The ERISA Industry Committee

SUBMISSION OF
THE ERISA INDUSTRY COMMITTEE
TO THE
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
U. S. DEPARTMENT OF LABOR

COMMENTS ON PROPOSED REGULATION:

INVESTMENT ADVICE— PARTICIPANTS AND BENEFICIARIES

October 6, 2008

The ERISA Industry Committee
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§ 2550.408g-1 & § 2550.408g-2,
73 *Fed. Reg.* 49,896-923 (August 22, 2008)

October 6, 2008

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the Department's proposed regulation implementing the statutory exemption for investment advice provided to participants and beneficiaries in participant-directed individual account plans. The exemption permits a fiduciary adviser to provide investment advice for a fee to participants and beneficiaries who direct the investment of their retirement accounts. The proposed regulation, when adopted, will affect plan sponsors, fiduciaries, and plan participants and beneficiaries as well as fiduciary advisers.

ERIC's Interest in the Proposed Regulation

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement savings programs and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals that affect its members' ability to deliver high-quality, cost-effective benefits.

All of ERIC's members sponsor individual account plans, including many of the largest individual account plans in the country. In the great majority of these plans, participants are responsible for directing how their accounts are allocated among the plan's investment options.

Investment advice can be an important tool to help participants and beneficiaries realize their retirement savings goals. Many of ERIC's members would like to give plan participants and beneficiaries greater access to professional

investment advice. ERIC's members have a vital interest in assuring that the regulation achieves its objectives in a way that encourages voluntary investment advice programs without exposing employers to an undue risk of liability. ERIC looks forward to working constructively with the Department to achieve this goal.

In the preamble to the proposed regulation, the Department recognizes how important investment advice can be to participants in individual account plans who are responsible for directing the investment of assets allocated to their accounts. 73 *Fed. Reg.* 49,896 (Aug. 22, 2008). Congress enacted the prohibited transaction exemption in ERISA §§ 408(b)(14) and 408(g) in order to give participants greater access to professional investment advice. *Id.* Investment advice programs are voluntary, however: no employer is required to make professional investment advice available under a participant-directed plan. Accordingly, the new statutory exemption will not have its intended effect unless the Department implements the exemption in a way that encourages employers to offer investment advice programs.

ERIC commends the Department for the steps it has taken, both in the proposed regulation and in its prior guidance, to clarify the rules that apply when an employer chooses to make investment education or investment advice available under a participant-directed plan. The Department should recognize, however, that plan sponsors and fiduciaries are increasingly targeted in class action lawsuits that propose expansive theories of fiduciary liability and seek substantial damages. Even when these lawsuits are without merit, as is often the case, they are expensive to defend, and they divert time and attention from the employer's business. As a result, any employer that considers whether to adopt an investment advice program must weigh the potential benefit to plan participants against the very real risk of costly and time-consuming litigation.

Employers will voluntarily offer investment advice programs only if the rules governing these programs are clear and objective, and provide safe harbors whenever possible. Many of ERIC's comments address the need for greater clarity and certainty in the proposed regulation. In addition, the regulation should clearly state how it interacts with other statutory provisions and with the Department's prior guidance concerning investment advice. ERIC's comments identify a number of areas where this clarification is needed.

Effect on Other Provisions

1. The regulation should state that it does not invalidate or otherwise affect prior guidance.

The Department has previously issued a number of items of guidance concerning participant investment advice. For example, Interpretive Bulletin 96-1,

29 C.F.R. § 2509.96-1, identifies investment-related information that does not constitute investment advice; Advisory Opinions 97-15A and 2005-10A explain that a fiduciary may provide investment advice with respect to funds that pay the fiduciary additional fees if the fiduciary offsets the additional fees against fees otherwise owed by the plan; and Advisory Opinion 2001-09A concludes that a fiduciary may provide investment advice with respect to funds that pay the fiduciary additional fees if the advice results from the application of methodologies developed and maintained by an independent party.

