W O O D A R D

Don Woodard, CLU
Blake Woodard, CLU

May 4, 2010

Ms. Phyllis C. Borzi
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: 2010 Investment Advice Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Via E-mail to e-ORI@dol.gov

Re: 2010 Investment Advice Proposed Rule

Dear Ms. Borzi:

The questions you have posed in the Proposed Rule regarding whether the Department should prescribe or proscribe generally accepted investment theories in its regulation of Section 601 of the Pension Protection Act are excellent questions. With respect to private IRAs, however, you are omitting some key questions. Chief among these is how, in the infinite and ever-evolving world of investment options available to the private IRA beneficiary, any modeling program or level fee arrangement can meet the requirements of Section 601.

Private IRA beneficiaries, insurers, insurance agents, broker dealers, registered representatives, and investment advisers need to know the answers to these questions to make sure that we are in compliance with the new regulation. Depending on how you answer these questions, you will be turning the private IRA beneficiary's world upside down. Sound public policy requires that the Department has thought through these issues and then clearly communicated the final regulation's implications to all involved in the owning and servicing of private IRAs.

As I stated in my 10/2/2008 comment letter to Brad Campbell, regarding the original proposed regulation, which I have **attached** and hereby incorporate by reference into this comment letter, the great challenge the Department faces is in making Section 601 – clearly drafted by its author for the purpose of giving a legal source of much-needed investment advice in the finite-investment-option world of employer-sponsored individual account plans, such as 401(k) and 403(b) accounts – work in the infinite investment-option world of IRAs. Section 601 makes great sense for 401(k) and 403(b) accounts. Section 601 was marketed by its author (and probably to this date is understood by its author) as applying to employer-sponsored individual-account plans. Section 601 makes no sense for IRAs. As we say in Texas, "that old dog won't hunt."

Suite 600
University Centre I
1300 South University Drive
Fort Worth, Texas 76107
(817) 877-4405
(817) 877-1100 FAX

I was pleased when the Obama administration withdrew the Bush Administration's investment advice regulation, because Mr. Campbell did not respond to my previous bona fide concerns, and I hoped that the withdrawal would give the Department and Congress a chance to correct an obvious error in Section 601, that being its applicability to private IRAs, which bear little resemblance to individual account plans. This error will cause grave disruption in the education, servicing, and choices of IRA beneficiaries.

Contrary to your assumption that implementation of these regulation will result in "expert investment advice (being) provided to the greatest number of participants," a narrow reading of the proposed regulation will encourage the best investment professionals to cease serving IRA beneficiaries altogether. Given the potential harm to the client and the cost of complying with these regulation, especially the cost of the annual audit, many advisors who currently provide exceptional service to clients for their private IRAs will stop servicing private IRAs. Sadly, the private IRA beneficiary most likely to lose the service of his trusted investment professional will be the smaller, unsophisticated private IRA beneficiary.[1]

As I spelled out on page 2 of my letter to Mr. Campbell, there is much disagreement in the investment world about exactly when the new statutory exemption applies to the current universal activity of servicing IRA beneficiaries. Having spent weeks on Section 601 and now two sets of proposed regulations, it is safe to say that I understand the law and the regulation better than most in the investment community, and yet the more time I invest in this regulation the more confused I become. To clarify this confusion and provide for a more relevant regulation, here are the practical questions the Department should be asking itself. These questions apply to every American who owns an IRA who does not select his own investments unaided by others:

Scenario A: Purchase of IRA through Registered Rep. Questions 1 through 4 are based on Scenario A. Brad Jones, a registered representative (and not a registered investment advisor) of ABC Broker Dealer (BD), currently assists a number of clients with the selection and purchase of investments and periodic review and servicing of their IRAs. Based on the suitability and preferences of his clients and subject to the supervision of his BD, as required by the SEC, Mr. Jones has sold some of his clients mutual fund accounts, other clients fixed, indexed, or variable annuities with principal protection guarantees and lifetime income riders, and other clients private real estate investment trusts (REITs) for their IRAs. Some of Mr. Jones' clients purchase more than one type of investment for their IRAs, in order to have diversification. The mutual funds pay a 3% to 5% first-year sales fee, depending on the asset class, and an ongoing 25bp 12b-1 fee. The annuities pay a 4.5% first-year commission and an ongoing 0.50% annual trail commission. The REITs pay a 7.0% first-year commission and no ongoing fee.

