

October 6, 2008

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: Proposed Regulation on 401(k) Plan Investment Advice

The American Institute of Certified Public Accountants (AICPA) is pleased to comment on the Department of Labor's (Department) proposed regulation 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 350,000 members in business, industry, public practice, government and education.

Our comments are focused on the annual independent audit requirement in the proposed regulation, the requirement that an "eligible investment expert" certify that the computer model meets specific requirements, and the specifications of the computer model. In addition, we also support the Department's guidance regarding the disclosure of information to participants to ensure that they are informed about the specifics of their plan (e.g., fees, affiliations of the fiduciary adviser, limitations on the computer model) to facilitate well-informed investment decisions.

1. Annual Audit

Section (f) of proposed regulation 2550.408g-1 states the following:

“(f) ANNUAL AUDIT.—

“(1) The fiduciary adviser shall, at least annually, engage an independent auditor, who has appropriate technical training or experience and proficiency, and so represents in writing to the fiduciary adviser, to:

- (i) Conduct an audit of the investment advice arrangements for compliance with the requirements of this section; and (ii) Within 60 days following the completion of the audit, issue a written report to the fiduciary adviser and, except with respect to an arrangement with an IRA, to each fiduciary who authorized the use of the investment advice arrangement, consistent with paragraph (e) of this section, setting forth the specific findings of the auditor regarding compliance of the arrangement with the requirements of this section.

Section (f)(4) further states that:

“... the auditor “shall review sufficient relevant information to formulate an opinion as to whether the investment advice arrangements, and the advice provided pursuant thereto, offered by the fiduciary adviser during the audit period were in compliance with this section. Nothing in this paragraph shall preclude an auditor from using information obtained by sampling, as reasonably determined appropriate by the auditor, investment advice arrangements, and the advice pursuant thereto, during the audit period.”

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. 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.

Commentary within the proposal makes it clear that there is no requirement of an audit of every investment advice arrangement or of all of the advice that is provided¹. 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)? We recommend that additional guidance (e.g., size of the sampling) be provided in this regard and are concerned that the lack thereof will leave the audit scope up to the interpretation of fiduciary advisers, auditors and other fiduciaries. Further, because the audit’s scope and frequency thereof will influence whether one decides to enter this line of business (from a cost and time perspective), additional guidance would promote greater consistency, efficiency and quality of investment advice programs.

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.

Audit timing- Paragraph (f) (1) (ii) of the proposed regulation requires that a written audit report be issued to the fiduciary adviser and each fiduciary who authorized the use of the investment advice arrangement within 60 days of completion of the audit. The Department should clarify the annual audit period (for example, based on the plan’s fiscal year end or annual enrollment period.) We would recommend that the period not conflict with the due date for plan Form 5500s and financial statement audits, which, with extension, the majority are due by October 15 of each year.

Audit exemption- Additionally, 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, based on plan assets, etc.) similar to the plan audit required for Form 5500.

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 eligible investment advice arrangement be considered to fail to meet the prohibited transaction exemption?

¹ Excerpt from page 49900 of the August 22, 2008 Federal Register notice: “The proposal, therefore, does not require an audit of every investment advice arrangement at the plan or fiduciary adviser-level or of all of the advice that is provided under the exemption. In general, the proposal leaves to the auditor the determination as to the appropriate scope of their review and the extent to which they can rely on representative samples for determining compliance with the exemption.”

2. Computer Model

Specifications of the computer model– Section (d) of the proposed regulation discusses the specifics of an investment advice arrangement utilizing a computer model. Requirement (iv) (A) of this section states that a computer model must avoid investment recommendations that “inappropriately favor” investment options offered by the fiduciary adviser or a person with a material affiliation/contractual relationship to the fiduciary adviser over other investment options, if any, available under the plan. Commentary in the published notice clarifies that a computer model will not fail this requirement merely because the only investment options offered under the plan are options offered by the fiduciary adviser or a person with a material affiliation or material contractual relationship with the fiduciary adviser².

We are concerned that plan participants may equate certification of the computer model with an endorsement of the investment options that were selected by the plan sponsor. The fact that a computer model can be certified notwithstanding that it contains exclusively proprietary funds highlights how this could create confusion to the plan participant. Diversification is fundamental to a sound investment strategy. Yet, a fiduciary adviser (and computer model) would be technically in compliance with this proposed regulation when only proprietary funds are selected. We therefore suggest that one of the disclosures the fiduciary adviser must make to the plan participant – per section (g)(vi) – is that investment advice generated by the computer model is based upon the products made available by the plan sponsor/presupposes prudent selection of investment options by the plan sponsor.

