

January 30, 2007

Filed Electronically

Robert Doyle  
Director  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5669  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Prohibited Transaction Exemption for Provision of Investment Advice to Participants in Individual Account Plans. 71 Fed. Reg. 70, 429 (Dec. 4, 2006) RIN 1210-AB13

Dear Mr. Doyle,

The Society for Human Resource Management (SHRM) appreciates the opportunity to respond to the Department of Labor's Request for Information on the new prohibited transaction exemptions for investment advice provided to participants in individual account plans. The exemptions were added by the Pension Protection Act of 2006 (PPA).

SHRM is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available to advance the human resource profession and to ensure that HR is recognized as an essential partner in developing and executing organizational strategies. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

SHRM would like to start by applauding the Department for taking the first steps towards issuing guidance that clarifies and expands upon the new prohibited transaction exemptions for investment advice. SHRM strongly believes that participants in 401(k), 403 (b), and other individual account plans need access to high-quality investment advice. Employees are increasingly responsible for investing their own retirement assets, yet many participants lack the knowledge necessary to make prudent investment decisions. Even participants who are relatively knowledgeable may lack the time to make and update investment decisions in a well-informed manner and it is essential that the Department issue guidance that facilitates investment advice arrangements.

Investment Advice Generally

As a threshold matter, SHRM believes that participants should have access to a broad range of different investment advice approaches. The new PPA prohibited transaction exemptions facilitate advice arrangements which either (i) provide that any fees (including any commission or other compensation) received by the fiduciary adviser do not vary depending on the

investment option selected, or (ii) use a computer model that meets certain requirements. However, these exemptions are needed only where the fiduciary adviser is a party-in-interest with respect to the plan (or is affiliated with a party-in-interest) and therefore has a potential conflict of interest (“affiliated advice”). There are a number of investment advice approaches that do not raise these prohibited transaction concerns because the investment adviser is not a party-in-interest or otherwise affiliated with a party-in-interest. These approaches range from investment advice arrangements with advisers that have no other nexus to the plan to arrangements that are crafted to rely on Advisory Opinion 2001-09A (the “SunAmerica Letter”). We have some concern that the new prohibited transaction exemptions will come to dominate the investment advice arena if only because there will be substantial guidance on the contours of the new exemptions. It is imperative that any guidance the Department issues not encourage a “one size fits all” approach to investment advice. For this reason, it is important that the Department clarify and confirm that there are a range of different approaches that plan sponsors may pursue for providing investment advice to participants. As importantly, the Department should address the remaining issues that arise for non-affiliated investment advice and foster the development of these programs as well.

It is also essential that the Department clarify a plan sponsor’s fiduciary responsibilities in selecting an investment advice arrangement. The new PPA prohibited transaction exemption provides that the plan sponsor or other fiduciary has no fiduciary responsibility for advice provided pursuant to one of the new PPA investment advice exemptions (and does not have to monitor any specific advice). Instead, the plan sponsor has limited responsibility “for the prudent selection and periodic review of a fiduciary adviser.” There is no guidance directly addressing a plan sponsor’s fiduciary responsibilities with respect to investment advice outside of the PPA exemption context. We urge the Department to clarify that these same standards also apply to non-affiliated advice arrangements. Without this clarification, many common approaches to investment advice will be unattractive to plan sponsors solely because of uncertainty regarding the sponsor’s fiduciary role with respect to the arrangement.

SHRM recommends that the Department clarify the guidance related to fiduciary considerations in selecting an investment adviser. It is critical that the Department not create an inference that there is a fiduciary bias against affiliated investment advice. Some plan sponsors will want to be able to hire an affiliated adviser, e.g., as part of a bundled services arrangements. Others will choose to go with an unaffiliated adviser. There should be no inference that an independent third-party adviser is preferable to an affiliated adviser that satisfies a PPA prohibited transaction exemption. The conditions of the exemption are intended to ensure that the advice will not be conflicted advice and sponsors should be able to assume that this will not be the case. For these reasons, any guidance should clarify that a plan sponsor or other fiduciary need not consider potential conflicts of interest beyond assuring that the advice program will satisfy a PPA prohibited transaction exemption.

SHRM also recommends that any failure by a fiduciary adviser to satisfy the terms of the exemption does not adversely affect the plan sponsor’s fiduciary relief. Although the PPA clarifies the plan sponsor’s fiduciary responsibilities in selecting an investment advice arrangement, the PPA imposes a number of conditions in order to rely upon the exemptions. Many of these conditions are within the sole control of the fiduciary adviser, e.g., bad disclosure.

Although the sponsor has a fiduciary duty to monitor the arrangement, a failure attributable to the fiduciary adviser should not adversely affect the plan sponsor's fiduciary relief.