In Field Assistance Bulletin 2007-01 (Feb. 2, 2007), the Department confirmed that the enactment of the new statutory exemption in ERISA §§ 408(b)(14) and 408(g) "do[es] not invalidate or otherwise affect prior guidance of the Department relating to investment advice and that such guidance continues to represent the views of the Department." The Field Assistance Bulletin also quotes the floor statement of Senate Health, Education, Labor, and Pensions Committee Chairman Enzi that "[t]his legislation does not alter the current or future status of the plans and their many participants operating under [the existing] advisory opinions." 152 *Cong. Rec.* S8,752 (daily ed. Aug. 3, 2006) (statement of Sen. Enzi). The preamble to the proposed regulation cites and apparently endorses the views expressed in the Field Assistance Bulletin and the floor statement. 73 *Fed. Reg.* at 49,897. The proposed regulation itself does not address the status of prior guidance.

The Department's prior pronouncements, in combination with the new statutory exemption, give employers and fiduciaries a range of options for offering investment education and advice to plan participants. This flexibility is important and should be preserved. ERIC welcomes the Department's statements that the new statutory exemption does not supersede prior guidance. This conclusion is too important to be expressed solely in informal statements such as the preamble and the Field Assistance Bulletin, however. Courts give less deference to an agency's informal statements than they give to regulations that are the product of a notice and comment rulemaking proceeding. *See United States v. Mead Corp.,* 533 U.S. 218 (2001); *Matz v. Household International Tax Reduction Investment Plan,* 265 F.3d 572 (7th Cir. 2001). Accordingly, ERIC urges the Department to state in the regulation itself, and not merely in the preamble, that the new statutory exemption does not affect the Department's prior guidance relating to investment advice and that such guidance continues to represent the Department's views.

2. The regulation should make clear that the relief provided in § 408(g)(10) applies to all investment advice programs.

The Pension Protection Act of 2006 amended ERISA to provide important relief for plans that offer investment advice to participants. Under a new § 408(g)(10), neither the plan sponsor nor any plan fiduciary (other than the fiduciary who provides investment advice) is liable under the fiduciary provisions of

ERISA for offering an investment advice program, or for the specific advice furnished by the fiduciary adviser to the plan's participants.

On its face, this relief applies only to an "eligible investment advice arrangement"—that is, an arrangement that satisfies the requirements of the new statutory exemption. In Field Assistance Bulletin 2007-01, however, the Department expressed the view that the relief provided in ERISA § 408(g)(10) applies to all investment advice arrangements, and not only to arrangements that meet the new statutory requirements, provided that the plan sponsor or fiduciary prudently selects the adviser and periodically reviews the adviser's performance. The preamble to the proposed regulation cites and apparently endorses this position. 73 *Fed. Reg.* at 49,897. The proposed regulation itself does not address the scope of the relief provided under § 408(g)(10).

ERIC strongly endorses the Department's interpretation of the relief provided in ERISA § 408(g)(10). Without this interpretation, employers would be effectively precluded from offering any investment advice arrangement that did not fit within the statutory exemption, a result that is illogical (for the reasons explained in the Field Assistance Bulletin) and that Congress clearly did not intend. *See* 152 *Cong. Rec.* S8,752 (daily ed. Aug. 3, 2006) (statement of Sen. Enzi). As explained in the previous comment, however, courts do not always give deference to an agency's informal statements. Accordingly, the Department should issue a regulation confirming its interpretation of § 408(g)(10).

3. The Department should not use the word "monitor" to describe a fiduciary's duty periodically to review the performance of the fiduciary adviser.

Section 408(g)(10)(B) states that the statute does not exempt a fiduciary from any requirement "for the prudent selection and periodic review" of a fiduciary adviser; but the statute also confirms that a fiduciary "has no duty under this part to monitor" the adviser's specific advice. ERIC believes that the terms used in the statute are chosen deliberately, and that these terms correctly reflect the applicable fiduciary requirements: a fiduciary might have a duty to "periodically review" the adviser's performance, but the fiduciary does *not* have a duty to "monitor" the adviser.

