



Walter Welsh

Executive Vice President, Taxes & Retirement Security
(202) 624-2157 t (202) 572-4795 f
walterwelsh@acli.com

James Szostek

Director, Taxes & Retirement Security
(202) 624-2378 t (202) 572-4739 f
jimszostek@acli.com

Shannon Salinas

Counsel, Taxes and Retirement Security
(202) 624-2028 t (202) 572-4773 f
shannonsalinas@acli.com

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Investment Advice Regulations
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Ladies and Gentlemen:

On behalf of the American Council of Life Insurers (ACLI), we are writing to comment on regulations proposed under Section 408(g) of the Employee Retirement Income Security Act, as amended (ERISA), which were published at 73 Fed. Reg. 49896 (August 22, 2008) (Proposed Regulations). The Proposed Regulations implement and provide additional details on the statutory exemption added to ERISA by the Pension Protection Act of 2006 (PPA) regarding the provision of investment advice to participants in participant-directed retirement plans. We also provide comments on the related proposed class exemption on the provision of investment advice, which was published at 73 Fed. Reg. 49924 (August 22, 2008) (Proposed Class Exemption). The Proposed Class Exemption exempts the provision of investment advice in certain situations not covered by the statutory exemption. Failure to conform to the rules in the Proposed Regulations or Proposed Class Exemption could result in a prohibited transaction.

The Proposed Regulations and Proposed Class Exemption are of particular interest to the three hundred fifty-three (353) member companies of ACLI. ACLI member companies account for ninety-three (93) percent of the life insurance industry's total assets in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including both defined benefit pension and 401(k) arrangements. ACLI member companies also are employer sponsors of retirement plans for their own employees.

ACLI appreciates the Department's significant work in addressing issues related to plan services and investment advice. As noted in the preamble to the Proposed Regulations, there has been a proliferation of participant-directed individual account plans. Unlike traditional defined benefit plans, the investment decisions made under individual account plans directly affect the benefits available to participants and beneficiaries. ACLI agrees that there is a need to provide participants greater access to professional investment advice in an effort to improve the adequacy of their retirement savings. We applaud the Department for its efforts regarding this important policy, to ensure that participants and beneficiaries have the information they need to make informed investment decisions.

In our comments below, we suggest a number of specific changes and clarifications to the Proposed Regulations and Proposed Class Exemption. We would welcome the opportunity to speak with the Department and supplement our comments as the Department considers these questions.

1. Permit Implementation of Investment Advice through Advance Agreements

Section (h)(2) of the Proposed Regulations and Sections I(b), II(b) and III(k) of the Proposed Class Exemption state that the sale, acquisition or holding of investment options must occur solely at the direction of the recipient of the advice. Some participants may prefer to operate through an advance agreement arrangement. Currently, there are commonly available arrangements whereby a participant or IRA owner could enter into an agreement with the plan administrator or fiduciary advisor to implement the advice generated under the investment advice rules without any further action by the participant. For example, after a participant has used a computer modeling program to determine the ideal allocation among the various investment options under his plan, unless the participant elects otherwise, his investment allocation would be changed in accordance with the allocation generated from the computer model. After the initial implementation of the advice, the participant's account may also be automatically updated from time to time, including automatic rebalancing or implementing changes to the model itself (e.g., if the advisor determines that that an adjustment to the asset allocation is needed based on the performance of the market or changes in the generally accepted investment theories (e.g., an increase in the percentage of bonds or a decrease in international equities funds)), provided that such changes are within the parameters of the agreement. This would apply only to participants who elected to direct their

investment options in this manner. It would be helpful if the Proposed Regulations and Proposed Class Exemption specifically stated that this type of arrangement is permitted.

This type of arrangement has already been approved by the Department. Over the years, the Department has issued guidance permitting investment advisors to obtain advance authority to automatically rebalance and/or to make changes in the mix of asset classes (model allocations) within certain parameters without consent of the participant (beyond his initial consent to the arrangement).¹

2. Permit Companies to Provide Advice Regarding their own Plans

Section (e) of the Proposed Regulations and Section III(a) of the Proposed Class Exemption require that the investment advice arrangement must be authorized by a plan fiduciary other than the person offering the arrangement or any affiliate of that person. This precludes a company from providing advice regarding its own plans. Both provisions contain a special exception for IRAs, so that an employer can provide advice to its own employees regarding the employees' IRAs. We believe that an employer should be permitted to provide investment advice to its employees regarding its own plan, provided that the employer meets the definition of "fiduciary advisor."

