

October 6, 2008

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Investment Advice Class Exemption
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comment on Investment Advice Class Exemption

Ladies and Gentlemen:

The Certified Financial Planner Board of Standards, Inc. (CFP Board) appreciates the opportunity to comment on the proposed class exemption (Proposed Class Exemption) by the U.S. Department of Labor (Department) to provide an exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended (ERISA).¹ If granted, the Proposed Class Exemption would permit, among other things, the provision of investment advice described in section 3(21)(A)(ii) of ERISA by a fiduciary adviser (or any employee, agent, registered representative or affiliate thereof) to a participant or beneficiary in an individual account plan or individual retirement accounts (and certain similar plans).

We strongly support the intent of the Proposed Class Exemption to further the availability of individualized investment advice to both participants and beneficiaries in participant-directed individual account plans and IRA beneficiaries by extending the circumstances under which individualized advice can be provided. Our comments are set forth below.²

Background on CFP Board

CFP Board is a non-profit certifying and standards-setting body that establishes and enforces education, examination, experience and ethics requirements for financial planning professionals. The mission of CFP Board is to benefit the public by granting the CFP® certification and upholding it as the recognized standard of excellence for personal financial planning. CFP Board currently oversees more than 58,000 financial professionals who have met the initial and ongoing requirements for CFP® certification.

¹ See 73 FR 49924 (August 22, 2008).

² Our comments are focused on the Proposed Class Exemption because of the flexibility the Department has in granting class exemptions.



Support of the Intent of the Proposed Class Exemption

Consistent with the mission of CFP Board, one of the objectives of CFP Board is to increase the public's access to competent and ethical financial planning. As noted in the Department's release for the Proposed Class Exemption, there has been an increasing recognition of the importance of investment advice to participants and beneficiaries with the growth of participant-directed individual account plans.³ The Pension Protection Act of 2006 (PPA) was enacted in part to respond to the need to afford participants and beneficiaries in participant-directed individual account plans greater access to professional investment advice. Congress recognized that such persons are responsible for the investment of assets in their individual accounts and, accordingly, for the adequacy of their retirement savings.⁴ CFP Board strongly supports this policy goal, and notes that there is a critical need to provide such persons with access to competent, professional, and ethical investment advice. By furthering the availability of individualized investment advice to such persons, the Proposed Class Exemption is consistent with this goal and CFP Board's overarching mission to serve the public interest.

Support of the Disclosure Requirements in the Proposed Class Exemption

As part of the CFP[®] certification process and the terms and conditions imposed upon certificants, CFP Board maintains *Standards of Professional Conduct*, a set of professional standards necessary for competency in the financial planning profession. In particular, CFP Board has adopted a *Code of Ethics and Professional Responsibility (Code of Ethics)*, which identifies the ethical principles certificants should meet in all of their professional activities. CFP Board also has adopted *Rules of Conduct* to establish the standards and describe the level of professionalism required of certificants. Through these *Rules of Conduct*, CFP Board establishes binding professional norms that protect the public and advance the profession of financial planning.

CFP Board recently adopted an updated *Standards of Professional Conduct* that became effective on July 1, 2008. The revised standards are intended to benefit the public by clarifying and strengthening the ethical standards for CFP[®] professionals. Included in the revised standards is a new duty of care that requires CFP[®] professionals to act in a fiduciary manner when providing financial planning services. (See Rule 1.4 of CFP Board's *Rules of Conduct* discussed below.) CFP Board upholds these *Standards* through a rigorous and consistent enforcement process and the imposition of *Disciplinary Rules and Procedures*, which include among other available sanctions revocation of a certificant's right to use the CFP[®] mark for violations of the *Rules of Conduct*.

The CFP Board's *Rules of Conduct* contain enhanced disclosure requirements for certificants that the CFP Board believes are similar to many of the disclosure requirements in the Proposed Class Exemption. In particular, CFP Board notes the following:

³ 73 FR at 49924.

⁴ Id.