ERIC notes with concern, however, that the Department uses the terms "periodically review" and "monitor" interchangeably in Field Assistance Bulletin 2007-1. For example, the bulletin states that fiduciaries have a duty "to prudently select and *monitor* investment advisers," and that "[i]n *monitoring* investment advisers, we anticipate that fiduciaries will *periodically review"* a number of specific items. Field Assistance Bulletin 2007-1 (emphasis added).

ERIC is concerned that the term "monitor" could be misinterpreted to imply that a fiduciary is required to keep advisers under continuous supervision. For example, one meaning given for the word "monitor" in the *American Heritage Dictionary of the English Language* (Fourth Edition 2000) is "To keep close watch over; supervise: *monitor an examination."* Similarly, one meaning given for this term in the *Oxford English Dictionary* (Online Edition) is "To observe, supervise, or keep under review; to keep under observation."

ERIC does not believe that a fiduciary duty of continuous supervision is consistent with the Department's intent or with the requirements of ERISA. When ERISA was first enacted, the Department described the ongoing responsibility of a fiduciary as follows: "*At reasonable intervals* the performance of trustees and other fiduciaries *should be reviewed* by the appointing fiduciary . . . ." 29 C.F.R. § 2509.75-8, FR-17 (emphasis added). Similarly, in the preamble to the final § 404(c) regulations, the Department stated that a fiduciary has "a residual fiduciary obligation *to periodically evaluate* the performance" of look-through investment vehicles. 57 *Fed. Reg.* at 46,924 n. 27 (emphasis added).

ERIC recommends that the Department use the term "periodically review" rather than "monitor" to describe the ongoing duty of a fiduciary to determine whether the performance of fiduciary advisers is adequate. The Department should use the term "monitor" only in the way that § 408(g)(10)(B) uses this term: to describe an obligation that a fiduciary *does not* have.

4. The regulation should state that fiduciaries are not required to make investment advice available under participant-directed plans.

ERISA § 404(c) creates an exception to ERISA's generally applicable fiduciary liability provisions. If a plan complies with the requirements of § 404(c), the participant is not deemed to be a fiduciary by reason of exercising investment control over his or her account, and no person who is otherwise a fiduciary is liable for any loss that results from the participant's exercise of control.

Relief from fiduciary liability is available under § 404(c) only if, among other things, the participant "is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan." 29 C.F.R. § 2550.404c-1(b)(2)(B). The regulation states, however, that "[a] fiduciary has no obligation under part 4 of Title I of the Act to provide investment advice to a participant or beneficiary *under an ERISA section 404(c) plan."* 29 C.F.R. § 2550.404c-1(c)(4) (emphasis added). In Interpretive Bulletin 96-1, the Labor Department explained that compliance with the § 404(c) disclosure requirements "does not require that participants and beneficiaries be offered or provided either investment advice or investment education, *e.g.* regarding

general investment principles and strategies, to assist them in making investment decisions." 29 C.F.R. § 2509.96-1(b) n. 1.

The Department recently proposed a regulation that would expand the disclosure requirements for participant-directed plans. Prop. Reg. §§ 2550.404a-5 & 2550.404(c)-1, 73 *Fed. Reg.* 43,014–44 (July 23, 2008). The proposed regulation would require plan fiduciaries to disclose certain investment information to participants and beneficiaries who have the right to direct the investment of their retirement accounts. Under the proposed regulation, the disclosure of this information would be a fiduciary obligation under § 404(a) of ERISA. Accordingly, the new disclosure requirements would apply to all participant-directed individual account plans, regardless of whether they rely on the fiduciary exception in ERISA § 404(c).

The Department's regulation concerning investment advice should reaffirm that ERISA does not require a fiduciary to offer either investment advice or investment education to participants and beneficiaries in participant-directed individual account plans. The regulation should make clear that this principle applies not only to § 404(c) plans, as stated in the § 404(c) regulations and Interpretive Bulletin 96-1, but also to participant-directed plans that do not rely on § 404(c).

