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Sent via Electronic Mail

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

Re: Request for Information regarding Prohibited Exemption for Provision of Investment Advice to Participants in Individual Account Plans

To whom it may concern:

The Financial Planning Association ("FPA®")[1] is pleased to submit comment regarding the provision of personalized investment advice to plan participants under Section 601 of the Pension Protection Act of 2006 (the "Act" or "PPA"). Retirement planning is a core area of practice for most financial planners. In addition to providing advisory services on broad financial planning issues to individuals and families, business owners and employees -- including personalized advice on individual retirement and 401(k) accounts -- many also serve as investment managers who select and manage a qualified plan's investment options.

FPA offers comment on three areas of the Department's Request for Information ("RFI"):

- Criteria used in designing computer models
- Disclosure of conflicts of interest under an eligible investment advice arrangement
- Disclosure of conflicts by fiduciary advisers outside of Section 601 activities

I. Criteria Used in Designing Computer Models

The criteria required for computer model advice programs, as outlined in ERISA section 408(g)(3), addresses fundamental components needed to help plan participants meet their long-term retirement planning goals. FPA strongly supports the criteria as written, which includes, among other things, the consideration of historic returns of different asset classes; basic client data such as age, life expectancy, risk tolerance, and retirement age; and a requirement that it be calculated in a manner that is not biased in favor of investments offered by the fiduciary adviser.

[1] The Financial Planning Association is the largest organization in the United States representing financial planners and affiliated firms. Most of FPA's 28,000 members are affiliated with investment adviser firms registered with the Securities and Exchange Commission, state securities administrators, or both. FPA is incorporated in Washington, D.C., where it maintains an advocacy office, with headquarters in Denver, Colo.

The investment time horizon of a plan participant, however, is not singled out as a criterion. It can be assumed that the data currently required, such as the current and retirement ages of the plan participant, as well as life expectancy, can help in establishing the time horizon. However, simply adding this as a separate data input would enhance a computer program's ability to measure risk tolerance.

There are two other issues that should be addressed in a computer model. First, section 408(g)(3) does not directly address investment expenses as part of an asset allocation. A recent report by the General Accountability Office ("GAO") illustrates how seemingly incremental investment fees, such as an increase in an asset-based investment management fee from .5 to 1.5 percent, could reduce a worker's savings by 17 percent over 20 years.[2] With 401(k) account balances averaging $100,000, every dollar saved towards retirement counts.[3] It is therefore critical that the criteria used in computer advice programs factor in mutual fund expenses, if these are used as investment options. Granted, many computer models and databases currently report historic performance data net of fees and expenses internal to a mutual fund, but some do not. We believe that historic performance data in a mutual fund option net of fees and internal expenses should be required as an important data input.

Second, the RFI solicits comment on procedures used to satisfy criteria under Section 408, including potential bias in favor of certain investments offered by the fiduciary adviser. The Department should establish a procedure that gives the eligible investment expert (i.e., independent auditor of the computer program) the ability to assess or track whether the model asset allocations can be manipulated by the fiduciary adviser or affiliates in a way that contravenes this important requirement.

II. Disclosure of Conflicts of Interest under an Eligible Investment Advice Arrangement

Much of the recent public policy debate in Congress over comprehensive pension reform centered on the so-called "investment advice provision," or Section 601. Under the PPA's "eligible investment advice arrangement," fiduciary advisers would need to satisfy certain disclosure requirements, among other things, in order to meet the prohibited transaction exemption. FPA believes that considerable care is needed in crafting an effective disclosure template for fiduciary advisers. With the exception of Form ADV Part II (the core disclosure document used by registered investment advisers), the financial services industry has no corresponding uniform disclosure template informing consumers about the financial adviser or sale agent's qualifications, disciplinary history, methods of compensation and investment philosophy.

In its RFI, the Department asks if there is a form available for presenting information on fees and compensation as required by Section 408(g)(6)(A)(iii). FPA believes it makes sense for the

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[2] *See* Abstract, GAO report, "Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees," GAO-07-21, Nov. 16, 2006, at 11.

[3] Employee Benefit Research Institute, Issue Brief No. 296, August 2006.

Department to carefully examine Form ADV Part 2, as proposed by the Securities and Exchange Commission ("SEC").[4] The core disclosure elements required by an eligible investment advice arrangement are already contained in Form ADV. The SEC's so-called Brochure Rule also contains a similar annual disclosure offer and required notification when there has been a material change in information about the advisory firm.

