

March 4, 2009

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor,
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Final Investment Advice Rules

Ladies and Gentlemen:

On behalf of the Securities Industry and Financial Markets Association (“SIFMA”)¹, I am writing in response to the Department of Labor’s (“Department”) request for comments on final rules relating to the provision of investment advice to participants in individual account plans and Individual Retirement Accounts (IRAs). The final rules provide additional guidance on the statutory exemption enacted as part of the Pension Protection Act of 2006 (PPA), as well as a final class exemption. In combination, they ensure that participants in defined contribution plans and IRA holders will have access to objective and cost-effective advice over the course of their careers and in retirement, recognizing the fact that for many of these workers, the investment options available to them are unlimited and not susceptible to models.

As you know, American workers’ retirement savings are increasingly held in participant-directed accounts such as 401(k) plans and in IRAs, either by contribution or through rollovers from employer sponsored retirement plans. Today, about 63 percent of the full time workforce is covered by a 401(k) plan; over the next 10 years, a high percentage of these assets will be rolled over into IRAs. IRA assets totaled \$4.13 trillion as of September 30, 2008 – they already exceed assets in defined contribution plans, and are expected to increase further as workers retire in greater numbers and roll over their 401(k) balances. As a larger and larger percentage of these savings accumulate in IRAs

¹ SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

which may be invested in annuities, stocks, bonds, foreign investments, mutual funds and other pooled vehicles, investment advice is even more critical to help retirees manage their savings.

Without the rules that have been debated by Congress and now made effective through the final regulations implementing the statutory exemption and the final class exemption, workers will not have access to quality investment advice at an affordable cost. Instead, they will rely on educational material which is based on a hypothetical person, and not their individual characteristics, or a patchwork of computer models that are unable to take into account the entire range of investments available to IRA holders. Indeed, the models currently available offer little flexibility or help in many real life situations that will arise throughout a worker's career and during retirement.

The final regulations interpreting the statutory exemption and the class exemption have been subject to a thorough process of evaluation and analysis. All stakeholders have been heard from. The very same individuals who provided assistance to Congress and best understood Congress' intent with respect to the PPA were responsible for drafting the regulation and the class exemption. While some may disagree with the investment advice exemption in the statute, or with Congress' mandate to the Department to determine whether models exist that can appropriately model any investment which an IRA may invest in, the final regulation and class exemption are true to the statute and the class exemption contains the statutory findings necessary for the Department to exercise its administrative discretion to promulgate relief.

This process has been careful, thoughtful, and designed to elicit the views of the entire benefits community.

- On December 4, 2006, the Department published a Request for Information soliciting comments that would assist in the development of regulatory guidance concerning several aspects of the computer model certification requirements of section 408(g)(3)(C) of ERISA, as well as in the assessment of economic costs and benefits of any such guidance. The Department received 24 comments from a range of individuals and organizations.
- On December 4, 2006, the Department also published a Request for Information to solicit information from the public concerning the feasibility of applying computer model investment advice programs for IRAs and similar types of plans. The PPA directs the Secretary of Labor, in consultation with the Secretary of the Treasury, to determine, based on the information received from the solicitation, whether there is any computer model investment advice program which may be utilized to provide investment advice to IRA beneficiaries. In addition to soliciting information from the public in general, section 601(b)(3)(A)(i) of the PPA directs the Secretary of Labor to solicit information regarding the feasibility of the application of computer model investment advice programs from: (1) the "top 50 trustees" of IRAs and similar plans, determined on the basis of assets held by such trustees; and (2) other persons offering

computer model investment advice programs based on non-proprietary products. There were 59 comments filed with the Department.