In proposal commentary³, the DOL expressed that it is seeking public comment on circumstances under which it would be inappropriate or appropriate to favor particular investment options. For example, the DOL believes that favoring a higher-cost investment alternative over an otherwise identical investment alternative with lower cost would be inappropriate. We recommend more guidance on the term “otherwise identical.” Without guidance, too much discretion is left in the hands of computer modeling experts and in the computer models themselves, potentially resulting in an unlevel playing field among fiduciary advisers as a result of different investment recommendations generated by the model.

3. Certification of Computer Model by Eligible Investment Expert

Prior to the utilization of a computer model, the fiduciary adviser must obtain a written certification from an eligible investment expert that the requirements of paragraph (d)(1) have been met. An “eligible investment expert” is defined in (d)(3) of the proposal as a “person that, through employees or otherwise, has the appropriate technical training or experience and proficiency to analyze, determine and certify, in a manner consistent with paragraph (d)(4) of this section, whether a computer model meets the requirements of paragraph (d)(1) of this section.” Proposal commentary states that the Department intentionally does not require a particular methodology, recognizing that as computer models and their use under investment advice arrangements continue to develop, experts may need the flexibility to develop new methodologies for examining those models.⁴

² Page 49898 of published *Federal Register* notice.

³ *Ibid.*

⁴ Page 49899 of published *Federal Register* notice.

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 of section (d)(4) in the proposal. We continue to recommend that the Department 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 specified in section (d)(4) that the certification must follow, 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.

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.

4. Disclosure requirements for fiduciary advisers

Section (g)(1) of the proposed regulation details the various components of the written disclosure that the fiduciary adviser must provide to a participant or beneficiary⁵ before the initial provision of investment advice, annually, upon request and finally, if there is any material change to the information. We commend the DOL for setting forth these requirements, since they enhance the ability of investors to make more informed decisions and facilitate access to other advisers.

There are a variety of persons or entities that are eligible to be a fiduciary adviser as defined in the regulation⁶. Every fiduciary adviser is considered to be an ERISA fiduciary to the extent that they render investment advice for a fee or other compensation with respect to any moneys or other property of such plan.

Because a fiduciary adviser may also advise a plan participant outside of the scope of an eligible investment advice arrangement, we suggest that a component of the written disclosure [disclosure requirements of section (g)]⁷ be expanded to make it clear that the adviser is acting as a fiduciary of the plan exclusively with respect to the eligible investment advice arrangement authorized.

⁵ See prior comment on these terms.

⁶ Various individuals or entities may qualify to serve as a "fiduciary adviser," as defined in section (j) of the proposed regulation.

⁷ Section (g)(vii) currently reads: "That the adviser is acting as a fiduciary of the plan in connection with the provision of the advice."

5. Clarification on the terms “participant” and “beneficiary”

The proposed regulation refers to “participants” and “beneficiaries” interchangeably. We suggest that there be clarification regarding the term “beneficiary,” and whether the appropriate term is (1) “participant(s)” or (2) “*if applicable*, beneficiary”. Most participant-directed individual account plans (e.g., 401(k) s) direct that beneficiary designations be established in the event of a participant’s death, the usage of which is also consistent with the statutory definition of “beneficiary” in ERISA⁸. The terms “beneficiary” and “participant” have distinct and different legal meanings.

A primary purpose of this proposed regulation is to increase the availability of quality, expert investment advice to individual plan participants with respect to managing their individual plan accounts. This purpose suggests that the targeted recipients of this advice are the plan participants, since beneficiaries, by definition, are not involved in investment decisions associated with individual plan accounts. Further, in many cases we believe that plan participants would be opposed to their named beneficiaries being made aware of specifics of an account for which they are a named beneficiary. Per ERISA, a beneficiary “is or may become entitled to a benefit.” Until vesting of such benefit occurs, beneficiaries do not participate or make decisions about the investments of individual accounts for which they are a named beneficiary.

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We appreciate the opportunity to comment on the proposed regulation. AICPA representatives would be pleased to further discuss our comments and suggestions, and to assist in developing audit procedures. If you have any questions please contact Ian MacKay at 202-434-9253.

Sincerely,



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⁸ ERISA 3(8) defines beneficiary as “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.”