1. Are the services provided by Mr. Jones to his IRA clients services that would require the new statutory exemption to be exempt from the prohibited transaction rules? Please see page 2 of my letter to Mr. Campbell before answering this question.

2. If your answer to question number 1 is *yes*, must Mr. Jones stop providing ongoing services to his existing IRA clients or insist that they sell their IRA investments and reinvest them according to a computer model or through a fee leveling arrangement to qualify as eligible investment advice, since their IRAs contain investments that pay differing levels of compensation?
   a. If your answer to question number 2 is *yes*, and Mr. Jones chooses not to follow the proposed regulation to take advantage of the statutory exemption by moving his clients' assets to a computer modeling program or fee leveling arrangement, does it follow that he must resign from his clients' IRA accounts prior to the effective date of the regulation to avoid a prohibited transaction?
   b. If your answer to question number 2a is *yes,* and Mr. Jones resigns, since the accounts still contain investments that pay differing levels of compensation, even to a new registered representative who inherits the accounts, does it follow that any representative who agrees to service the now "orphan" IRA investments will be committing a prohibited transaction, unless he insists that the clients move their assets to an eligible investment advice arrangement?
   c. If your answer to question number 2b is *yes*, must the IRA beneficiary manage her own accounts with no help from any registered representative, unless she wants to move her assets to investments selected by a computer model or subject to a fee leveling arrangement?
   d. If your answer to question number 2c is *yes* and no registered representative is now servicing the clients' IRAs, to whom shall the investment sponsor (mutual fund company, insurer, REIT) pay the ongoing trail commissions that are priced into the products?
3. If your answer to question number 1 is *no*, can Mr. Jones sell similar products to new IRA clients?
4. If your answer to question number 1 is *no* (servicing existing IRA clients does not require statutory exemption) and to question number 3 is *no* (similar products not permitted to new clients), can Mr. Jones continue to serve his existing IRA clients by moving their IRA investments to different, but similar commission- and trail-based investments at their request? For example, can he move an existing IRA client's IRA funds from the DEF Growth Fund to the GHI Growth Fund or to a variable annuity with lifetime income benefits, all of which pay commissions?

Scenario B: Purchase of SIMPLE IRA through Registered Rep. Questions 5 through 8 are based on Scenario B. Elizabeth Watson is a registered representative who sets up SIMPLE IRA plans for small employers. Her typical plan uses one mutual fund company per employer account. Based on the suitability and preferences of her clients and subject to the supervision of her BD, as required by the SEC, employees choose from among the funds offered by the mutual fund company their employer chose for the SIMPLE IRA plan. Ms. Watson is compensated with a front-end sales load of 3% to 5%, depending on the mutual fund's asset class, and an ongoing 25bp 12b-1 fee. Her services include helping participants with fund selection and purchase of investments and periodic review and servicing of their SIMPLE IRAs. She also helped the employers set up the SIMPLE IRA plan and helps distribute the employers' annual required notices.

