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January 30, 2007

00022-000(07)

<u>**SENT VIA EMAIL (e-OED@dol.gov)**</u>
<u>**HARDCOPY VIA FEDERAL EXPRESS**</u>
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
Attn: IRA Investment Advice RFI
200 Constitution Avenue, N.W.
Room N-5700
Washington, D.C. 20210

Re: **Request For Information: Prohibited Transaction Exemption for Provision of Investment Advice to Individual Retirement and Similar Plans**

Ladies and Gentlemen:

We are writing to respond to the referenced Request for Information. Our purpose is to discuss the context for the analysis of the issues, rather than to comment on the specific questions raised.

A fair reading of the Pension Protection Act of 2006 (PPA) suggests that there was a Congressional determination that the private sector had developed computer model investment advice programs for virtually all investment structures used by 401(k) plans (and other participant-directed ERISA retirement plans). In addition, the legislation could reasonably be read to mean that Congress concluded that the private sector had not developed similar computer model investment advice programs for individual retirement accounts and similar types of vehicles.

To the extent those statements accurately reflect the Congressional determinations, we believe that the conclusions are based on a false foundation.

Instead of focusing on the specific types of retirement vehicles – 401(k) plans vs. IRAs – we submit that the analysis should focus on the investment structures used by those vehicles which, in many cases, are virtually identical.

While it may be difficult to determine all of the types of investment structures in use for participant-directed plans and IRAs, most of those structures will fall into one of four categories. Those are:

1. A limited line-up of look-through investment vehicles, such as mutual funds or collective trusts. For our purposes, this structure is called a "selected line-up." In a participant-directed plan, it would often be called the core line-up, and the investment options would be prudently selected and monitored by the plan's investment fiduciaries. In an IRA, the line-up would typically be selected by the broker-dealer or other provider that sponsors the IRA, and the investments would ordinarily represent a broad range of investment alternatives consistent with modern portfolio theory and strategic asset allocation concepts. In the IRA setting, the selected line-up could be assembled by a provider in a fiduciary or non-fiduciary capacity.

   It seems fairly obvious that, regardless of whether the selected line-up is in a participant-directed plan or an IRA, there are computer model investment advice programs that could be used for this scenario. In fact, there would be no reason for the programs to be any different in the IRA setting than in the plan setting. Therefore, the conditions for compliance with the PPA exemption for fiduciary advice should apply to both plans and IRAs where this investment structure is used.

2. The second structure is a "mutual fund window," that is, a very large list of mutual funds or similar vehicles. Instead of the investment options being prudently selected, or selected in a manner consistent with generally accepted investment theories and prevailing investment industry practices, the mutual funds included in the window would be chosen for administrative and financial reasons. Stated slightly differently, the provider would include mutual funds with which it entered into agreements and that revenue share to assist in paying for the cost of providing the platform.

   Again, conceptually, there is no difference between a mutual fund window in a participant-directed plan or in an IRA. In both cases, the participants would have a large number of mutual funds to be used to develop portfolios in their accounts.

   We assume that, in other comments, the industry will describe the computer model investment advice programs that are available for developing suitable asset allocations and for populating the asset classes in those models with well-selected mutual funds – as well as monitoring both the asset allocation and the mutual fund retention on an ongoing basis.

In broad terms, we see no reason why such programs cannot be utilized in both settings to develop the asset allocations in a manner consistent with generally accepted investment theories, such as modern portfolio theory and strategic asset allocation, as well as selecting and monitoring the individual mutual funds in a manner consistent with prevailing investment industry practices, such as the use of qualitative and quantitative criteria and analysis.

With the robust databases maintained by information providers, such as Morningstar and Lipper, it seems logical that objective information is available and can be used for substantially all of the mutual funds commonly included in mutual fund windows and brokerage accounts. Assuming this is true, we submit that both IRAs and participant-directed plans should be subject to the same standards for computer model investment advice programs. That is, the IRA programs for mutual fund windows should be subject to the same reporting and disclosure requirements, as well as the acknowledgement of fiduciary status, as the PPA requires in order for fiduciary advisers to provide investment advice to participant accounts in plans. We see no substantive difference. In fact, we see considerable efficiencies in having a single body of law for fiduciary advisers, so that the compliance issues and processes will be consistent. In the private sector, it is common for the same financial consultant to provide advice to clients who have both retirement plan accounts and individual retirement accounts. In other words, it would be inefficient and, therefore, unnecessarily expensive if the financial adviser were required to comply with two different sets of rules depending on the type of retirement account that holds the assets. It would require two sets of rules, two sets of forms, two sets of procedures, and so on. Hopefully, that duplication of effort can be avoided by a single set of standards.

