Zacks IFE

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

Via Email: e-ORI@dol.gov

To Whom It May Concern:

The Office of Regulations and Interpretations has received numerous requests to ease various safeguards in the Pension Protection Act's ("the "Act") proposed investment guidelines. Many firms and industry associations seem particular concerned that only registered SEC investment companies and ERISA 3[38] managers will be able to control default investments. For example, the ERISA Industry Committee ("ERIC") argues that, since parties in interest have constructed model portfolios for years, inserting a fiduciary 3[38] manager is unnecessary. We believe that the statute and default guidelines are designed to control conflicts of interest by controlling the ability of parties in interest to self-deal. The problem is that the ERIC request (and similar submissions from ICI and the US Chamber of Commerce) has the unintended consequence of making it possible to self-deal through the control of default investments. They should therefore be disregarded.

We respect ERIC because its sole focus is the improvement of retirement savings processes. We do not respect those who would like to find ways around the Pension Protection Act's rules against self-dealing. To avoid such self-dealing, advice under Section 601 of the Act is transactional. By this, we mean that Fiduciary Advisors who receive variable income from funds under their control may not solicit changes to their initial advice allocations. Fiduciary Advisors may affect initial allocations only if (1) their compensation, and perhaps that of their employer, is "flat" or (2) allocations are controlled by an independently audited computer model.

Our question is, why would a Fiduciary Advisor bother with Section 601 advice rules if the ERISA 3[38] requirement is removed? If they are freed to skew their model portfolios towards funds that provide them with the highest compensation, we believe that many would not. That is, without the 3[38] safeguard, brokers and others who receive variable fees from a plan's underlying funds will simply bypass Section 601 advice constraints and self-deal via discretionary construction and assignment of participant asset allocations.

We fear that the ERIC request is the "Trojan horse" for which unscrupulous parties have been looking. Clearly, such self-dealing is a prohibited transaction and one that can only be avoided if the construction and assignment of default investments are controlled by '40 Act investment companies or ERISA 3[38] fiduciaries.

Thank you for your consideration,

Michael Case Smith
President, Zacks IFE
312/680-9880 Ex.427
msmith@zacks.com
www.ZacksIFE.com