- On February 2, 2007, the Department issued a Field Assistance Bulletin (FAB 2007-1) providing additional guidance on the statutory exemption for investment advice. In that bulletin, the Department advised its field offices that: (a) the statutory exemption does not invalidate prior guidance on investment advice, (b) the same fiduciary duties apply to the selection and monitoring of an investment advisor, regardless of whether the advice arrangement is one to which the statutory investment advice exemption applies, and (c) the definition of fiduciary advisor for purposes of the level fee requirement in section 408(g)(11)(A) of ERISA does not include affiliates of the fiduciary advisor. With respect to the latter, the Department indicated that the definition of fiduciary advisor encompasses only the person actually providing the advice and the corporate or other legal form of entity which employs such person.
- The DOL convened a public hearing on July 31, 2007 at which 13 organizations testified. The focus of the hearing was to hear testimony on the feasibility of computer models for IRAs to facilitate the conclusion of DOL's study.
- On August 22, 2008, the Department proposed a regulation implementing the statutory exemption and a proposed class exemption on investment advice. The Department received 43 comments on the proposals.
- Finally, on October 21, 2008, the Department held a hearing on the proposals at which 8 individuals and organizations, representing a wide range of interests were heard.

Taking all of these voluminous comments and divergent points of view into account, the Department issued final regulations on January 21, 2009 and promulgated a final class exemption which contains findings that meet the requirements of section 408(a) of ERISA. If the Department determines that the regulations and class exemption should be withdrawn or substantially amended, we request that a public hearing be convened to ensure a full discussion of the issues.

The Final Rules Should Be Retained

. Currently, many advice providers depend on the Internet for the delivery of advice and have little interaction with plan participants on a personal level. If the rules promulgated under the PPA are allowed to take effect, plan participants will have access to advice providers who offer advice on a wide variety of investments – in person or on the phone – in a cost-effective manner. Studies have confirmed that one on one communication or telephone counseling is the most effective way to increase savings and encourage better investment decisions. Without these rules, it is unlikely that there will be any increase in the provision of advice to participants and IRA holders. Comments received by the Department from individual participants and beneficiaries make clear their need for investment advice, particularly in this economy.

While the final rules helpfully addressed numerous interpretive questions, a further review by the Department should focus particularly on how investment advice will be delivered and who can deliver it. To implement an effective advice policy, the final rules provide a framework that has the most potential to expand the advice currently available at an affordable price. They provide that framework through the following mechanisms: (i) allowing the use of level-fee arrangements applicable to the individual providing the advice; (ii) permitting an advisor to provide off-model advice at the request of a participant or IRA holder; and (iii) allowing advice to an IRA holder where modeling is not feasible.

Level-fee arrangements

We urge the Department to retain the rule in the class exemption that applies the level fee requirement at the individual level, rather than at the corporate level. As many commentators noted, and as the Department itself found, the likely place for an advisor to be biased is at the individual level, not at the corporate or affiliate level. If there is no way for the individual advisor to make any more in compensation or bonuses based on the advice he or she gives, we believe that the protections Congress envisioned in the fee leveling requirements are fully met. Section 404 of ERISA imposes the duty to act solely in the interests of participants and to act in a prudent manner; those duties, coupled with no incentive whatsoever for an advisor to favor its company's or affiliate's products, fully conforms to Congressional intent.

Off-model advice

We also urge that the final regulation and exemption retain the flexibility that the class exemption provides regarding off-model advice. SIFMA believes that this provision will make advice far more useful, less rigid and more accessible to plan participants and IRA holders. Under the Sun America option, many participants have been dissatisfied with the advice they receive because of the constraints on the advice provider. Permitting off-model advice will significantly enhance the quality of the advice that participants receive.