3. The third investment structure is an individually directed brokerage account (IDBA). Both 401(k) plans and IRAs offered IDBAs. The issues related to the mutual funds in those accounts would be the same as for the mutual fund windows discussed above. However, IDBAs are complicated by the opportunity to invest in individual stocks and bonds and, in some cases, an even broader array of investments. As a result, the IDBAs present unique and difficult issues, regardless of whether they are in 401(k) plans or IRAs.

Conceptually, the development of asset allocation models should be similar, regardless of whether individual securities or diversified investment vehicles are used. Thus, the difficulty is in the selection of the individual securities (and the transaction-based compensation related to trades in those securities). We assume that representatives of the securities industry will respond with comments on whether there are computer model investment advice programs that would

appropriately assist in the selection of individual securities to populate the asset allocation model and in subsequent decisions to sell and buy securities. That is not our area of expertise.

Addressing the issue from a legal perspective, though, we would point out that the DOL's guidance should apply to both participant-directed plans and IRAs that offer brokerage accounts. We see no meaningful difference between the investment advice issues on IDBAs, regardless of whether they are part of the investment structure for a plan or an IRA.

Also, we recommend that there be a single set of rules respecting the disclosure requirements for fiduciary advisers for both retirement plans and IRAs. That is, we believe that one set of policies should cover all types of investments in all retirement vehicles, regardless of whether they are plans or IRAs and that, beyond the policies, the specific requirements should be as similar as possible.

4. The fourth investment structure would be a plan or an IRA that permits the participant or IRA owner to invest in virtually any investment option. This structure goes beyond brokerage accounts, in that it might allow investments in illiquid, non-publicly traded choices, such as hedge funds, limited partnerships, private equity, real estate, and so on.

While we do not purport to comment on the investment issues, we would urge the Department to approach this particular structure in a conservative manner. The options are virtually unlimited, so it is difficult to anticipate the future impact of any rules or restrictions and, as a result, it is difficult to evaluate their consequences in terms of favorable or unfavorable results for retirement benefits. In addition, there are issues, like valuation, that are conceptually difficult within the context of asset allocation. Also, in our experience, very few participants actually use this type of arrangement and, therefore, very few would be helped by any guidance in this area.

As a result, we recommend that the Department address the more common arrangements at this time and defer consideration of these less understood scenarios until it has more information and experience.

In preparing these comments, we have not discussed managed accounts because they are outside of the PPA's definition of a "fiduciary adviser." Accordingly, our belief was that the Department was not soliciting input on managed accounts (that is, arrangements where the participant or IRA owner's accounts were actively managed with an investment manager as defined in ERISA section 3(38)). In addition, we have not discussed "wrap" arrangements, where

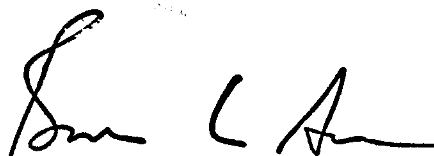
the fees are levelized and revenue sharing is offset (for example, where a broker-dealer may charge 150 basis points for investment advice, but then offset any 12b-1 fees or other revenue sharing received from the mutual funds or from related mutual fund investment advisory affiliates). These arrangements are common at broker-dealers and have been successfully used for a period of years for individual retirement accounts.

In fact, the Department has given guidance to broker-dealers in this area through prohibited transaction exemptions. Most recently, advice was given on these types of arrangements to Country Trust Bank in DOL Advisory Opinion 2005-10A. Since the fees are level (including both direct and indirect payments), no prohibited transactions have occurred and, therefore, there is no need for an exemption. Having said that, though, the Department needs to clarify the calculation of level fees. For example, are they calculated at the broker-dealer level or the registered representative level, or both? Does this include investment management fees paid to affiliated mutual fund investment advisory entities?

We hope these comments are helpful. Please feel free to contact us if you would like any clarification or additional detail.

Very truly yours,

C. FREDERICK REISH



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CFR:shm