- The requirement in paragraph (g)(1)(i) of Section III of the Proposed Class Exemption – to provide written notification of the role of any party that has a material affiliation or material contractual relationship with the fiduciary adviser in the development of the computer model or the educational materials and in the selection of investment options available under the plan – is similar to the disclosure requirements found in Rule 2.2 of CFP Board’s *Rules of Conduct*. For instance, under Rule 2.2(b), a certificant must disclose to clients or prospective clients a general summary of likely conflicts of interest between the client and the certificant, the certificant’s employer or any affiliates or third parties, including, but not limited to, information about any familial, contractual, or agency relationship of the certificant or the certificant’s employer that has a potential to affect materially the relationship between the client and the certificant.
- The requirement in paragraph (g)(1)(iii) of Section III of the Proposed Class Exemption – to provide to the participant or beneficiary written notification of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property – is similar to the disclosure requirement found in Rule 2.2(a) of CFP Board’s *Rules of Conduct*. Under this requirement, a certificant must disclose to clients or prospective clients an accurate and understandable description of the compensation arrangements being offered. This description must include (i) information related to costs and compensation to the certificant and/or the certificant’s employer, and (ii) terms under which the certificant and/or the certificant’s employer may receive any other sources of compensation, and if so, what the sources of such payments are and on what they are based.
- The requirement in paragraph (g)(1)(iv) of Section III of the Proposed Class Exemption – to provide written notification of any material affiliation or material contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property – is similar to the disclosure requirement found in Rule 2.2(b) of CFP Board’s *Rules of Conduct*. The requirement in Rule 2.2(b) is noted in the first bullet above.
- The requirement in paragraph (g)(1)(vi) of Section III of the Proposed Class Exemption – to provide written notification of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser – is similar to the disclosure requirement found in Rule 2.2(c) of CFP Board’s *Rules of Conduct*. Under this requirement, a certificant must disclose to clients or prospective clients any information about the certificant or the certificant’s employer that could reasonably be expected to affect materially the client’s decision to engage the certificant, and that the client might reasonably want to know in establishing the scope and nature of the relationship. This includes, but is not limited to, information about the certificant’s areas of expertise. A description of the type of service provided by a certificant may be considered information that could reasonably be expected to affect materially a client’s decision to engage the certificant.
- The requirement in paragraph (g)(1)(vii) of Section III of the Proposed Class Exemption – to provide written notification that the fiduciary adviser is acting as a fiduciary of the

plan in connection with the provision of the investment advice – is similar to the standards in Rules 2.2(c) and 1.4 of CFP Board’s *Rules of Conduct*. In Rule 2.2(c), a certificant must disclose to clients or prospective clients any information about the certificant or the certificant’s employer that could reasonably be expected to affect materially the client’s decision to engage the certificant that the client might reasonably want to know in establishing the scope and nature of the relationship. To whom the certificant owes a duty is relevant information that could reasonably be expected to affect materially the client’s decision to engage the certificant. Under Rule 1.4, a certificant is required to, at all times, place the interest of the client ahead of his or her own. In addition, when the certificant provides financial planning or material elements of the financial planning process, the certificant owes to the client the duty of care of a fiduciary as defined by CFP Board.⁵

- The requirement in paragraph (g)(2)(i) of Section III of the Proposed Class Exemption – that the required notification be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant – is similar to the disclosure requirement found in Rule 2.2(e) of CFP Board’s *Rules of Conduct*. Under this requirement, the disclosures that Rule 2.2 requires must be in writing if the services include financial planning or material elements of the financial planning process. These disclosures may consist of multiple written documents, and may be satisfied by documents a certificant (or the certificant’s employer) is required to provide to clients under state and federal laws.
- The requirement in paragraph (g)(4) of Section III of the Proposed Class Exemption – that the fiduciary adviser provide accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information – is similar to a requirement found in Rule 2.2 of CFP Board’s *Rules of Conduct*. Under this requirement, a certificant must timely disclose to the client any material changes to the information required by Rule 2.2.
- The requirement in paragraph (h) of Section III of the Proposed Class Exemption – that the fiduciary adviser provide appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws – is similar to a requirement found in Rule 4.3 of CFP Board’s *Rules of Conduct*. Under this requirement, a certificant must be in compliance with applicable regulatory requirements governing professional services provided to the client.

CFP Board supports the disclosure requirements in the Proposed Class Exemption. As discussed above, most of the proposed disclosure requirements track similar requirements in CFP Board’s *Rules of Conduct* and consequently are followed by CFP® certificants. CFP Board has affirmatively embraced its disclosure requirements to protect the interests of the public and set high professional standards for the delivery of financial planning services. CFP Board believes

⁵ CFP Board defines “fiduciary” as one who acts in utmost good faith, in a manner he or she reasonably believes to be in the best interest of the client.

that the disclosure requirements contained in the Proposed Class Exemption will establish standards for providing individualized advice to plan participants and beneficiaries that will protect and serve their interests.