5. Providing investment advice should not affect fiduciary relief under § 404(c).

If a plan complies with the requirements of § 404(c), fiduciaries are not liable for any loss that results from the participant's exercise of investment control over his or her account. In Interpretive Bulletin 96-1, the Department explained that "the provision of investment-related information and material to participants and beneficiaries in accordance with paragraph (d) of this interpretive bulletin will not, in and of itself, affect the availability of relief under section 404(c)." 29 C.F.R. § 2509.96-1(b) n. 2.

The Department's regulation interpreting the new statutory exemption should include a similar statement concerning investment advice provided under an eligible investment advice arrangement, or under any of the other investment advice arrangements described in the Department's prior guidance. No investment advice—regardless of how sound, how unbiased, and how well-grounded in accepted theories—will produce positive results 100% of the time. If a plan sponsor runs even a remote risk that the act of offering investment advice (regardless of the quality of the advice) will impair its ability to rely on the relief provided under § 404(c), the plan sponsor will not adopt an investment advice program. Accordingly, the regulation should state that a participant in a § 404(c) plan is still responsible for any loss that results from the participant's exercise of investment control, even if the participant has followed investment advice provided under the plan.

6. The fiduciary adviser or computer model should be permitted to furnish information concerning life expectancy.

Under the proposed regulation, investment advice must take into account information "furnished by a participant or beneficiary," including (among other things) information concerning life expectancy. Prop. Reg. § 2550.408g-1(c)(1)(ii) & -1(d)(1)(ii). In most cases, a plan participant will have only a vague idea—and sometimes not even that—of his or her life expectancy. Accordingly, the regulation should permit (but not require) a fiduciary adviser or computer model to use the average life expectancy for a person of the participant's age and sex rather than a life expectancy furnished by the participant.

7. The ability to exclude qualifying employer securities from a computer model should also apply to other single-asset funds.

Investment advice provided under a computer model generally must take into account all designated investment options offered under the plan. Prop. Reg. § 2550.408g-1(d)(1)(v). A computer model is not treated as failing to satisfy this requirement, however, merely because it does not take into account "an investment option that constitutes an investment primarily in qualifying employer securities." *Id.* The preamble explains that computer models generally are based on investment theories that rely on diversified asset classes, so that it might be difficult for a computer model to address "a single undiversified security." 73 *Fed. Reg.* at 49,889. The preamble states that the Department is concerned that requiring a computer model to take into account an employer stock fund "might discourage arrangements based on utilization of a computer model, or otherwise limit their availability." *Id.*

The ability to exclude an investment option consisting of qualifying employer securities from a computer model should be extended to any type of investment option that is designed to invest primarily in a single undiversified asset. The most common type of single-asset fund in a participant-directed plan is an employer stock fund; but these plans occasionally offer other single-asset funds (such as funds investing in the stock of a prior employer or a spin-off company). To the extent that a computer model is designed to address diversified asset classes, the model will have the same difficulty incorporating any single-asset fund into its investment recommendations. Accordingly, the concern that the Department expressed in the preamble applies with equal force to all single-asset funds.

8. Participants should be permitted to receive investment advice with respect to a designated portion of the account.

Investment advice provided under a computer model must take into account all designated investment options, except that a computer model is not

treated as failing to satisfy this requirement merely because it does not take into account an employer stock fund. Prop. Reg. § 2550.408g-1(d)(1)(v). A computer model that includes this limitation must disclose the limitation to plan participants. Prop. Reg. § 2550.408g-1(g)(1)(vi).

The exclusion of employer securities from a computer model is likely to present a serious obstacle for employers that offer an employer stock fund, and for participants who wish to invest in employer stock. Many computer models automatically implement the investment recommendations offered by the program if the participant selects the automatic-implementation feature. If the computer model does not take into account the employer stock fund, however, the plan will sell the participant's entire investment in the employer stock fund, regardless of whether this action is consistent with the participant's wishes or with the provisions of the plan. Even if the participant attempts to implement the investment recommendation manually, the participant will have to adjust the recommendation provided by the computer model so that the recommendation will apply only to the portion of the account that the participant wishes to invest in assets other than employer stock.