5. Are the services provided by Ms. Watson to her SIMPLE IRA clients services that would require the new statutory exemption to be exempt from the prohibited transaction rules?
6. If your answer to question number 5 is *yes*, must the employer who sponsors the SIMPLE IRA authorize Ms. Watson's providing service to its employees, per paragraph (b)(5) of the proposed regulation?
7. If your answer to question number 5 is *yes*, must Ms. Watson stop providing ongoing services to her <u>existing</u> SIMPLE IRA clients or insist that they sell their SIMPLE IRA investments and reinvest them according to a computer model or through a fee leveling arrangement to qualify as eligible investment advice, since their SIMPLE IRAs contain mutual funds that pay differing levels of compensation?
   a. If your answer to question number 7 is *yes*, and Ms. Watson chooses not to follow the proposed regulation to take advantage of the statutory exemption by moving her SIMPLE IRA clients' assets to a computer modeling program or fee leveling arrangement, does it follow that she must resign from her clients' SIMPLE IRA accounts prior to the effective date of the regulation to avoid a prohibited transaction?
   b. If your answer to question number 7a is *yes,* and Ms. Watson resigns, since the SIMPLE IRA accounts still contain mutual funds that pay differing levels of compensation as new payroll deferrals are invested, even to a new registered representative who inherits the accounts, does it follow that any representative who agrees to service the now "orphan" SIMPLE IRA investments will be committing a prohibited transaction, unless he insists that the clients move their assets to an eligible investment advice arrangement?
   c. If your answer to question number 7b is *yes*, must the SIMPLE IRA participant manage her own accounts with no help from any registered representative, unless she wants to move her assets to a SIMPLE IRA whose investments are selected by a computer model or subject to a fee leveling arrangement?
   d. If your answer to question number 7c is *yes* and no registered representative is servicing the clients' SIMPLE IRAs, to whom shall the mutual fund company pay the ongoing 12b-1 fees that are priced into the products?
8. If your answer to question number 5 is *no*, can Ms. Watson sell similar loaded mutual funds to the new employees of <u>existing</u> SIMPLE IRA employer accounts?
9. If your answer to question number 5 is *no*, can Ms. Watson start serving new SIMPLE IRA employer accounts by using loaded mutual funds?

Scenario C: Bank CD-IRAs. Questions 10 through 17 are based on Scenario C. Regina Johnson is a bank officer who works in the lobby of Grand National Bank. Her duties include selling CD-IRAs to customers. She does not work in the trust department. This scenario is different from the Scenarios A & B in that her employer is not only the distributor but also the manufacturer. The bank's profit (or compensation) from the sale of CDs varies by the length of term. The bank's margins are higher on longer-term CDs than on shorter-term CDs.

10. Does the act of selling CD-IRAs make Ms. Johnson a fiduciary adviser under the proposed regulation?
11. If Ms. Johnson were a trust officer, would she be a fiduciary adviser?
12. Is Grand Bank a fiduciary adviser under the proposed regulation when it sells CD-IRAs? Does the answer depend on whether Ms. Johnson is a trust officer?
13. Assuming that her CD-IRA clients approach her unsolicited, is the sale of CD-IRAs by Ms. Johnson a transaction that would require the new statutory exemption to be exempt from the prohibited transaction rules?
14. Assuming that her clients are referred to her by the bank tellers, who suggest to clients that they buy a CD to fund their current-year IRA contributions, is the sale of CD-IRAs by Ms. Johnson a transaction that would require the new statutory exemption to be exempt from the prohibited transaction rules?
15. Assuming that Ms. Johnson's sale of CD-IRAs (whether solicited or unsolicited or as a trust officer or non-trust officer) is a transaction that would require the new statutory exemption, does the fact that the bank makes a **higher profit (spread)** on longer-term CDs violate paragraph (3)(i)(D) of the proposed regulation?
16. Assuming that Ms. Johnson's sale of CD-IRAs (whether solicited or non-solicited or as a trust officer or non-trust officer) is a transaction that would require the new statutory exemption, does the fact that the bank pays Ms. Johnson a **larger bonus** for selling long-term CDs than short-term CDs violate paragraph (3)(i)(D) of the proposed regulation?
17. Assuming that Ms. Johnson's sale of CD-IRAs (whether solicited or non-solicited or as a trust officer or non-trust officer) is a transaction that would require the new statutory exemption, does the fact that the bank pays her a bonus if she sells an insurance company annuity rather than a CD-IRA violate paragraph (3)(i)(D) of the proposed regulation?

