October 23, 2008

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

Attn: Investment Advice

E-mail to e-ORI@dol.gov

Subject: Extended Testimony of Louis S. Harvey
at EBSA hearing on Investment Advice Proposal
on October 21, 2008

RECAP OF ORAL PRESENTATION

- The current financial turmoil and the volume of requests from retirement plan account holders wondering, "What do I do now?" underscore the need for personal advisers to help guide toward smart, rational decision-making. However, in the majority of cases, answering this question could be the basis for a prohibited transaction.
- Plan sponsors have been reluctant to incur the additional fiduciary liability and expense of engaging fiduciary advisers because they perceive that the need has been met through other means (IB 96-01, SunAmerica, Frost, and Managed accounts).

  Participants and beneficiaries have a different view and actual usage of these solutions is low (estimated at 7% to 10% of participants) leaving a gap in the perceived need.

  The single most effective way to close this gap and increase availability of advice is by requiring plan sponsors to make an affirmative election to engage or not engage a fiduciary adviser and then disclose that election to participants and beneficiaries.
- Competent advisers have been reluctant to assume the role of fiduciary adviser due to the added regulation, fiduciary liability and cost in relation to the potential revenue and profit margins. The proposals put forth by the Department of Labor go a long way to making the role of fiduciary adviser more attractive to adviser firms.

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Additional clarification in the form of explicit statements will be required to attract a large number of competent advisers to this role:

- *The balances in participant and beneficiary accounts may be used to pay for the services of fiduciary advisers. While use of plan assets is permitted, the question of whether that includes using an individual participant's account is somewhat ambiguous.*

TESTIMONY NOT PRESENTED ORALLY

(The following is a continuation of the oral testimony.)

- *Unlevel compensation may be made level if all such fees are paid into a blind trust that in turn pays the fiduciary adviser a level fee. The trust is paid an administrative fee and takes the risk that the adviser could be paid more than the trust receives in unlevel compensation.*
- *There is concern about the ability for firms to control what their representatives say. Fiduciary liability of fiduciary advisers may be limited to a written recommendation if a disclosure to that effect is made to participants and beneficiaries ahead of time.*
- *Recommendations to transfer assets out of a plan (in-service distributions, rollovers, etc.) do not cause a prohibited transaction if the adviser's fee does not vary as a result of the transfer. This puts fiduciary advisers on a level playing field with competitors who are not associated with the plan.*

- The concerns regarding conflicts of interest with unlevel fee advisers can be further addressed by the imposition of minimum standards with respect to advisers operating under both the statutory and proposed class exemptions. Use of minimum standards will eliminate most advisers who are likely to take unfair advantage of participants and beneficiaries. DALBAR has employed standards for advisers since 1997 in our due diligence review and monitoring, with no reports of problems with DALBAR-rated advisers. The DALBAR standard for advisers consists of minimums for:
  - Experience level
  - Past infractions
  - Nature and level of services provided to clients
  - Knowledge of investments and regulation

  Adopting these or similar standards into the regulation would greatly improve the quality of advisers who operate under the exemptions and protect the retirement assets of participants and beneficiaries.

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- The comments requesting that target date funds be excluded from model requirements have great merit but the issue is broader than target date funds and the computer model. Target date funds are part of a larger class of investments known as “asset allocation” investments. These asset allocation investments are managed to mitigate risk at the expense of return. As such they are subject to changes in allocations under the control of the asset allocation manager. It is therefore implausible to include these already allocated assets into another unrelated overlaying asset allocation scheme.

  For this reason, the exclusion in the exemptions should be for all asset allocation investments, including hybrid funds, mixed funds, balanced funds, target risk funds, life-style funds, life-cycle funds, variable annuities, etc.

  Additionally, any performance benchmarks for asset allocation investments (including benchmarks required on the proposed participant fee disclosure) should contain only investments with known, comparable risk objectives.

Thank you for your consideration.

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