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October 8, 2008

VIA FACSIMILE: 202-219-5526

The Honorable Bradford Campbell
Assistant Secretary
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5665
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attn: Investment Advice Regulations and Investment Advice Class Exemption

Dear Assistant Secretary Campbell:

We are submitting these comments in response to the Department of Labor's (Department) proposed regulations on investment advice pursuant to the exemption outlined in Sections 408(b)(14) and 408(g) of the Employee Retirement Income Security Act (ERISA); the corresponding provisions set forth in the Internal Revenue Code (Code); and the proposed class exemption for investment advice to participants and beneficiaries of self-directed individual account plans and IRAs.

We are deeply concerned with the Department's proposed rules and urge their immediate withdrawal. The Department has ignored Congressional intent and overstepped its authority by impermissibly expanding the "eligible investment advice" exemption. This proposed expansion threatens the retirement security of millions of American workers by exposing their retirement savings to self-interested investment advice.

Over the last few weeks this country has witnessed the devastating consequences unregulated markets can have on our economy. Unsupervised financial giants such as Bear Stearns, Wachovia, AIG, and Lehman Brothers sold Americans on financially risky products. These institutions, motivated by greed and self-interest have jeopardized the economic and financial security of millions of families and businesses around the world.

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As a result of this mismanagement and self-dealing, Congress had to appropriate \$700 billion to restore confidence in and the security of our financial markets. The Department's proposed rules similarly would undo over 30 years of pension law protections against conflicts of interest and open the doors to unregulated access to the retirement savings of 60 million Americans.

During its consideration of the Pension Protection Act of 2006 (PPA), Congress spent a considerable amount of time debating the inclusion of the highly controversial investment advice exemptions. Concerns were raised that the inclusion of any exemption would "[give] a sweetheart deal to investment houses by allowing them to offer conflicted investment advice to employees so long as they disclose to them that fix is in."¹ This, many felt, would deprive workers of the objective advice they needed in order to make prudent decisions.

The investment advice provisions included in the PPA were the result of a last minute compromise needed to ensure final passage of the bill. Senators Bingaman and Grassley fought vigorously against broad exemptions and the final PPA only included two narrow exemptions to ERISA and the Code's prohibition on conflicted investment advice. Prior to the law's enactment, Congress on several occasions expressly rejected enacting legislation that would have allowed for a wide range of investment advice arrangements. Under PPA, Congress was clear that permissible investment advice arrangements must be independent and made pursuant to either: (1) "fee-leveling" arrangements; or (2) arrangements that provide advice based solely on a certified computer model.

ERISA's prohibition on conflicts of interest in the management of workers' retirement monies was thoroughly debated during the enactment of the law. The Department's proposed rules fly in the face of over 30 years of the Department's own precedent – precedent that has worked well to protect worker's retirement savings. The rules, as proposed, would place the retirement security of American workers at risk.

When Congress drafted the investment advice exemptions it did so with the knowledge that investment advisers have an inherent self-interest to offer investment recommendations that are personally lucrative. Recognizing the conflict of interest, Congress adopted the fee-level exemption based on DOL precedent and founded on the belief that if fees did not vary based on the investment choice the investment advice could be offered on a truly independent basis. While advisers are subject to the level fee requirement, the Department's proposal would not prohibit advisers from making recommendations that are more beneficial to its affiliates. The proposed rules ignore the

¹ Statement of Chairman George Miller during the consideration of H.R. 2830, the Pension Protection Act of 2005 (December 15, 2005).

reality that an adviser, its affiliates and the employer can be closely related, for example under the same holding company. Consequently, the affiliate's profitability can directly impact the success of a fiduciary adviser and create a conflict of interest. This loophole stands in direct opposition to Congress' intent when it included the level fee requirement within PPA.

In addition, we are extremely troubled by the class exemption proposal which grants fiduciary advisers the authority to initiate investment advice to 401(k) and other individual retirement account plan participants and beneficiaries shortly after receiving advice through a computer model arrangement. Without question, the Department lacks the statutory authority to propose such a regulation, as evidenced by current law which explicitly prohibits unsolicited advice to a participant or beneficiary after receiving advice through a computer model arrangement: "[I]f a computer model is used, the only investment advice that may be provided under the arrangement is the advice generated by the computer model, and any investment transaction pursuant to the advice must occur solely at the direction of the participant or beneficiary."² The Committee on Joint Taxation explanation accompanying PPA expressly states that investment advice generated from a computer model shall be the only advice to be offered from this type of arrangement.³

The Department's proposed class exemption significantly broadens the computer model exemption far beyond Congressional intent. Whether using or ignoring the information generated by the computer model, fiduciary advisers would be free to steer participants toward investments that are more lucrative to the adviser, its employer and its affiliates. The adviser is required to explain why he/she believed the recommendations made are the best option for the participant but notice of that rationale need only be provided within 30-days after the advice is given. This 30-day notice period fails to ensure that participants have critical information about possible conflicts of interest before they make investment decisions. Information such as this must be disclosed prior to the provision of investment advice so participants are fully informed. As a whole, the proposed class exemption is a fundamental change in the law and exposes retirement accounts to the exact conflict and bias that Congress sought to protect against.

The Department's proposed regulations run contrary to Congress' clear intent to protect the retirement security of millions of American workers. If these rules are promulgated, participants will be exposed to self-interested investment advice by the very consultants purporting to offer unbiased investment advice. In light of this country's current economic downturn, there is an urgent need to ensure that workers are getting the

² ERISA § 408(g)(3)(D), IRC 4975

³ Joint Committee on Taxation Technical Explanation, ERISA, 3-89

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information they need to make sound and honest investments. Instead of helping workers, these proposals could make it much more difficult for workers to receive this much needed impartial advice as they make critical financial decisions.

We urge the Department to withdraw the proposed regulation and the proposed class exemption immediately.

Sincerely,



GEORGE MILLER
Chairman
Committee on Education and Labor



ROB ANDREWS
Chairman
Subcommittee on Health, Education,
Labor, and Pensions