Scenario D: Purchase of IRA Directly From Fund Company. Questions 18 through 21 are based on Scenario D. Sam Snyder is a registered rep who works the incoming phone queue for Integrity Funds, a broker-dealer which both manages and sells no-load mutual funds through its website and through its 800 number. His duties include selling IRAs to customers. This scenario is different from the Scenarios A & B in that his employer is not only the distributor but also the manufacturer. Integrity's profit (or compensation) from the sale of mutual fund varies by the type of fund. Integrity charges a higher management fee for stock funds than for bond and money market funds.

18. Is Integrity a fiduciary adviser under the proposed regulation when it sells unsolicited IRAs to customers who call Integrity's 800 number? (Even for unsolicited calls, its registered representatives assist customers in their fund selection.)

19. Assuming that his IRA clients call him unsolicited and request to open an IRA, is the sale of IRAs by Mr. Snyder a transaction that would require the new statutory exemption to be exempt from the prohibited transaction rules?
20. Assuming that Mr. Snyder's clients call him to discuss their non-qualified account and he suggests that they open an IRA account to fund their current-year IRA contributions, is the sale of the IRA by Mr. Snyder a transaction that would require the new statutory exemption to be exempt from the prohibited transaction rules?
21. Assuming that Mr. Snyder's sale of IRAs (whether solicited or unsolicited) is a transaction that would require the new statutory exemption, does the fact that Integrity makes a higher profit (management fee) on equity funds than on bond and money market funds violate paragraph (3)(i)(D) of the proposed regulation?

The following questions do not refer to a scenario.

22. In addressing computer modeling software, the proposed regulation alludes to <u>finite</u> investment selections, such as (b)(4)(D) "investment options available under the plan," (b)(4)(E)(1) "other investment options, if any, available under the plan," and (b)(4)(F)(1) "take into account *all* designated investment options . . . available under the plan without giving inappropriate weight to any investment option." Since the investment options available to private IRA beneficiaries are <u>infinite</u>, how can any investment professional and any computer modeling software consider <u>all</u> investment options available to private IRA beneficiaries to ensure that no investment option is given inappropriate weight? Would the failure to include, for example, Fidelity Funds and Vanguard Funds, in a computer model disqualify this software for computer modeling for IRA beneficiaries by giving inappropriate weight to those fund companies that are included in the software?

23. Similar to question 22, would a private IRA computer modeling program be in compliance with (b)(4)(F)(1) if it includes every no-load mutual fund sold in America but fails to include fixed annuities, index annuities, variable annuities, REITs, CDs and other similar investments commonly held in private IRAs today? Comment: Paragraph (b)(4)(F)(2)(iii) notes that a computer model shall not fail to comply merely because it does not mention *annuity* options; however, like so much of the proposed regulation, this paragraph appears to deal with the finite options found under employer-sponsored individual account plans and not the infinite options available to private IRA beneficiaries. The paragraph requires the computer model to give participants or beneficiaries a general description of annuity options and how they operate. Such a sentence is nonsensical in the infinite and ever-evolving world of private IRA investment options and only makes sense in the finite world of employer-sponsored individual account plans. Interestingly, the proposed regulation gives no relief to the fiduciary adviser, be it for an individual account plan or private IRA, who sells a client an annuity after having provided the off-model annuity disclosure required by the regulation.

24. In light of the proposed regulation, is there any way in which private IRA beneficiaries can keep their current commission-based investments in their IRAs and continue to be served by their current investment professionals without violating the prohibited transaction rules?

25. In light of the proposed regulation, is there any way in which private IRA beneficiaries can purchase new commission-based investments for their IRAs without violating the prohibited transaction rules? Proscribing such investments will greatly reduce not only the quantity, but more importantly, the variety of retirement planning products available to private IRA beneficiaries.

26. Section 601(a)(3)(D) of the Pension Protection Act states that "nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement." The regulation fails to implement this section of the Act. If an investment advisor is advising a client on an IRA under an eligible investment advice arrangement and charging a flat advisory fee, and the client wishes to invest her IRA in a commission-based variable annuity with lifetime income guarantees, can the advisor accommodate her wishes? Moreover, exactly how is the client supposed to know about the intricacies of complex annuity products and choose from the vast quantity of retirement annuities available without an advisor raising the issue of annuities and guiding her selection?