In order to address these issues, the regulation should make clear that a computer model may permit the participant to seek investment recommendations with respect to a portion of the participant's account rather than the entire account. For example, if a participant wished to keep 5% of his or her account invested in the employer stock fund, the computer model could permit the participant to "lock in" that investment and seek investment recommendations with respect to the remaining 95% of the account. Similarly, if the terms of the plan required the participant to keep a portion of his or her account invested in employer securities (to the extent permitted under the statutory diversification rules), the computer model could automatically "lock in" that investment and provide investment recommendations with respect to the remainder of the account. Although ERIC believes that the proposed regulation does not preclude this approach, ERIC respectfully requests that the Department clarify this point in the final regulation.

9. The regulation should describe the credentials an expert must have in order to certify a computer model.

If investment advice is provided under a computer model, an eligible investment expert must certify that the computer model (and any material modification of the model) meets the requirements of the regulation. Prop. Reg. § 2550.408g-1(d)(2). The proposed regulation defines an "eligible investment expert" as a person who "has the appropriate technical training or experience and proficiency to analyze, determine and certify" whether the model meets the regulatory requirements. Prop. Reg. § 2550.408g-1(d)(3). The preamble explains, "The Department has concluded that it would be very difficult to define a specific set of

academic or other credentials that would serve to define the appropriate expertise and experience for an eligible investment expert." 73 *Fed. Reg.* at 49,899.

The regulation should provide more guidance concerning the kinds of credentials an individual must have in order to qualify as an "eligible investment expert." As the regulation makes clear, the act of selecting an eligible investment adviser is a fiduciary act that carries with it the prospect of fiduciary liability. Prop. Reg. § 2550.408g-1(d)(5). The preamble also notes that "the fiduciary adviser has the burden of demonstrating that all applicable requirements of the exemption are satisfied with respect to its arrangement." 73 *Fed. Reg.* at 49,899. The Department should not expose fiduciary advisers to the risk that their good-faith efforts to identify experts with "the appropriate technical training or experience" will be second-guessed by the courts, or will result in substantial civil penalties because they fail to conform to subjective criteria.

ERIC agrees that the regulation should not define a single set of academic qualifications that an investment expert must possess, since these qualifications might change over time. However, ERIC urges the Department to provide examples of the types of credentials that would cause a person to qualify as an investment expert. In addition, the Department should create a safe harbor, so that a person possessing certain academic credentials or a defined amount of relevant experience would automatically qualify as an "eligible investment expert."

10. A fiduciary who is not an adviser should be permitted to rely on the written certification of a computer model.

In order to qualify for the exemption, a computer model must receive a written certification that it satisfies the requirements of the exemption. Prop. Reg. § 2550.408g-1(d)(2). If the computer model is modified in a material respect, the modified model must be re-certified. *Id.* It is the responsibility of the fiduciary adviser to obtain the appropriate certification. If the computer model is not certified in accordance with the regulation, however, the investment advice arrangement is likely to constitute a prohibited transaction, since it will involve self-dealing by the fiduciary adviser. ERISA § 406(b).

Any arrangement under which investment advice is provided to participants and beneficiaries pursuant to the statutory exemption must be authorized by a plan fiduciary other than the fiduciary adviser or its affiliate. Prop. Reg. § 2550.408g-1(e). If the computer model is not appropriately certified and the investment advice arrangement results in a prohibited transaction, the fiduciary who authorized the transaction is potentially liable for a breach of fiduciary duty. In most cases, however, it will not be practicable for a fiduciary to determine whether a computer model satisfies the requirements of the exemption, whether it has been certified by a person who qualifies as an "eligible investment expert," or

whether it has been modified materially since it was certified. Accordingly, the regulation should make clear that when a fiduciary authorizes investment advice provided under a computer model, the fiduciary is entitled to rely on the written certification that the computer model satisfies the requirements of the exemption, unless the fiduciary has actual or constructive knowledge that the certification is not valid.

