

January 30, 2007

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

**Attn: 401(k) Plan Investment Advice RFI**

The American Institute of Certified Public Accountants (AICPA) is pleased to comment on the Department of Labor's (Department) request for information (RFI) concerning the prohibited transaction exemption for the provision of investment advice provided under an "eligible investment advice arrangements," as defined in the Pension Protection Act of 2006 (Act). The AICPA is the largest professional association of certified public accountants in the United States, with approximately 330,000 members in business, industry, public practice, government and education.

Our comments are focused on the requirement in the Act that an "eligible investment expert" certify that the computer model meets requirements of subparagraph B of section 601 of the Act, and the annual independent audit requirement in section 601 (a) (5). In addition, we also support the Department requiring a standard format for the disclosure of fee-related information to ensure participants and others obtain consistent and comparable information about plan advisory fees.

**Annual Audit**

Section 601 (a) (5) of the Act states the following:

"(5) ANNUAL AUDIT.—The requirements of this paragraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

"(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and "(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

*Audit scope and approach*- The Department should clarify the scope of the compliance audit, including the audit procedures to be performed with respect to the computer model certification; the required written notifications and disclosures by the fiduciary advisors (including the information required to be included therein such as fee information), fee arrangements, and other requirements of the arrangement as specified in the Act. We recommend the Department establish an “agreed-upon procedures” engagement in which auditors would perform procedures specified by the Department and issue a report of findings based on the procedures performed on subject matter. We believe this would provide a cost effective approach to the audit while ensuring consistency for all the audits performed. We would be pleased to discuss this agreed-upon procedures approach and to assist the Department in developing the procedures.

Are there any circumstances where a plan sponsor could have a single arrangement (and audit) covering more than one plan (for example, the plan sponsor has a collectively bargained and a non- collectively bargained plan that are similar in design and investment options and utilize the same computer model?) Also, if a plan sponsor establishes more than one arrangement are multiple audits and reports required or can a single audit be performed covering all arrangements offered by the plan sponsor?

*Auditor qualifications and performance standards*- We believe that CPAs are qualified to perform the compliance audits and encourage the Department to recognize the AICPA professional attestation standards as being suitable to perform the compliance audits. The Department should also specify what other standards would be suitable to perform the compliance audits to ensure consistency in auditor qualifications, audit procedures performed and reporting.

*Auditor independence*- The Department should provide clarifying guidance around the independence requirements stated in Section 601(a)(5) of the Act which states, "For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan." Can the independent auditor of the benefit plan also perform the annual audit of the investment advice arrangement? Would this answer change if the independent auditor also audits the service provider offering the investment products and advice? We recommend that the Department require the auditor comply with the AICPA's independence standards in the AICPA Code of Professional Conduct, which apply to CPAs in all situations requiring independence.

*Audit timing*- The Department should clarify the annual audit period for example, based on the plan’s fiscal year end or annual enrollment period, and timing of when the audit is required to be completed and report provided to the fiduciary that authorized the arrangement. We would recommend that the period not conflict with the due date for financial statement audits as part of Form 5500, which, with extension, are due by October 15 of each year.

*Audit report addressee and distribution*- We understand that the audit report should be addressed to the fiduciary which authorizes the arrangement. We believe that this generally would be the plan sponsor or trustee. Are there other parties to which the plan report should be addressed or to whom the auditor report should be distributed?

*Audit exemption*- The Department should consider whether there should be a de minimus threshold to comply with the annual audit, (e.g.- based on the number of participants in the plan, etc.)

*Prohibited transaction enforcement provisions* – What enforcement and penalty provisions exist to ensure that the compliance audits are obtained by the plan fiduciary? Under what circumstances related to the audit (i.e. - audit findings or noncompliance) would the plan investment arrangement be considered to fail to meet the prohibited transaction exemption?

#### Certification of Computer Model by Eligible Investment Expert

Subparagraph C of section 601 of Subtitle A--Investment Advice of the Act states:

“(C) CERTIFICATION.—

“(i) IN GENERAL.—The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

“(ii) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

“(iii) ELIGIBLE INVESTMENT EXPERT.—The term ‘eligible investment expert’ means any person—

“(I) which meets such requirements as the Secretary may provide, and

“(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

*Eligible Investment Expert*- We infer that the required certification is intended to provide a form of independent assurance by an individual or entity (i.e.-eligible investment expert) that the investment advice program computer model meets the requirements in subparagraph B of section 601. The Department should develop or reference suitable performance and reporting standards and procedures, as well as specify appropriate qualifications for the individual or entity making the certification. Based on the requirements in subparagraph (B) to be covered by the certification, we believe that the individual or entity making the certification would need to possess a combination of technical expertise relating to investment advice -- encompassing knowledge of generally accepted investment theories and their application to participant and beneficiary demographics groups – and knowledge of informational technology application design, processing controls and auditing. The objectives of the certification might include, for example, determining whether the computer model was suitably designed to achieve the specified requirements in subparagraph B of section 601, and whether suitable computer processing controls have been placed in operation and are operating effectively.

*Renewal of certification*- The Department should also define “material modifications” (e.g.- new investment option added or eliminated,) to clarify the circumstances when a certification would need to be renewed.

*Certification procedures*- We understand that the computer model would need to be tailored to meet the investment offerings and demographics for each individual plan. The Department should consider for purposes of the certification whether any efficiencies can be achieved by having certain certification procedures be performed by a single individual or entity at the investment manager level (generic computer model design specifications and controls), and having other certification procedures be applied by the individual or entity certifying the computer model at the plan-specific level. The certifying individual or entity could use the results of the procedures performed at the investment manager level to possibly reduce the procedures applied to the plan-specific computer model.

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We appreciate the opportunity to comment on the RFI. AICPA representatives would welcome a meeting with the Department to discuss our comments and suggestions, and to assist in developing the audit procedures.

If you have any questions please contact Ian MacKay, Director, Federal Regulatory Affairs, at 202-434-9253.

Sincerely,

A handwritten signature in black ink, appearing to read "Ian MacKay".

Ian A. MacKay CPA  
Director  
Federal Regulatory Affairs and Strategic Alliances

cc: Mr. Ian Dingwall, Chief Accountant, Employee Benefit Plan Security Administration