These are fundamental questions. Private IRA beneficiaries and investment professionals deserve to know the Department's straight-forward answers to these questions. You may have noticed that most of my questions deal with the disposition of existing IRA accounts under the regulation. At a minimum, the Department should include in the final regulation provisions addressing existing IRA accounts by providing for a grandfathering or a reasonable transition period, such as the greater of five years or the expiration of any surrender penalties, before clients and their investment professionals must liquidate their IRAs and move them to eligible investment advice arrangements. Some IRA annuities have valuable but complex lifetime income features, and the IRA beneficiary would suffer great harm if she were forced to surrender the annuity or lose the services of her investment professional to comply with the regulation.

Last month, the IRS in Notice 2010-38 announced that it was extending the PPACA's liberalization of the tax deductibility of dependent health insurance under Sec. 105 to Sec. 106, because "there is no indication that Congress intended to provide a broader exclusion in §105(b) than in §106." In other words, the IRS realized that Congress overlooked Sec. 106 when drafting the PPACA. Congress made a mistake, and absent corrective action by the IRS, Congress' clear intent in extending the maximum age for dependents to stay on their parents' health plans would not have been followed.

It is equally clear that Congress did not intend to re-invent private IRAs when drafting the investment advice regulation of Sec. 601 of the Pension Protection Act and that the statutory exemption was intended for employer-sponsored individual account plans. Any interpretation of Section 601 to the contrary is attempting to shove a camel through the eye of the needle. If you choose to dissect that camel to fit it through the needle, please make sure the regulation and its accompanying explanation give clear guidance so that everyone affected can comply with the law. An example of clear guidance would be a regulation that answers questions similar to the 26 questions in this letter in Q&A format.

Finally, I understand that you are a proponent of requiring 401(k) plans to offer annuities to plan participants to ensure that they have an adequate income at retirement. I submit to you that the proposed regulation will have exactly the opposite effect with private IRAs, barring millions of IRA account holders from purchasing or even hearing about today's popular annuities with lifetime income features from their investment professionals, who will be presenting only no-load investment options or options that can be selected by a computer program.

Ms. Borzi, please call me at 800-877-4406 if I may be of service to you in your efforts to finalize the proposed regulation. I would like to help.

Sincerely,

Blake Woodard

1- The concerns I have raised are real. Only today a man called to tell me he had lost his job, needed a withdrawal from his non-qualified mutual fund account to pay his living expenses, and hoped that I would assist him with the rollover of a 401(k) account at a former employer to an IRA account with a well-known mutual fund company. I told him about the proposed regulation and that until I can gain some clarity about the future of private IRAs in America, I will not help clients with their IRAs. Ironically, the law designed to give investors more avenues for advice may have the opposite effect.

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Resubmitted as attachment to Blake Woodard's 5/4/2010 comment letter to DOL re 2010 Investment Advice Proposed Rule.

Don Woodard, CLU
Blake Woodard, CLU

October 2, 2008

Mr. Bradford P. Campbell
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Investment Advice Regulations
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Via E-mail to e-ORI@dol.gov

Re: Investment Advice Regulations

Dear Mr. Campbell:

I am a partner in Woodard Insurance, LLP, a Texas partnership with seven employees, and a registered representative of a 200-rep Georgia broker-dealer. My colleagues and I provide investment services to about 50 families in the North Texas area, adding a few families each year. The investment accounts we manage include non-qualified accounts and private IRAs. Most of our clients also have individual accounts in employer plans such as 401(k) and 403(b) plans. Like many investment professionals, we assist them with their investment selections in these employer plans at no charge to coordinate all their investments.

