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October 6, 2008

By E-mail: e-ORI@dol.gov

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: Investment Advice Regulations and Class Exemption

Dear Sir/Madam:

I appreciate the opportunity to comment on the proposed regulations implementing the provisions of the statutory exemption set forth in sections 408(b)(14) and 408(g) of the Employee Retirement Income Security Act of 1974, as amended and the related class exemption. Unfortunately, the proposed regulations and exemption appear to be premised on a number of assumptions that are so questionable it would be highly advisable and may be legally necessary to flesh out these issues at a public hearing. Therefore, I request the Department of Labor (the "Department") hold a public hearing on both the interpretative regulation and the exemption.

The Proposed Class Exemption

As you know, the Department may grant an exemption only if it makes specified findings, italicized below. For the reasons stated below, it is highly questionable whether such findings can be made in this case, particularly without a public hearing.

In the interest of the plan and of its participants and beneficiaries

The Department has found that computer model investment advice programs do exist for IRAs. The Department stated that the exemption was proposed to provide advice with respect to additional options for IRAs. There is no respected study of which I am aware that states that additional options beyond which are needed to provide a prudent investment portfolio have a positive effect on investment performance. Instead, there are studies that state that additional options have a negative effect. Further, there are numerous studies documenting the negative effect of conflicts of interest. Therefore, how can the Department make a finding that it is in the interest of participants to go beyond that which Congress specified and provide relief for additional self dealing in order to obtain no or a negative benefit? This issue should be fleshed out during a public hearing.

There is a real record on providing disclosure based relief in the case of IRAs. The failure to examine this record contradicts the statement that the Department carefully considered the risks attendant to increased opportunity for self dealing under the proposed class exemption. This is because there has been an actual example of the effect of providing relief for self dealing based on a class exemption, with reduced protections for IRAs, using disclosure as the principal protection. That exemption is PTE 86-128.

While the Department has not investigated the results, it is my information and belief that at least one very major financial service organization did keep records of the performance of IRAs as compared with taxable accounts as of the end of the last bull market. It is my understanding that the data demonstrated that the financial service providers were so emboldened by the exemption that they churned the IRAs so much that the performance of the IRAs was over 30% worse over the period in question than the taxable accounts. I understand that it is easier to churn IRAs because the transactions are frictionless as they do not result in having to pay taxes, which may account for some of the disparity.

A public hearing could provide a forum to examine the performance of IRAs under 86-128, or to determine whether further investigation is warranted, and to determine how best to proceed under the proposed exemption in view of this performance. It could also provide the Department the opportunity to bolster the record concerning the reasons which support its proposed view that providing lesser protections than did Congress would be in the interests of participants and beneficiaries.

One condition that could be added and should be considered in view of the above is conditioning relief on IRAs or individual accounts which receive advice under the exemption not falling substantially below (with the degree and time period specified) that of described alternatives such as taxable accounts, a target date index fund, or a managed account index fund. Compliance with such a condition could be examined by the auditor. Adding such a condition would help support a finding that an exemption would be in the interest of, and protective of, participants and beneficiaries as well as administratively feasible.

This condition would ideally remove relief for the period in question, or conditioning relief over the period on providing the amount of the investment shortfall to accounts receiving conflicted advice pursuant to a reasonable formula.

Protective of the rights of participants and beneficiaries and administratively feasible

Under the proposed exemption, conflicted advice could be provided even if other conflicted persons received variable fees and profits so long as the actual person providing the advice receives a flat fee. There was not any mechanism suggested that could address how the variety of incentives that could be provided to employees could be effectively monitored. If the Department believes that there is such a mechanism, which is effective and can be checked in an

administratively feasible manner, it should propose it. If not, this weakening of the protections against self dealing does not meet the requirement of being protective of the rights of participants or administratively feasible.

Conditioning relief on the performance of accounts receiving conflicted advice, as outlined above would provide an administratively feasible and protective mechanism for ensuring that the provision of conflicted advice under the exemption is beneficial. This is consistent with the comment by Dalbar which urges that the most effective approach is to continually monitor the outcome for participants and beneficiaries. We also agree with the implicit comment by Dalbar that it is necessary for an auditor to have access to computerized records of transactions under the exemption.

We take issue with and believe another suggestion by Dalbar is inconsistent with its own comment and Congressional intent. Dalbar suggests that self dealing ought to be facilitated by automating it and removing the critical safeguard of individual participant direction. However, there is a record of what has happened under 86-128 when self dealing only for brokerage commissions is automated. We believe that a multiple of the billions of dollars of losses we believe IRAs have suffered under that exemption would be likely, should anything close to this suggestion be implemented. Further, any such expansion would be vulnerable to legal challenges without a hearing and a new proposal.

The Proposed Regulation

We will focus on two deficiencies in the regulation. The most glaring is that the Department's certification that this exemption will not have a significant effect on small entities. As the Department has stated, plan sponsors (who typically act as fiduciaries in determining whether and what services such as advice to provide) bear an additional burden when selecting or monitoring a conflicted service provider, and has stated that this specifically applies in the case of conflicted investment advice.

It is very plausible that the accounts of persons who receive conflicted advice will underperform. In this event, what will the defense of small plan sponsors who are sued be since they do not have the resources or expertise to understand what other safeguards they should try to negotiate and generally are not able to negotiate more protective terms with service providers? Courts would not be likely to find that stating that it was not foreseeable that financial service firms would self deal, or that this Administration would provide for inadequate regulation of such self dealing, are winning defenses. Therefore, we believe that the Department should prepare an Initial Regulatory Flexibility Analysis of the proposed regulation.

Finally, it is not clear how the Department, based on the language in the Pension Protection Act ("PPA"), formulated a new exemption for persons who promote or market an investment advice program. The PPA states that such persons will be considered fiduciaries, except that the Department may propose rules under which only one fiduciary advisor may elect to be treated as a fiduciary. While this language could be clearer, general rules of statutory construction dictate that exemptions from remedial schemes are construed narrowly. The Department should not effectively add words to the law and create a new exemption from being treated as a fiduciary, and should therefore withdraw this interpretation.

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Thank you for this opportunity to comment and for your attention to this matter.

Sincerely,

/s/ Marcia S. Wagner

Marcia S. Wagner

MSW/krk