3. Required Disclosure Limited to Investments Actually Recommended

The Proposed Regulations and the Proposed Class Exemption require that, before the initial provision of investment advice, the fiduciary advisor provide certain disclosures regarding any security or other property offered as an investment option. The fiduciary advisor then must maintain such information during the term of the advice arrangement and provide participants with this information at least annually, upon request and reasonably contemporaneously with any material change. We believe that, after the investment advice has been provided, a fiduciary advisor should only be required to provide the disclosure with regard to the investment options that were actually recommended, rather than all investment options available under the retirement plan. Participants will already receive much of this information for all investment options in accordance with the regulations under Section 404(a) of ERISA regarding participant fee disclosure.

4. Permit Disclosure of General Statement Where Information not Readily Available

Section III(3) of the Proposed Class Exemption requires that advice cannot include recommendations for investment options that may generate greater income for the fiduciary advisor, any employee agent, or registered representative or affiliate thereof, or any person with a material affiliation or material contractual relationship,

¹ See, e.g., Individual Prohibited Transaction Exemption (IPTE) 97-12 (Wells Fargo); Advisory Opinion (AO) 97-16A (Aetna); IPTE 97-60 (TCW Group); IPTE 2000-45 (Salomon Smith Barney); IPTE 2000-46 (Bank of Oklahoma); IPTE 2001-14 (Keystone Brokerage).

compared to that of other options of the same asset class. The relative value of income that would be generated by the various investment options is not static, but changes often. Therefore, at any point in time, the individual providing the advice may not know which investment option would provide greater compensation to the parties listed in the preceding sentence. It should be acceptable in such case to provide the participant with a general statement, such as “The investment options that I have recommended may provide greater income to me, my employer, or its affiliate than other options of the same asset class.”

5. The Term “Agent” is not Limited to Insurance Agents

Section (j)(2)(vi) of the Proposed Regulations and Section IV(a)(6) of the Proposed Class Exemption use the term “agent” in defining who qualifies as a fiduciary advisor, specifically, “[a]n employee, agent, or registered representative” of the advisory entity. For banks or thrifts exempt from registration under the Investment Advisers Act of 1940, and that distribute their services and products through independent contractors who, technically, neither satisfy the “employee” nor “registered representative” status, the term “agent” should not be limited to an insurance agent, but rather should include a person acting on behalf of the fiduciary advisor as used in agency law principles.

6. No Requirement to Take into Account Annuity Investment Options

Section (d)(1)(v) of the Proposed Regulations requires that, to qualify for the exemption, a computer model arrangement must take into account all of the designated investment alternatives available under a plan. However, brokerage windows (and similar arrangements) and investments in qualifying employer securities are exempted from this requirement. We request that the final regulations contain a similar exemption for in-plan annuity investment options. Some participant-directed retirement plans include annuity options that include both accumulation and distribution options. Many computer models may not have the ability to take these options into account, and this should not preclude these programs from relying on the exemption. We recommend that the Department provide the option to take into account in-plan annuity investment options, so that investment advice programs with the ability may do so, while programs without the ability are not disadvantaged.

7. Class Exemption Rule for IRAs Should Extend to Certain Other Plans

Section III(e)(2) of the Proposed Class Exemption contains special rules for IRAs for which the type or number of investment choices reasonably precludes the use of a computer model. We believe that relief is also needed to allow other retirement plan participants to receive advice. While the model for large retirement plans is to have a plan fiduciary limit the universe of designated investment alternatives, not all retirement plan participants are fortunate enough to participate in this type of arrangement. Instead, many small retirement plans simply offer participants a brokerage account with access to a wide range of investments. Even

in a large retirement plan, a participant may decide to go beyond the designated investment alternatives and choose to take advantage of an open brokerage window option. In each of these cases, the retirement plan participant would benefit from investment advice offered by a fiduciary advisor under the rules set forth in Section III(e)(2). Therefore, we would request that you expand Section III(e)(2) of the Proposed Class Exemption to cover any retirement plan with respect to which the types or number of investment choices reasonably precludes the use of a computer model. Alternatively, we would request that the exemption at least be expanded to include plans that cover no employees within the meaning of 29 CFR 2510.3-3(b) (e.g., Keogh plans). Treating Keogh plans and IRAs similarly would be consistent with PTE 86-128, which applied conditions to IRAs and Keogh plans in a similar manner.