Form ADV has been in effect for nearly two decades and has worked well in enhancing consumer protection. The proposed changes to Part II, which are expected to be considered for adoption later this year by the SEC as Part 2, would essentially convert the existing check-the-box format to a plain-English, narrative description of the adviser's fees and compensation, among other important disclosure items. Similar to the fiduciary adviser requirement in Section 601, registered investment advisers have had a longstanding fiduciary duty to their clients under the Investment Advisers Act of 1940 and similar state statutes. Adaptation of elements of Form ADV to the more limited disclosure requirements of an eligible investment advice arrangement should be considered by the Department.

At a minimum, we believe the Department also should clarify that registered investment advisers, both federal and state-registered, are able to satisfy the disclosure requirements of Section 408 if such information is also contained and prominently featured in Form ADV Part II (or Part 2 when adopted by the SEC). Such disclosure, of course, must be consistent with other requirements of Section 408, i.e., that the disclosure is prominent, and in language that is clear and understandable by the average plan participant.

III. Disclosure of Conflicts of Interest by Fiduciary Advisers Outside of Section 601 Activities

Section 601 of the Act requires a person in an eligible investment advice arrangement to disclose that they are acting in a fiduciary capacity to a client. However, the PPA does not address the need for disclosure of other, non-fiduciary services that may be provided subsequent to, and outside of the advice arrangement. In recent years, there has been a broad consolidation of financial services and products offered by the four major regulated groups eligible to act as fiduciary advisers: banks, insurance companies, investment advisers and broker-dealers. Aggressive marketing by these industries strongly suggests a relationship of trust and fiduciary responsibility between the adviser and client at all times, particularly in the area of retirement planning. In reality, only two of these industry sectors have a clearly established fiduciary duty: bank trust departments and registered investment advisers.

FPA believes that fiduciary advisers who no longer act in that capacity outside of the scope of Section 601 should be required to disclose to plan participants that they are no longer bound to legally act in their best interest. Registered investment advisers have an established fiduciary duty to their clients.[5] Advisers in the trust department of banks also generally have a fiduciary duty. However, broker-dealer agents do not, and then only on an intermittent "facts-and-

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[4] *See* "Electronic Filing be Investment Adviser; Proposed Amendments to Form ADV," 17 CFR Parts 200, 275, and 279, [SEC Release No. IA-1862; 34-42620; File No. S7-10-00], June 13, 2000.

[5] *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180 (1963).

circumstances" basis. Insurance agents, who have substantial market penetration within the qualified retirement plan business through the sale of annuity products, have no legally required fiduciary duty.

FPA is in the process of publishing best practices for eligible investment advice arrangements under the PPA, in an effort to encourage fiduciary advisers to adopt a prudent process that benefits the consumer and guides the financial professional in providing personalized investment advice. One of the most important practices by the FPA task force developing these standards suggests that the fiduciary adviser provide "appropriate written disclosure of any material conflicts of interest" in the event the plan participant or beneficiary requests services unrelated to the eligible investment advice arrangement. As part of the criteria for this best practice, FPA recommends that:

- The fiduciary adviser determines whether the client relationship is warranted, based on the needs and objectives of the plan participant or beneficiary;
- The fiduciary adviser has the requisite competency to provide those services, or to make the appropriate referral to other professionals; and
- If the fiduciary adviser provides other services to the plan participant, he or she will disclose and document any change in fiduciary status prior to providing such services.

FPA would strongly encourage the Department to consider similar disclosure requirements by fiduciary advisers whose clients seek advice outside of an ERISA advice arrangement.

Separately, FPA would note that the Act requires compliance by fiduciary advisers with all securities laws. FPA believes the Department, consistent with this requirement, should likewise make broker-dealers aware that receipt of "special compensation" under an eligible investment advice arrangement is also subject to "Rule 202," a special fee-based exemption from the Advisers Act adopted by the SEC in 2005. This rule requires, among other things, that brokerage firms provide to fee-based customers the following disclosure:

> **Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time.**[6]

Rule 202 clearly provides a model, imperfect as it may be by <u>not</u> disclosing actual conflicts, but nonetheless a step in the right direction by serving notice of a difference in legal responsibilities. FPA would suggest that the Department develop a similar disclosure template for fiduciary advisers who no longer act in that capacity, and by requiring disclosure prior to execution of other non-ERISA advisory agreements or transactions.

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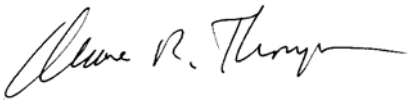
[6] *See* § 275.202(a)(11)-1, "Certain Broker-Dealers Deemed Not To Be Investment Advisers."

FPA greatly appreciates the opportunity to provide additional comments on this proposal. Please do not hesitate to contact me at 202.449.6341 should you have any questions or comments.

Sincerely,



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