Special rules for IRA Accounts

The final rules provide a special rule for advice offered to a 401(k) plan participant investing through a self-directed brokerage window or to an IRA account holder where modeling is not feasible. This provision recognizes that, as millions of workers move into retirement, they will need access to different types of investment products that cannot be modeled effectively with a computer program. IRAs may invest in stocks, bonds, CDs, currency, annuities, and many other financial products. As more of the population nears retirement, employers and financial services firms are working on product innovations that it may or may not be feasible to model. SIFMA is concerned that reliance on computer models including only "plain vanilla" investments will stifle innovation or leave middle-income families with very few choices in retirement. IRA

holders are increasingly interested in investments that can't be modeled, such as bank products, securities (including Treasury instruments) and other investments that may be more cost-effective. Without this class exemption, an advisor could not recommend that an IRA owner invest half his IRA in an annuity that provides level income for life, and the other half in a laddered Treasury bond program, because there is no model that could permit him to do so. Nonetheless, this is certainly a program that many IRA holders might reasonably want to consider. In addition, without the class exemption, a computer model provider could not respond to questions from participants that go beyond the model's required inputs, such as questions about suitable levels of risk. If the results of the model were unsatisfactory, a participant's only choice would be to run the model again, trying to guess at the inputs that would allow the model to provide choices that meet his or her needs. The class exemption addresses how off-model advice can be provided with sufficient safeguards, including contemporaneous recordkeeping, advance disclosure, and audit requirements that will protect participants and beneficiaries and create a record for ensuring that the requirements of the exemption and of all the fiduciary duties in ERISA have been met.

Critics of the final rules may argue that these arrangements should be subject to the level-fee requirement. One important consideration for an advice program should be to have policies that encourage advisors to offer a broad range of products, including both proprietary and non-proprietary funds. The most accessible exemptions issued by the Department of Labor (*see, e.g.*, PTE 77-4) are limited to proprietary funds only. Most advisors would argue, however, that an advisor needs to be able to recommend both proprietary and non-proprietary products, and the level fee option under the statutory exemption makes the offering of a broad array of affiliated and non-affiliated products difficult.

Participants Are Well-Protected

The final rule and class exemption include strong safeguards and fiduciary obligations on fiduciary advisors. Only individuals subject to oversight of insurance regulators, the SEC, or similar state agencies or banking regulators can provide advice, adding a layer of oversight and protection to these rules that does not exist under current law, where anyone can provide advice so long as he or she follows one of the methods in the Department's existing guidance. Additional protection is found in the requirement that participants be told that they are always free to seek advice on their own from an advisor whose company does not sponsor investment products, if that is what they prefer. This information will cause all participants and IRA holders to focus on how much oversight and indeed skepticism they are prepared to exercise with respect to their own retirement savings. If an advisor recommends an investment with higher fees, he is required to explain why the higher fee investment is better for the participant. This focused disclosure is still another protection for participants and IRA holders. A further protection is the dire consequence of failing to meet the requirements of the exemption. Not only will the offending transactions need to be reversed and the client put in a position he or she would have been in had the investment not been made, but unlike any other exemption that the Department has issued, if there is a pattern and practice of

failures, all of the transactions during the period of noncompliance will lose the relief provided by the exemption and will have to be reversed, *including those that did not violate the law.*

The final regulation and class exemption require the fiduciary advisor to obtain an independent audit on an annual basis. This audit is protective of plan participants and consistent with other exemptions that the Department has granted in the past. The audit requirement is analogous to the so-called QPAM look alike exemption, PTE 99-14, which required an independent annual audit based on sampling. Even the critics of the class exemption did not argue that the audit requirement is somehow too lax or inadequate in any way. The audit will be done by professionals; the selection of the auditor will be subject to the fiduciary standards of ERISA; and the results of the audit will be made available to plan sponsors, IRA holders, and, where there is evidence of a failure to meet the exemption, to the Department. We believe this requirement is a strong, vibrant protection for participants and beneficiaries.

In conclusion, we believe that the Department has thoughtfully and carefully addressed the important policy goal of encouraging advice arrangements that protect participants and encourage the provision of advice to participants and IRA holders, as Congress clearly intended. We look forward to continuing to work with the Department on these important issues and hope you will call upon us and our members if you have particular questions on which we might be helpful. Please contact me at (202) 962-7300.

Best regards,

A handwritten signature in cursive script that reads "Liz Varley".

Liz Varley
Managing Director, Government Affairs

cc: Robert Doyle