five-Day Period For Notifying A Participant Of His Or Her Failure To Comply With The Plan's Claims Procedure Should Be Extended For Retirement Plans.

Paragraph (b)(6) of the proposed regulation would provide that the plan administrator, within five days of receipt of a request for benefits that does not comply with the plan's claims procedures, (1) must notify the participant that the request does not comply; and (2) must describe the plan's procedures. The preamble to the proposed regulation states that

this requirement "would ensure that no reasonable attempt to file a claim could be ignored by a plan for failure to meet some aspect of the filing process set up by the plan, but would also preserve the integrity of those procedures."

The Institute submits that it is unnecessary to apply this short time frame to retirement plan claims. As noted at the outset of this comment letter, retirement plan claims differ from health care- related claims. For health plan claims, time frequently may be of the essence; retirement plan claims, however, do not require similar rapid response. To implement a five-day notice requirement will be administratively burdensome and, indeed, unfeasible for many plan administrators in light of current practices, standards and staffing levels. The Institute recommends that this time period be extended to thirty days for retirement plans.

Plan Administrators Should Be Explicitly Permitted To Provide This Notification Orally.

Under paragraph (b)(2) of the proposed regulation, a claims procedure would not be deemed reasonable unless, among other things, a description of all claims procedures and the applicable time frames is included in the plan's summary plan description (SPD). Because participants have available to them a full description of claims procedures, it should be deemed sufficient for the plan administrator to orally inform plan participants who do not comply with the claims procedure that (1) the request does not comply; (2) the claims procedure can be found in the plan's SPD; and (3) the SPD is available at a particular location, including a web site. The Institute submits that the final regulation or the preamble thereto should specifically permit such oral notification.

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The Institute appreciates this opportunity to provide information and recommend changes concerning these important aspects of plan administration. Please contact me at 202/326-5835 if we can provide further information.

Sincerely,

Russell G. Galer

cc: Robert J. Doyle
Susan G. Lahne
Jeffrey J. Turner

ENDNOTES

1 The Investment Company Institute is the national association of the American investment company industry. Its membership includes 7,335 open-end investment companies ("mutual funds"), 451 closed-end investment companies, and 9 sponsors of unit investment trusts. Its mutual fund members have assets of about $4.837 trillion, accounting for approximately 95% of total industry assets, and have over 62 million individual shareholders.

2 Thus, we disagree with the statement in the preamble that suggests a uniform claim and appeals procedure for all employee benefit plans is desirable. Indeed, much of the Department's proposed regulation establishes different procedures and time frames for

certain health care claims, such as those involving urgent care. In fact, uniformity should not be a goal, because claims in the health and retirement plan contexts are very different.

3 The economic analysis of the cost of the regulation in the preamble indicates that the proposed regulation imposes significant costs on retirement plans, especially small employer plans. The benefits of the proposed regulation, however, are related to health plans—not retirement plans.

4 Existing case law concerning claims for benefits under ERISA Section 503 provides support for this analysis. For example, in Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir.), cert. denied, 459 U.S. 1039 (1982), the Second Circuit held that a denial of a particular method of payment does not constitute a denial of a claim for benefits for purposes of Ssection 503 of ERISA. See also Clarke v. Bank of New York, 687 F. Supp. 863 (S.D.N.Y. 1988) (section 503 of ERISA is not applicable to a denial of a specific rate of return on an investment). In addition, in the Internal Revenue Code context, certain aspects of plans are described as "other rights and features" rather than benefits, for which, by extension, a "claim for benefits"—by definition—could not be made. These include: (1) plan loan provisions (other than those relating to a distribution of an employee’s accrued benefit upon default under a loan); (2) the right to direct investments; and (3) the right to a particular form of investment. Treas. Reg. 1.401(a)(4)-4(e)(3).

5 Paragraphs (a) and (b)(5) of the proposed regulation specifically would permit representatives to act on behalf of the claimant. The Institute recommends that the final regulation include a definition of the term "representative" that limits such representatives in the pension plan context to certain recognized types of representatives generally authorized to make benefit requests on behalf of participants, such as attorneys and accountants, so that plan administrators can be assured that contacts with other persons (e.g., the participant’s broker) would not constitute "benefit requests" or "claims."