8. Add Ability to Cure and Limit Exposure Under the Pattern of Noncompliance Provision

Section V of the Proposed Class Exemption states that if there is a pattern of noncompliance with any of the conditions of this exemption, the exemption will not apply to any advice given by the fiduciary advisor during the period that the pattern existed. Although we agree that the Department cannot tolerate deliberate noncompliance with the rule, this provision is too severe. For example, if there is a fiduciary advisor that is a large investment company that employs or contracts with many individual advisory representatives, then even with the best policies and procedures in place, it may take time for the fiduciary advisor to realize that one individual advisor consistently does not follow the rules (at the least it would be after the individual advisor has already committed errors). It would seem extreme that all advice given by any individual advisor in that company would be adversely affected. In addition, even with careful planning, mistakes can be made inadvertently, and through the use of systems, such mistake may be spread across many participants. There should be some ability to cure such a mistake so that the availability of the exemption is preserved. In the case of the one bad advisor, there should be an ability to limit the exposure to just the offending advisors. There should also be a materiality requirement (*i.e.*, limit this rule to a pattern of material noncompliance). The retroactivity of this provision creates additional uncertainty for providers of investment advice. If the Department feels strongly that simply denying the exemption for transactions that do not meet the requirements would not provide enough protection, then this section could be replaced with a statement that the Department reserves the right to prospectively deny use of the exemption by an institution that has evidenced a pattern or practice of noncompliance, but not deny relief retroactively to those transactions that were compliant.

9. Coordination with SEC and FINRA Rules

We recognize that the rules under the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) do not apply to all investment advice arrangements that will use this exemption; however, a significant portion of the arrangements are subject to those rules in addition to Department of Labor rules. The FINRA and SEC rules have been in existence for many decades, and

thus many of our members are long accustomed to the compliance required under them. As currently drafted, the proposal would duplicate many SEC and FINRA rules. Because the requirements, as proposed, would not be identical, this duplication would create significant inefficiencies for many advice programs, by necessitating the creation of new operational processes, compliance structures and IT processing systems. In light of the SEC and FINRA rules, it would be efficient to take advantage of the very similar regimes that are in many cases already in place. We recommend that the Department revise certain provisions of the proposal to more closely align with existing SEC and FINRA rules. This would be in the best interest of plan participants because it would avoid unnecessary confusion and would also make compliance with the proposal much simpler for many of the providers of investment advice.

Section III(e)(4) of the Proposed Class Exemption requires that, for off-model advice, the basis of the advice and how the advice relates to the computer models or investment education materials must be documented. The SEC and FINRA rules also require similar documentation of the applicable information collected from the participant that help to form the basis of the advice. We request that, to the extent that the Department's proposed documentation requirements are already satisfied in whole or in part pursuant to existing SEC or FINRA investment advice documentation rules, no duplication of documentation effort be required by the Department.

The Proposed Regulations and Proposed Class Exemption require that numerous disclosures must be made to the advice recipient. The SEC requires similar (but not identical) disclosures from Broker Dealers and Registered Investment Advisors. We request that the mandatory annual disclosures under the Proposed Regulations and Proposed Class Exemption be modified to provide that if a firm can satisfy the Department's disclosure requirements through disclosure documents required by SEC or FINRA, no separate additional or duplicative disclosure document will be required. We suggest that the Department's final rules mirror those rules promulgated by the securities regulators and provide that firms can satisfy this requirement through other disclosures required by the securities regulators. In addition, we request that the Department's disclosure requirement be revised to provide that firms are only required to provide the disclosures on an annual basis when there is a material change from the initial disclosure.

In addition to the coordination recommended in this Section 9, the following Sections (Sections 10 through 12 below) discuss items that are also addressed by existing SEC or FINRA rules.

10. Calculation of Life Expectancy or Consideration of All Factors not Required

Sections (c)(1)(ii) and (d)(1)(ii) of the Proposed Regulations and Section III(c) of the Proposed Class Exemption specify that in order to take advantage of the fee leveling or computer model provisions, an arrangement must take into account information furnished by the participant or beneficiary, including age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and investment

preferences. It is not clear whether the Department intends that each of the factors listed in these sections must be considered for all investment advice programs under these rules, or whether these are examples of information that an investment advice program should consider. Many advice programs are not designed to take into account all of these factors, and participants may not provide information regarding all of these factors. We request that the Department clarify that this list represents the type of information to be considered, but that each item is not a required factor. This position is supported by the SEC and FINRA rules, which provide for reasonable attempts to request and obtain relevant investment advice information from the advice recipient under the suitability rules.

If the Department does intend that each of these factors must be taken into account, we request that the term “life expectancy” be replaced with the term “time horizon.” Many investment advice programs consider the participant’s current age and estimated retirement age, to determine the time period over which the retirement assets will be held and will continue to accumulate (e.g., a 55 year old participant may plan to annuitize his plan benefits at age 65, giving him a 10 year time horizon). Typically, advice programs do not calculate actual life expectancy (based on factors such as health, family history, whether the individual smokes or exercises, etc.), which involves actuarial calculations and underwriting and is generally associated with life insurance contracts. Nor do all programs use life expectancy charts based solely on age and sex. FINRA rules reference the consideration of a participant’s time horizon rather than life expectancy.

