



*Filed Electronically  
Via e-ORI@dol.gov*

October 17, 2008

Office of Regulation and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

Attention: Hearing on Class Exemption and Proposed Regulation  
for the Provision of Investment Advice

To Whom It May Concern:

AARP requests the opportunity to testify at the public hearing on October 21, 2008, on the Class Exemption and Proposed Regulation for the Provision of Investment Advice.

In issuing an exemption from ERISA's prohibited transactions, the Secretary may not grant such an exemption unless it is (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries. 29 U.S.C. § 1108(a). Having reviewed the comments, AARP submits that the record is insufficient to permit the Department to make the necessary findings in favor of subsections (2) & (3) above.

AARP will discuss the reasons the Class Exemption is neither in the interests of participants and beneficiaries nor protective of their rights. In particular, AARP will discuss the following:

1. Investment for retirement is different from personal investment because of the tax expenditures and the long-term horizon.
2. Increasing access to investment advice for individual account plan participants, alone, is not enough for a finding that this Class Exemption is in the interests of the plan and its participants. Plan participants must receive investment advice from independent and

well-trained advisors. Thus the Class Exemption should ensure that participants are protected from conflicted advice as much as possible.

3. The plain language of the investment advice provisions of the Pension Protection Act along with its legislative history demonstrates that the proposed Class Exemption exceeds the scope of the hard-fought compromise reached by Congress.
4. By excluding certain affiliates of an advisor from the requirements of fee-leveling, the Class Exemption goes well beyond the statutory exemption, and undermines the Pension Protection Act's fee-leveling requirement. This direct contradiction of the statute exceeds the Secretary's authority on this issue. *Cf. Chevron USA, Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984) (where the intent of Congress is clear, an agency must give effect to that intent).
5. By ignoring incentives other than direct compensation, the Class Exemption ignores how advisors and their affiliates are incentivized to provide advice and sell products. Whether it is through direct or indirect payments, the end game is the same, and the Exemption permits practices well beyond those permitted by Congressional. It will make it difficult to enforce the exemption. Most importantly, advisors and affiliates can easily circumvent the restriction, and participants are left with no remedy for excessive fees in connection with the receipt of investment advice and the investment products chosen.
6. Research shows that financial illiteracy is widespread among the general population and particularly acute among certain groups. A. Lusardi, *Household Saving Behavior: The Role of Financial Literacy, Information, and Financial Education Programs* (February 2008), at <http://www.nber.org/papers/w13824>. Those participants who have low financial literacy believe that the financial services industry intentionally uses jargon to confuse and intimidate investors. *Americans are Befuddled by Financial Jargon*, [http://moneysmarts.com/survey/survey\\_befuddled.cfm](http://moneysmarts.com/survey/survey_befuddled.cfm). Although working with a financial advisor may help investors, sixty-three per cent of investors still do not know who to trust for financial advice. *The Simple Truth: Speak Plainly and They Will Come*, [http://moneysmarts.com/survey/survey\\_simpletruth.cfm](http://moneysmarts.com/survey/survey_simpletruth.cfm).
7. Given the difficulty in fashioning understandable disclosures, see *Comparison of 401(k) Participants' Understanding of Model Fee Disclosure Forms Developed by Department of Labor and AARP*

(September 2008),<sup>1</sup> the Class Exemption should not be finalized until a model form is vetted through testing.

8. In the midst of the current financial environment, with economic uncertainty, wild market fluctuations, and financial firms teetering on bankruptcy, the underlying principle that financial advisors will always act solely in the best interests of individuals is certainly questionable.

AARP looks forward to the opportunity to present its views at the hearing on the Department's proposed regulation and Class Exemption concerning investment advice on October 21. Please do not hesitate to contact me at 202/434-3750 or Mary Ellen Signorille at 202/434-2072.

Sincerely,



David Certner  
Legislative Counsel and Legislative Policy Director  
Government Relations and Advocacy

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<sup>1</sup> Available at [http://www.aarp.org/research/financial/ira/fee\\_disclosure.html](http://www.aarp.org/research/financial/ira/fee_disclosure.html).