11. The regulation should permit automatic rebalancing of accounts.

The proposed regulation requires that "[t]he sale, acquisition, or holding [of any security or other property] occurs solely at the direction of the recipient of the advice." Prop. Reg. § 2550.408g-1(h)(2). Under many participant-directed plans, a participant is permitted to direct that his or her account be rebalanced at stated intervals (for example, at the end of each month or quarter). The participant might direct, for example, that his account be rebalanced on the designated dates so that the account will remain invested 20% in each of five different investment funds, regardless of changes in the relative value of each fund.

If the participant has selected this rebalancing option, the plan's investment manager will automatically buy or sell interests in the different investment funds on the relevant date in order to restore the investment allocation the participant has chosen. The final regulation should clarify that these automatic purchases and sales pursuant to a participant's rebalancing election are deemed to occur solely at the participant's direction.

12. The regulation should describe the credentials an auditor must have to conduct an annual audit.

A fiduciary adviser must engage an independent auditor "who has appropriate technical training or experience and proficiency, and so represents in writing to the fiduciary adviser," to perform an annual audit of the investment advice arrangement for compliance with the requirements of the exemption. Prop. Reg. § 2550.408g-1(f)(1). In this case, as in the case of the eligible investment expert who certifies a computer model, the regulation should provide examples of the types of credentials that would cause an auditor to possess "appropriate technical training or experience and proficiency."

13. The regulation should not impose liability based on the results of the annual audit.

An independent auditor must annually audit the investment advice arrangement, and must issue a written report setting forth the auditor's findings concerning the arrangement's compliance with the requirements of the statutory exemption. Prop. Reg. § 2550.408g-1(f)(1). The auditor must provide the report

both to the fiduciary adviser and to the plan fiduciary who authorized the investment advice arrangement. *Id.*

As currently structured, the audit requirement poses a significant risk to fiduciaries that wish to rely on the statutory exemption. The burden falls on the fiduciary to demonstrate that an investment advice arrangement satisfies all applicable requirements of the exemption. 73 *Fed. Reg.* at 49,899. Many of the requirements are vague and subjective, and can reasonably be interpreted in more than one way. Accordingly, it will be impossible for a fiduciary to ensure that an independent auditor will agree that the investment advice arrangement satisfies all applicable requirements of the exemption.

If an independent auditor concludes that the investment advice arrangement falls short of perfect compliance with the exemption requirements in any respect, the arrangement will potentially constitute a prohibited transaction. Prohibited transactions are self-reported: if a prohibited transaction occurs with respect to an individual account plan, the fiduciary must file an excise tax return and pay the tax, and the plan administrator must report the transaction on Form 5500. Accordingly, even if the fiduciary adviser or authorizing fiduciary does not agree with the auditor's conclusion, the fiduciary will face a difficult question whether it is obligated to treat the arrangement as giving rise to a prohibited transaction. The problem is especially acute for the authorizing fiduciary, who (unlike the fiduciary adviser) has little control over the investment advice arrangement's day-to-day compliance with the exemption requirements. ERIC believes that many fiduciaries, faced with this unpredictable and uncontrollable risk, will choose not to offer an investment advice arrangement at all if the arrangement would need to rely on the statutory exemption.

ERIC believes that the principal purpose of the annual audit is to identify areas in which the fiduciary adviser can address potential weaknesses and improve compliance with the exemption requirements. Accordingly, as long as the fiduciary adviser has made a good-faith effort to comply with the exemption requirements, and acts promptly to correct any problem identified in the audit report, the investment advice arrangement should not give rise to a prohibited transaction solely because the audit report identifies areas in which the arrangement might not perfectly comply with the exemption requirements. In addition, the plan fiduciary who authorizes the investment advice arrangement should not be liable for any problem identified in the audit report unless the plan fiduciary failed to discharge its obligation to select the adviser prudently and periodically review the adviser's performance. ERIC urges the Department to incorporate these principles in the final regulation.

14. Fiduciaries should be given greater freedom to meet their disclosure obligations by providing electronic disclosure.

Before providing investment advice and at least annually thereafter, a fiduciary adviser must provide a written notice to each affected participant disclosing the fiduciary adviser's compensation for providing the advice, the types of services it provides, and a variety of other matters. Prop. Reg. § 2550.408g-1(g)(1). The proposed regulation states that this notice "may, in accordance with 29 C.F.R. 2520.104b-1, be provided in written or electronic form." Prop. Reg. § 2550.408g-1(g)(3).