### Disclosure of Fee Information

SHRM strongly supports the meaningful disclosure of individual account plan fee information, including wrap fees and revenue-sharing fees. It is essential that plan sponsors and plan participants have accurate and transparent information regarding the fees in a plan, particularly any fees that are embedded in a plan's investment options. Fee transparency is an issue where a plan offers participants access to an investment advice arrangement as well as where a plan does not offer such an arrangement. SHRM understands that the Department is actively working on guidance on fee disclosure that will have an application beyond the advice context and we are encouraged by the prospect of enhanced disclosure across all individual account plans subject to Title I of ERISA.

Pending issuance of broader guidance on appropriate disclosure of plan fee information, any guidance issued by the Department on fees in the context of investment advice will be important both on its own and because it will be a touchstone for fee disclosure generally. SHRM believes that disclosure is most meaningful for the vast majority of plan participants when that disclosure expresses fees in dollar amounts. To date, much of the fee disclosure has been made in terms of "basis points" and percentages; however, this form of disclosure is abstract and often difficult for participants to evaluate and understand. In addition, it is critical that any fee disclosure reflect and highlight the impact of fees over time. Investment fees may seem modest in the near term but over time may have a dramatic effect in terms of reduced retirement savings. For this reason, it is important that any fee disclosure capture the effect fees having over time, e.g., over a 10-year period. Moreover, the Department should consider approaches that will ensure that fee disclosure is standardized among providers to ensure that participants can easily make an "apples-to-apples" comparison.

Although fee disclosure is an issue of importance for individual account plans generally, there are a number of unique issues associated with fee disclosure regarding investment advice arrangements. At a minimum, any investment advice fee disclosure must coordinate disclosure under general fiduciary standards with the specific disclosure needed to satisfy the conditions of the PPA prohibited transaction exemptions. It is critical that participants understand both the fees under the plan without the investment advice and the fees if the participant elects to utilize the investment advice arrangement. This is necessary to allow participants to evaluate the cost of the advice. Part of this disclosure is providing clear information regarding the extent to which any fees will be offset or leveled against other fees, for example, where investment management fees are offset against investment advice fees.

Central to fee disclosure regarding advice arrangements is ensuring that any disclosure explains the services that are being provided in exchange for the fees. Many investment advice arrangements effectively include two components: one that provides advice to the participant and one that implements that advice and rebalances a participant's account in accordance with those recommendations. For the former, it may make more sense for fees to be charged on a flat dollar basis. However, most managed account options that provide ongoing rebalancing and

management charge based on a percentage of a participant's account. One important function that fee disclosure can serve is to identify the cost of these two functions separately so that participants can reasonably determine whether a particular service is worth the cost.

An issue in the context of affiliated investment advice that is not fee leveled is the extent to which fee disclosure should highlight or otherwise illustrate potential conflicts of interest. In this regard, an affiliated investment adviser may receive additional investment management and/or revenue-sharing payments in connection with the investment advice. However, the very premise of the prohibited transaction exemption for computer-based advice is that this potential conflict is neutralized by the use of an audited and independently certified computer program. Moreover, the PPA requires disclosure of these potential conflicts of interest. As a result, we believe that the plan sponsor or other fiduciary should not be required to provide a numeric disclosure of the total fees paid to a fiduciary adviser in connection with the investment advice. Instead, we believe it is sufficient for the advice disclosure to highlight that the advice may cause the fiduciary adviser to receive additional compensation under the investment funds, including investment management fees and/or revenue-sharing fees. Such disclosure will complement existing disclosures regarding the fees paid in connection with the underlying investment options.

We also note that we see little reason that investment advice fee disclosure should be limited to investment advice arrangements that satisfy one of the new PPA prohibited transaction exemptions. Fee disclosure is essential to all investment advice arrangements without regard to whether the arrangement relies on a statutory prohibited transaction exemption. For this reason, the Department should consider the importance of uniformity of disclosures across different advice approaches. This may be particularly important as more and more plans choose to offer multiple advice programs to participants.

Finally, we note that there is some lack of clarity in the PPA prohibited transaction exemptions regarding the party that bears responsibility for ensuring meaningful disclosure. As mentioned above, the fiduciary adviser is the party that has the requisite information and we urge the Department to confirm that this is an obligation of the fiduciary adviser and that any failure only affects the fiduciary adviser and not the plan sponsor.

SHRM appreciates the opportunity to submit these comments on the new prohibited transaction exemptions for investment advice. SHRM looks forward to working with the Department to improve and expand investment advice for plan participants.

Respectfully submitted,

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Society for Human Resource Management