Suggested Changes to the Proposed Class Exemption

Computer-Generated Advice

CFP Board notes that the Proposed Class Exemption contains a limitation that hampers the ability of participants and beneficiaries to obtain professional investment advice. In this regard, paragraph (e)(1) of Section III requires a participant or beneficiary to be provided with investment recommendations generated by a computer model that meets the requirements of the PPA prior to being provided with other investment advice covered by the Proposed Class Exemption. CFP Board fails to understand why the furnishing of computer-generated advice in the manner set forth in the Proposed Class Exemption is necessary. If the Department is concerned about the objectivity of an individual providing investment advice as opposed to a computer model, CFP Board believes that the standards an individual adviser must meet under paragraphs (e)(3) and (e)(4) provide more than sufficient protection to the participant or beneficiary, and the limitation on the individual adviser's compensation in paragraph (f) will ensure that the advice given will not be influenced by the compensation the individual adviser may receive.

CFP Board also believes that providing participants and beneficiaries with computer model advice that recommends specific investments and then personal advice that may (or may not) recommend different investments will be confusing to the average participant or beneficiary and will interfere with the policy goal of providing understandable advice that participants and beneficiaries can use when deciding how to invest their assets. CFP Board notes that, while CFP certificants often use their own version of computer models in connection with providing investment advice, these computer models are often provided at the same time certificants are providing individualized investment advice and frequently convey information about general investment concepts but do not necessarily make specific investment recommendations to participants or beneficiaries. Accordingly, CFP Board believes that the Department should consider modifying paragraph (e)(1) in a manner such that it affords participants and beneficiaries greater access to professional investment advice by either eliminating the computer model requirement or modifying the requirements governing the content and time for delivery of the computer model.

Audit Requirement

CFP Board understands that the annual audit requirement in paragraph (j) of Section III of the Proposed Class Exemption is designed to ensure that fiduciary advisers comply with the Class Exemption. We are concerned, however, that the costs and burdens associated with the annual audit requirement, especially for smaller firms that act as fiduciary advisers to plans, will undermine the intent of the Class Exemption. There will be significant costs associated with finding and engaging an auditor that meets the proposed requirements. In addition, there will be significant burdens in the form of time spent on dealing with the annual audit and responding to requests by the auditor. These costs and burdens likely will place smaller firms at a competitive

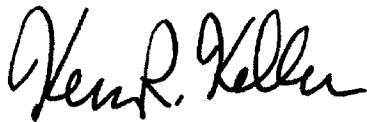
disadvantage to larger firms that provide such services. Because of these burdens, some smaller firms may choose not to participate in this market.

We believe that there other safeguards in place to ensure fiduciary advisers' compliance with the Proposed Class Exemption. Under paragraph (i) of Section III of the Proposed Class Exemption, a fiduciary adviser is required to adopt and follow written policies and procedures designed to assure compliance with the Proposed Class Exemption. This requirement, along with the fiduciary adviser's general fiduciary duty and the potential consequences the fiduciary adviser would face for non-compliance with the Proposed Class Exemption, will serve as an adequate check to ensure that the fiduciary adviser is complying with the Proposed Class Exemption. We therefore urge the Department to consider ways to lessen the burdens of the audit requirement particularly on smaller firms, such as by granting a complete exclusion for smaller firms, or by requiring smaller firms to conduct an audit once every three years rather than on an annual basis.

Conclusion

CFP Board appreciates the opportunity to comment on the Proposed Class Exemption. We strongly support the intent of the Proposed Class Exemption to further the availability of individual investment advice to participants and beneficiaries and we support the disclosure requirements, which generally track CFP Board's *Rules of Conduct*. We request that the Department consider changing the Proposed Class Exemption in the manner discussed above. We believe that these changes will increase the pool of persons providing investment advice under the Exemption, which in turn should benefit participants and beneficiaries in a manner consistent with the intent of the Exemption. CFP Board hopes the information it has provided is useful to the Department. If you should have any questions regarding CFP Board, the financial planners it certifies, or the CFP® marks, please contact Marilyn Mohrman-Gillis, Managing Director of Public Policy at 202-379-2235, or visit CFP Board's website at www.CFP.net.

Sincerely,

A handwritten signature in black ink that reads "Kevin R. Keller". The signature is written in a cursive, flowing style.

Kevin R. Keller, CAE
Chief Executive Officer