I have read the Department's proposed regulations and proposed class exemption pursuant to Section 601 of the Pension Protection Act. **I respectfully request that you delay for at least one year the finalization and implementation of any part of the regulations or class exemption that deal with private individual retirement accounts (IRAs) that are unaffiliated with employer retirement plans.** The purpose of the delay is to give the next Congress time to clarify an apparent confusion about the Congressional intent with Section 601. It was the well-publicized intent of Congress that the Pension Protection Act expand investment advice opportunities for participants in employer plans. The bill's author still promotes on his website that the purpose of Section 601 is to give "***workers*** new access to face-to-face, personally-tailored professional investment advice." The purpose of 601 was to protect workers, not to add a new layer of bureaucracy on the heavily-regulated private investment market.

As recently as October 1, a senior aide for a representative who was heavily involved in drafting the PPA told me that she thought that "IRAs are qualified plans, too." Of course, IRAs are not qualified plans under Secs. 401(a) or 403(b) and do not fall under the scope of ERISA. If you polled the Congressmen who

Suite 600
University Centre I
1300 South University Drive
Fort Worth, Texas 76107
(817) 877-4405
(817) 877-1100 FAX

voted for the PPA, most of them probably are unaware that what was intended to create a liberating mechanism for employees to receive paid professional advice on their employer-provided retirement plans has inadvertently created a chilling obstacle to the continuation of advice in the well-served private IRA market. The language of Section 601 and the Department's proposed regulations and proposed class exemption are logical in the limited-scope investment world of a 401(k) or 403(b) plan but are unworkable with the private investment world, where consumers can choose from several product types, investment classes, and fee arrangement options and an infinite number of investment choices.

<u>No exemption needed for private IRAs</u>. While the purpose of Section 601 was to provide an additional exemption – a liberalization – to the prohibited transaction rules so that investment advisors can assist employees with their employer-provided retirement plan accounts, no such additional exemption is necessary for investment professionals to serve private IRA owners, any more than an exemption is necessary for investment managers to manage the investment options of 401(k) plans at the employer level. IRC Sec. 4975(e)(3)(B) includes in the listing of "disqualified persons" a *fiduciary*, which it defines as one who "renders investment advice for a fee or other compensation, direct or indirect . . . ." Congress would not have defined a fiduciary – a person of trust – as a person who is paid to provide investment advice if the very provision of that advice which makes a person a fiduciary was a prohibited transaction. That would be circular logic.

That a fiduciary can provide investment advice for the owner of a private IRA is made clear by Section 4975(d)(2), which exempts from the prohibited transaction list "any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor" and also by Section 4975(d)(10), which exempts "receipt by a disqualified person of any reasonable compensation for service rendered . . . in the performance of his duties with the plan . . . ." If I am advising an employer's employees with their 401(k) accounts, Sections 4975(d)(2) and 4975(d)(10) provide no relief for me, because I am not providing services for the plan but rather for the employees. But if I am providing services for the owner of a private IRA (traditional, rollover, or Roth), I am providing services to the plan.

One plan service provider, Dalbar, who has submitted comments on these regulations to the Department, opined on a PPA white paper posted on its website that "it is the view of the DOL that since advice to IRA account holders is a prohibited transaction then these individuals do not have the benefit of investment advice (notwithstanding the widespread practice of providing advice to IRA account holders)." Perhaps Dalbar is projecting onto the Department its own thinking. Dalbar's position means that every bank, every life insurance company, every mutual fund company, every broker-dealer, and most registered representatives, investment advisors, and life insurance agents in the nation have been violating the law for decades and that the United States government has banned IRA owners from seeking any investment advice while simultaneously ignoring these law breakers for decades. If the IRS wanted to assess the 15% prohibited transactions tax on the trillions of dollars of IRAs that have been invested and exchanged throughout the last 30 years, **it could pay off our entire national debt overnight.** Dalbar's position is unsupported by the code sections I have cited above. Dalbar stands to profit from the $63,175,000 in outside audit costs that the Department has estimated in the regulations. What is an unreasonable, unnecessary financial burden to many will be a bounty to a few.

