REISH & REICHER
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
11755 WILSHIRE BOULEVARD
10TH FLOOR
LOS ANGELES, CALIFORNIA 90025-1539
TELEPHONE (310) 478-5656
FACSIMILE (310) 478-5831

www.reish.com
fredreish@reish.com

BRUCE L. ASHTON
HEATHER BADER-ABRIGO
MARC L. BENEZRA
PASCAL BENYAMINI
SUMMER CONLEY
JOSEPH C. FAUCHER
STEPHEN I. HALPER
MARTIN M. HEMING
JONATHAN A. KARP
MEENA P. KOTAK
JEFFREY D. LEWIS**

LELAND J. REICHER
C. FREDERICK REISH*
RYAN R. SALSIG
MARK E. TERMAN*
RYAN C. TZENG
MICHAEL A. VANIC
GARY A. WEXLER

OF COUNSEL
ADAM M. COHEN
STEPHEN P. WILKES

*ALSO ADMITTED IN DC
**ALSO ADMITTED IN MT

February 7, 2011

00022-000(11)

VIA ELECTRONIC MAIL - e-ORI@dol.gov
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5655
Washington, DC 20210

Re: **Definition of Fiduciary Proposed Rule**

Dear Sir/Madam:

We are writing to you to provide comments on the Definition of Fiduciary Proposed Rule published at 75 Fed. Reg. 65263 on October 22, 2010 (the "Proposed Rule").

Specifically, we are requesting the addition of a limitation for individually directed brokerage accounts (IDAs) (i) inside IRAs (*i.e.*, individual retirement annuities and accounts) and (ii) where offered as a service by 401(k) and other ERISA-governed and/or tax-qualified participant-directed plans.

It is common for IRAs to be invested through individually directed brokerage accounts; in fact, there are millions of such accounts.[1] Furthermore, 401(k) plans frequently offer participant-directed brokerage accounts as a feature of their plans. These IDAs offer thousands of investment choices; as a result, the assistance of a knowledgeable adviser is important for informed decisions about asset allocation and investment selection (and monitoring). However, the Proposed Rule on the definition of fiduciary investment advice would effectively preclude that advice for most IRAs (other than the largest, who may be served by Registered Investment Advisers, "RIAs"), because of the variable commissions (*i.e.*, compensation) and payments from third parties (*e.g.*, 12b-1 fees from mutual funds) received by broker-dealers as compensation for their services. In effect, fiduciary status would result in prohibited transactions in those cases

[1] The U.S. Retirement Market, Second Quarter 2010, Investment Company Institute.

(under ERISA §406(b) and section 4975(c)(1)(E) and (F) of the Internal Revenue Code). On the other hand, the Department is appropriately concerned about the potential for abuse where conflicted advice can increase the compensation of an adviser.

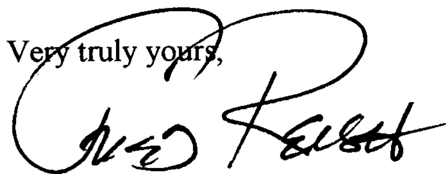
Accordingly, we request the addition of a regulatory limitation, under these circumstances, if the following conditions are satisfied:

- Conflict of interest disclosures similar to those imposed on registered investment advisory entities (*e.g.*, see Form ADV Part 2) are required.
- The IRA owner (or the affected 401(k) participant) is notified in writing that the IDA includes investments that provide compensation to the adviser and that the compensation varies from investment to investment (and may, in addition, vary due to other factors, such as the total amount invested and the frequency of investment changes).
- The ability of the adviser to affect its own compensation is a potential conflict of interest.
- The IRA owner or 401(k) participant is advised in writing to carefully monitor his account activity for these reasons.

We are aware of the exemptive relief provided by Prohibited Transaction Class Exemption 86-128. However, the PTCE is deficient in several regards. First, the conditions imposed on ERISA-governed plans are so burdensome that the exemption is, as a practical matter, not available. Secondly, the PTCE applies to "fees" and, as a result, it may not apply to the myriad forms of compensation paid through brokerage accounts. However, if the conditions for IDAs were the same as for IRAs, and if "fees" were redefined as "compensation," the PTCE could provide effective relief from most of the issues raised in this comment letter.

Thank you for your consideration.

Very truly yours,



C. FREDERICK REISH

CFR:shm