



Response to Request for Comments on Legal and Policy Questions Relating to the Final Investment Advice Regulation

March 6, 2009

Employee Benefits Security Administration
Department of Labor

29 CFR Part 2550
RIN 1210-AB13

The American Society of Pension Professionals & Actuaries (ASPPA) and the Council of Independent 401(k) Recordkeepers (CIKR) appreciate this opportunity to provide comments to the Department of Labor (DOL) on the legal and policy questions relating to the final investment advice rule issued on January 21, 2009 (Final Regulation).

ASPPA is a national organization of more than 6,500 members who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA a unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. As a consequence, the independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of \$120 billion in assets.

As demonstrated during the past year, the consequences of concentrated investments, made without regard to risk tolerance or investment horizon, can be dire for participants and beneficiaries who often lack access to professional, prudent investment guidance. The Final Regulation's interpretation of the statutory exemption in the Pension Protection Act of 2006 (PPA) will make it more likely that participants and beneficiaries may obtain assistance in diversifying investments and appropriately reflecting their own risk tolerances and investment horizons in asset allocations.

However, as addressed more completely below, the portion of the Final Regulation which implements the non-statutory class exemption (*i.e.*, the portion that does not relate to the statutory exemption from the prohibited transaction rule enacted in PPA) may expose participants and beneficiaries to conflicted investment advice without sufficient protection from the effects of an adviser's conflicts of interest. Furthermore, this exemption is contrary to Congressional intent.

Recommendation

ERISA and the Internal Revenue Code generally prohibit plan fiduciaries from rendering any investment advice to plan participants and beneficiaries that would result in the payment of additional fees to the fiduciaries or their affiliates. PPA §601 provided a statutory prohibited transaction exemption to the rule [codified at ERISA §§ 408(b)(14) and 408(g) and IRC §§ 4975(d)(17) and 4975(f)(8)] for certain transactions that may occur in connection with the provision of "eligible investment advice" by a "fiduciary adviser," subject to specific requirements. In particular, the final PPA investment advice provision allowed two specific permissible investment advice exceptions: (1) "fee-leveling" arrangements; or (2) certified computer model arrangements.

When the proposed investment advice regulation was issued by the DOL on August 22, 2008 interpreting PPA §601, a separate prohibited transaction class exemption (Class Exemption) was also issued that provided relief for certain transactions that went beyond the scope of relief contemplated in the statutory language. The DOL incorporated the separate Class Exemption into the Final Regulation released on January 21, 2009.

The Class Exemption provides additional relief for the provision of individualized or "off-model" investment advice by a fiduciary adviser following delivery to a participant of investment recommendations generated through a computer model arrangement, and further applies the statutory fee-leveling limitation in that circumstance solely to the compensation received by the individual fiduciary adviser providing the advice (as distinguished from compensation received by the adviser's employer or affiliate). In providing this additional relief, the DOL set forth a number of disclosure and audit conditions to be met in order to obtain the relief provided under the Class Exemption.

The additional prohibited transaction relief provided in the Class Exemption portion of the Final Regulation clearly goes beyond the scope of the investment advice prohibited transaction relief as enacted by PPA. In the Joint Committee on Taxation Explanation

accompanying PPA, the explanation explicitly stated that “if a computer model is used, the only investment advice that may be provided under the arrangement is the advice generated by the computer model.” Both the U.S. House of Representatives and the U.S. Senate have weighed in on the subject as well.¹ The DOL itself acknowledges in Section B(4)(b) of the supplementary information of the Final Regulation that the allowance of individualized investment advice to plan participants and beneficiaries was “not clearly encompassed by the statutory exemption or implementing regulations.”

Congress spent a considerable amount of time examining and debating the optimum way to encourage employers to provide investment advice and education to their employees without removing the carefully crafted protections from conflicted advice originally put in place over 30 years ago. While ASPPA and CIKR fully support the policy behind making professional prudent investment advice more available to plan participants and beneficiaries, we are concerned that the DOL does not overstep the protections carefully considered by Congress (*i.e.*, the computer modeling and fee-leveling requirements).

In particular, we have concerns that working Americans should not have their retirement assets exposed to conflicted investment advice where the adviser has a financial interest in what investment choices to recommend, regardless of what disclosure is being provided. Although the Final Regulation provides that plan participants can always hire an independent investment adviser on their own, as a practical matter, most plan participants would be unlikely to take this additional step and would thus be a “captive” audience. Even with the fiduciary adviser being subject to fee-leveling in the Class Exemption, there is no protection to ensure that investments for which the adviser’s employer has a financial interest are not favored over other plan investment options. Accordingly, if the Class Exemption were to be enacted as finalized, there is a high likelihood that plan participants and beneficiaries would be subjected to investment advice that is not in their best interest as a result of conflicts of interest that could benefit the fiduciary adviser.

ASPPA and CIKR recommend that the DOL withdraw the Class Exemption portion of the Final Regulation. The enactment of ERISA §§ 408(b)(14) and 408(g) reflect Congressional desire to provide very limited relief for providing conflicted investment advice. The Final Regulation expands this relief in a manner that does not provide adequate protection to participants and beneficiaries.



¹ In an October 6, 2008 comment letter to the DOL, Sens. Edward Kennedy (D-MA), Charles Grassley (R-IA) and Jeff Bingaman (D-NM) concluded that “the Department’s proposed regulation and class exemption run contrary both to the clear language of PPA and Congress’ clear intent in enacting PPA to protect the retirement security of millions of American workers.” Likewise, in an October 8, 2008 comment letter to the DOL, House Education and Labor Committee Chairman George Miller (D-CA) and Subcommittee on Health, Education, Labor and Pension Chairman Rob Andrews (D-NJ) urged the immediate withdrawal of the Department’s proposed regulation and class exemption as they stated that the Department “ignored Congressional intent and overstepped its authority by impermissibly expanding the ‘eligible investment advice’ exemption.”

These comments were prepared by ASPPA's DOL Subcommittee of the Government Affairs Committee, A. Michael Marx, APM, Chair, and Stephanie Bennett, APM, Vice-Chair. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

/s/

Brian H. Graff, Esq., APM
ASPPA Executive Director/CEO

/s/

Tommy Thomasson, Chair
Council of Independent 401(k) Recordkeepers

/s/

Teresa T. Bloom, Esq., APM
ASPPA Chief of Government Affairs

/s/

Robert M. Richter, Esq., APM, Co-Chair
ASPPA Government Affairs Committee

/s/

Stephanie L. Napier, Esq. APM, Co-chair
Administrative Relations Committee