Either current law permits IRA owners to receive advice or it doesn't. And if it doesn't, then the IRS has been derelict in collecting prohibited transaction taxes for decades, because every financial institution in America has been selling investments to and advising IRA owners in plain sight. If there is any doubt that the law prior to the PPA permits financial institutions and investment professionals to provide advice to private IRA owners, including owners of rollover IRAs, Congress needs to clarify that uncertainty with specific legislation, not with a law that intended to help employer plan account holders seek advice but that unintentionally captured the entire private investment world in its scope, like a dolphin caught in a tuna net. **Please give Congress time to deal with the ambiguities that Section 601 has created and that the Department has struggled to address in its proposed regulations and class exemption.**

<u>Including IRAs Under Sec 601 Will Reduce Quantity & Competitiveness of Advice</u>. Section 601 and private IRAs simply do not fit. Forcing Section 601 to apply to private IRAs will disrupt the established and satisfactory advisory relationships of millions of Americans and will accomplish the opposite of the PPA's intentions. Whereas the regulations provide a tightly-controlled new mechanism for employer plan account holders to receive paid advice, they create a huge impediment to the continuation of existing private IRA advisory relationships by implying that the current exemptions under IRC 4975(d)(2) and 4975(d)(10) somehow do not apply to fiduciaries.

On top of the audit costs, the proposed regulations estimate an equivalent cost burden of $381,157,000 in the first year alone. For small firms such as mine, this cost burden will be triple the average $86 per hour that the Department has used in its calculation, because it will be the firm owner handling many of the new responsibilities, and those hours will come from her already-limited client time. We estimate that the annual legal and audit cost alone on our small office will be about $10,000, not to mention the lost time of the firm owners and staff. These regulations will create a huge new cost on small investment businesses with no gain to investors who are pleased with their advisory relationships.

For all of our clients, IRAs are but a portion of their total assets under management with us. For example, one of our client families has about $1 million invested with us, but less than $10,000 is in private IRAs. Are we supposed to follow the extensive regulations, including completing an eligible investment advice arrangement, the disclosures, and the annual audit, for the $10,000 in IRAs that may generate $100 in annual fees or commissions while the other 99% of assets invested is not subject to the regulations? Many fine but small investment advisors, such as me, will be driven from the IRA market if these regulations are finalized. And sadly, in many cases the free assistance advisors give to their investment clients for their employer-provided individual account plans will end when the private IRA relationship ends.

I have some questions for the Department with regard to the thousands of advisors who do not become fiduciary advisors under the proposed regulations on the first day they are effective:

1. Are these advisors supposed to terminate their relationships with their IRA customers the day the regulations become effective?

2. Is the Department prepared to deal with the resulting millions of orphan IRA accounts who are no longer receiving investment advice due to the implementation of a law that was intended to increase the availability of investment advice?

3. Will banks, mutual fund companies, and insurers that pay ongoing 12b-1 fees or trail commissions on products held in IRAs to these investment professionals who have not complied with these regulations be committing a prohibited transaction?

4. Has the Department discussed companion rules with the SEC and 50 state insurance departments to modify the 12b-1 and other compensation regulations? For example, if I own mutual fund shares in my IRA, and my 15-year advisor severs his relationship with me upon the finalization of these regulations and the mutual fund company stops paying 12b-1 fees, I would want my investment returns increased to reflect the cessation of the 12b-1 fees. Administratively, that would require the mutual fund company to convert my share class to a different "advisor-less" class that charges no 12b-1 fees and then to convert it back to my old class if I locate a fiduciary advisor to take over my account. Likewise, if I purchased an annuity product for my IRA through an insurance company and my insurance agent terminates her

> relationship with me due to the enactment of these regulations, I will want the insurer to re-price my annuity contract to reflect the cessation of trail commissions paid to my former agent. All of these compensation changes will require extensive re-working of securities and state insurance laws.

IRA Advice Already Heavily Regulated. Unlike the employer-sponsored retirement plan market, where prior to the PPA employees could seek no paid investment advice, the private IRA market is well-advised by investment and insurance professionals. It is also well-regulated. For any one of our client relationships, we must answer to the SEC, FINRA, our broker-dealer, and the local state's insurance department. Any of the above entities can audit our operations to ensure compliance with numerous laws, and each of them will scrutinize the suitability and reasonableness of the investments we recommend to our private IRA owners.