11. Fee Leveling Determinations Should not Consider “Aggregate” Incentives

Section (c)(1)(iii) of the Proposed Regulations and Section III(f) of the Proposed Class Exemption require that “[a]ny fees or other compensation (including salary, bonuses, awards, promotions, commissions or any other thing of value) . . . [do] not vary depending on the basis of any investment option selected by a participant or beneficiary.” We agree with the Department that the level fee requirement should include the concept of “product neutrality.” This requirement generally extends to salaries, bonuses, awards, promotions, commissions, or other things of value; however, we believe that it should not apply to performance-based compensation that is awarded for gross production and that does not depend on a single type of investment option, such as annual volume bonuses and similar awards. Annual volume bonuses, trips, etc. that are awarded for gross production not dependent on a single type of investment option appear to be permissible. It would be helpful if the Department would add such a clarification and include examples. An illustrative example is as follows:

A broker-dealer/registered investment adviser offers a Reward Program consisting of an all-expense paid trip to a resort for a two-and-a-half day conference. While the objective is to provide advanced education and training relating to the investment business, there are also social/recreational activities. The conference is available to the 100 top producing registered representatives. Eligibility is based on Gross Production Compensation, which

equally weights brokerage commissions, advisory compensation, retail securities and annuities, etc. IRAs and other retirement accounts are treated the same as nonqualified, retail accounts. Because eligibility for the award of the trip does not vary based on any investment option selected by a retirement plan/IRA client, the program meets the PTE level fee requirement.

This position is supported in concept by existing IRA exemptions that permit receipt of premiums or services at a reduced cost or at no cost (See PTEs 93-1 and 93-33). Applying the principles of these PTEs to the investment advice context, bonuses or awards that are based on sales equally weighting IRAs and non-IRAs, without regard to the investment option selected, should clearly meet the level fee requirement.

This position is also supported by existing FINRA rules relating to the compensation that sales personnel can receive, that address a comparable policy concern. The FINRA rules provide that sales personnel may not be provided with any incentive or additional compensation “for the sale of specific [investment company] securities based on the amount of brokerage commissions received or expected from any source ...” FINRA also requires that any non-cash compensation be based on “total production” of all investment company securities or variable insurance products, as applicable, and that the credit received for each security be “equally weighted.”

12. Audit Report Should not Include Cured or Immaterial Errors

The Proposed Regulations and Proposed Class Exemption require an annual independent audit. Following the audit, the auditor is required to send a written report to each fiduciary who authorized the use of the arrangement, and in the case of IRAs, to furnish a copy of the report to each beneficiary or post the report on a website accessible to the beneficiary. Before the audit report is distributed, the fiduciary advisor should be given an opportunity to cure any defects, when appropriate, and when the noncompliance is deemed not to be harmful to investors. In addition, there should be a materiality standard for the audit report. Defects should be corrected and not documented in the audit report when they are immaterial (e.g., minor errors due to an oversight). We recognize that the audit control is the primary safeguard for participants under the proposals. However, posting an audit report with such minor or easily correctable errors would not benefit IRA beneficiaries, and could unnecessarily harm the providers of the advice.

The SEC and FINRA have similar annual audit requirements. The SEC and FINRA audit rules permit firms to correct, without penalty, immaterial oversight or operational violations during the audit. In addition, the audit report is not required to be sent to the plan sponsor or IRA holder or posted on a website, but rather the plan sponsor and IRA holders are required to be notified that they can obtain copies of the audit report upon request. It would be helpful if the Department mirrored the SEC and FINRA rules in these respects.

The proposals state that the audit report must be sent within 60 days of the audit; however, in the case of an IRA, the fiduciary advisor has an additional 30 days to provide the audit to the IRA beneficiaries. We request that the Department extend this rule to qualified plans as well (*i.e.*, the fiduciary advisor should have an additional 30 days to distribute the audit report to the fiduciaries of a 401(k) plan as well).

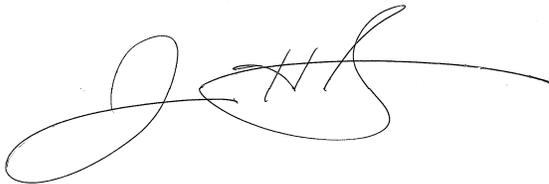
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On behalf of the ACLI member companies, thank you for consideration of these comments. As stated above, we welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,



Walter C. Welsh
Executive Vice President,
Taxes & Retirement Security



James H. Szostek
Director, Taxes & Retirement Security



Shannon Salinas
Counsel, Taxes & Retirement Security