The Department's rules governing electronic disclosure are largely unworkable to the extent that they require a participant's affirmative consent to the electronic delivery of information. A fiduciary may avoid obtaining a participant's consent only if access to the employer's electronic information system "is an integral part of [a participant's] duties." 29 C.F.R. § 2520.104b-1(c)(2). This restriction makes it virtually impossible for a fiduciary adviser to provide disclosure electronically to workers who are not required to use a computer as part of their job. The administrative burden of collecting, storing, and updating individual consents on a participant-by-participant basis for thousands of employees is too great to be tenable, even though many of these workers might prefer to receive information electronically.

In the preamble to its proposed regulation concerning the disclosure requirements for participant-directed plans, the Department invited comments as to whether the electronic disclosure rules could be improved. 73 *Fed. Reg.* at 43,017 (July 23, 2008). ERIC commends the Department's interest in making these rules more workable. In its comments on the disclosure regulations, ERIC suggested several ways in which the Department could improve the electronic disclosure rules; those suggestions would also apply to the electronic delivery of the notice required under the statutory exemption.

At a minimum, however, if investment advice is provided through a computer model that requires participants to log on to the computer in order to receive the advice, the fiduciary adviser should be permitted to post an electronic copy of the required disclosure notice at the site that provides access to the computer model. Whether or not the participant uses a computer on the job, it is evident that the participant must use a computer in order to receive investment advice under such an arrangement. In this circumstance, the regulation should make clear that the participant's consent to electronic disclosure is not required.

15. The regulation should clarify that funds offered through mutual fund windows are not "designated investment options."

The proposed regulation requires a computer model to take into account "all designated investment options." Prop. Reg. § 2550.408g-1(d)(1)(v). The proposed regulation explains that the term "designated investment option" does not include "'brokerage windows,' 'self-directed brokerage accounts,' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan." Prop. Reg. § 2550.408g-1(j)(1). ERIC believes that the Department has appropriately excluded these arrangements from the requirement that a computer model take into account all designated investment options, and that this exclusion should be retained in the final regulation.

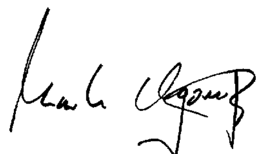
The term "brokerage window" does not have a uniform definition. Some people use this term as an alternate name for a self-directed brokerage account, an arrangement that permits participants to invest (through a designated stockbroker) in any asset available to individual investors, including investments not typically offered under participant-directed plans. Many plans, in order to avoid potential legal or administrative problems, impose certain restrictions on the types of assets a participant can acquire through a self-directed brokerage account. For example, a plan might prohibit a participant from investing in illiquid assets, real property, commodities, derivatives, or similar assets.

In contrast, some people use the term "brokerage window" as an alternate name for a "mutual fund window," an arrangement that offers plan participants access to a large (but not unlimited) number of registered mutual funds. For example, a mutual fund window might allow participants to choose among five hundred registered mutual funds offered by an array of different providers, but would not give participants unlimited access to all of the approximately 8,000 different mutual funds available to investors.

ERIC believes that the Department intended to exclude both types of arrangement from the definition of "designated investment option." Although a plan that offers a mutual fund window might be thought to have "designated" as an investment option each of the many funds available through the window, it is not practicable for a fiduciary adviser to develop a computer model that will take into account hundreds of different funds. Accordingly, if plans that offer mutual fund windows (which are popular and beneficial to participants) are to benefit from the statutory exemption for investment advice provided through a computer model, it must be clear that the funds available through the window are not "designated investment options." ERIC requests that the Department clarify this point in the final regulation.

ERIC appreciates the opportunity to present these comments. If the Department has any questions about our comments, or if we can be of further assistance, please let us know.

Sincerely,



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President
THE ERISA INDUSTRY COMMITTEE