

THE FINANCIAL SERVICES ROUNDTABLE



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Impacting Policy. Impacting People.

May 5, 2010

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: 2010 Investment Advice Proposed Rule
US Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

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RICHARD M. WHITING
EXECUTIVE DIRECTOR
AND GENERAL COUNSEL

RE: Dept. of Labor's Proposed Regulation on Investment Advice – Participants and Beneficiaries (RIN 1210-AB35)

Dear Sir or Madam:

The Financial Services Roundtable¹ (“Roundtable”) submits this letter in response to the Department of Labor’s (“DOL”) proposed regulation on investment advice. The Roundtable supports the Department’s intent to enhance the amount of clear and concise disclosures made by plan advisors. However, the Roundtable is concerned that the broad application of the proposal may cause unintended consequences. The Roundtable *urges* the DOL to create a workable plan for disclosure will positively impact the promotion and expansion of retirement plans. Our concerns are outlined below.

Historical Performance Provides Greater Context

Paragraph (b)(4)(i)(E)(3) of the proposed rule prohibits developers of computer models from providing investment recommendations within an asset class on a basis that cannot “confidently” be expected to persist in the future. The proposed rule assumes that plan participants do not benefit from knowing how a particular asset has performed over time. Therefore, while a computer model is free to include fees and expenses in its analysis, it may not consider historical performance. The Roundtable disagrees with the assertion that historical performance is not an “appropriate criteria for asset allocation” because it is “less likely” to persist into the future. The consequence of this proposed prohibition is that less information ultimately would be available to plan participants. The proposal also discounts assets that have demonstrated a high-level rate of return or displayed long-term consistency.

The Roundtable believes that historical performance **is** a critical factor that plan participants need to know when they are considering the range of available investment options. Given the

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$74.7 trillion in managed assets, \$1.1 trillion in revenue, and 2.3 million jobs.

important contextual role that historical performance data plays, the information should be provided to investors and included in any program providing investment guidance to plan participants. Therefore, the Roundtable respectfully recommends that the Department amend the proposed rule to include historical performance as necessary component to the investment advice puzzle.

Expanded Definition of Fiduciary

The proposed rule includes an expanded definition of “fiduciary adviser” (see section 2550.408g-8c(2)(i)). This broad definition includes banks, insurance companies, broker-dealers, marketing personnel and computer designers. Of note, subsection 8c(2)(ii) of the proposed rule provides that “any person who develops the computer model, or markets the computer model or investment advice program” is considered a fiduciary adviser. The Roundtable believes that this proposed definition of a fiduciary adviser is overly broad.

We are concerned that the proposal is an effort to impose a uniform duty of care in the industry and that imposing fiduciary liability on indirect persons (software developers and marketers) imposes additional and expensive burdens on financial firms. This would lead to significant unintended consequences, such as limiting investor options. Further, the imposition of a fiduciary relationship would decrease the number of software developers willing to create the investment-advisor software absent significant additional compensation from advisors. The finalization of this provision would increase the cost of service for plan providers and ultimately consumers. It may also impact an investment advisor’s decision-making processes regarding whether they should invest in developing a computer model at all.

The Roundtable respectfully recommends that the Department withdraw the proposed definition of “fiduciary adviser” and develop a more accurate and simplified definition of fiduciary that does not encapsulate a large population of individuals that do not directly provide investment advice to the plan participant. In the alternative, the definition should include an exception for computer developers and marketers who were hired as contractors by financial firms and have no contact with plan participants for the purposes of providing investment advice.

Guidance for Computer Models and Annuity Investment Options

The two methods of providing investment advice to covered plan-participants involve computer models that consider the plan’s investment options when it provides investment advice. The first approach uses software developed by a qualified, independent third-party developer (known as the “SunAmerica Opinion” model). The other program is derived from an exemption in the Pension Protection Act of 2006 (the “PPA” model). In general, a PPA computer model must take into account all of a plan’s investment options when it provides investment advice to participants. However, it does not appear that a SunAmerica model is required to consider every investment option offered by the plan when the SunAmerica model gives advice.

The proposed rule would allow a PPA computer model to disregard a deferred annuity investment option that would otherwise be available under the plan. Presumably, a SunAmerica

program could also disregard deferred annuity options, but the proposed rule is unclear about this.

The Roundtable respectfully requests additional clarification and guidance from the Department regarding the apparent operational differences between the two models. We also recommend that the rule require at least one of the computer models to consider available deferred annuities when it provides investment advice.

Conclusion

In closing, the Roundtable supports the DOL's overall intent to enhance disclosures for plan sponsors. However, we are concerned about the unintended consequences discussed above that may occur due to the broad application of this proposal. Appropriately addressing such complex issues as longevity, market risk, and health care costs in retirement, will require a constantly evolving set of solutions. Greater regulatory flexibility and innovative public policies that foster the free exchange of information regarding retirement options available to plan participants will permit the introduction of products responsive to the retirement needs of the American people.

Thank you again for the opportunity to share our views with you on this subject. If you have any questions, please feel free to contact Brian Tate, or me at 202-289-4322.

Sincerely,

Richard Whiting
Executive Director and General Counsel