Having a third-party company come in to audit our IRA business, which as noted above is a fraction of each client relationship, is adding an unnecessary layer of cost and bureaucracy. Did Congress really intend for yet another government agency to oversee every investment professional in America? **Please give Congress time to sort out the confusion over Section 601.**

Modeling & Fee-Leveling Unworkable in Private IRA Market. Most employer retirement plans, such as 401(k) and 403(b) plans, offer a limited scope of investments. Their world is a vacuum, and in a vacuum it is practical to develop a fee schedule that treats all investments equally or a computer modeling program that divides up 20 or so funds into a pie chart based on participant answers. Private IRA owners, however, do not live in a vacuum but in the vast, competitive investment world. Unlike the 401(k) account holder, they are not captive but can shop around for the investment or advice that best suits them. Therefore, neither the modeling nor fee-leveling envisioned by the proposed regulations and class exemptions are workable in the private IRA market.

Modeling. There is no model that will encompass all of the investment choices available to IRA owners, and therefore any such modeling software would generate recommendations that are influenced by the investment advisor, for in selecting his modeling software the advisor would have to consider its universe of investment products (fund companies, annuities, stocks, bonds, etc) and whether he is licensed and contracted to even offer those products. Therefore, such models are unworkable in the private IRA market as final investment-selection tools, and the alternative investor education material discussed in Section III(e)(2) of the proposed class exemption always would apply to private IRAs. As III(e)(2) anticipates, short of artificial limitations on the infinite investing world imposed by modeling software or the fiduciary advisor, **all** private IRAs exist in a world in "which the types or number of investment choices reasonably precludes the use of a computer model meeting the requirements of section 408(g)(3)(B) of ERISA."

Fee-Leveling. The whole concept of fee leveling is meaningless and unworkable in the private IRA world, unless an advisor artificially limits his practice to fee-based advisory accounts. Many of the eligible types of fiduciary advisors under the regulations cannot legally establish fee-based advisory accounts, because they are not registered investment advisors. In many cases, the fee is built into the pricing of the product, such as with a bank CD; in others it reduces investment returns, such as with a mutual fund 12b-1 fee; and in other cases, the IRA owner pays a specific advisory fee to an investment advisor. Even for advisors who can legally charge advisory fees, advisors are negligent if they don't take into account a wide variety of investment types, assets classes, and specific products for their clients, and compensation structures for these products will vary widely.

Although Section III(e)(3) permits the fiduciary advisor to use his judgment to offer investments with varying compensation, Section III(f) appears to prohibit the recommendation of **any** investments that would generate more compensation for the employee or registered representative of an investment fiduciary than another investment. These two sections directly conflict each other in many circumstances, as explained in item 2 below.

Section III(f) says that "**any** fees or other compensation (including salary, bonuses, awards, promotions, commissions or any other thing of value) received, directly or indirectly, by an employee, agent or registered representative providing advice on behalf of the fiduciary adviser pursuant to this exemption (as distinguished from any compensation received by the fiduciary adviser on whose behalf the employee, agent or registered representative is providing such advice) do not vary depending on the basis of **any** investment option selected by a participant or beneficiary." Section III(f) of the proposed class exemption has two major problems:

1. Since the gamut of investment options available to IRA owners has widely different compensation structures, it is impossible for a broker-dealer or other fiduciary advisor to ensure that registered representatives and agents are paid the same amount no matter what products they offer.

2. In most situations it will not be clear who the fiduciary advisor is. In the private investment world, most persons advising IRA clients will be both fiduciary advisors as well as employees or registered representatives of other fiduciary advisors. For example, when I am advising my private IRA clients, I will be a fiduciary advisor under the proposed regulations and class exemption, but I also am a registered representative of a broker-dealer. That

broker-dealer does not direct my investment advice to my clients but does review my investment orders for suitability and compliance with numerous laws. So am I an investment fiduciary allowed to recommend products with differing compensation under Section III(e)(3), or is my broker-dealer the investment fiduciary, in which case they have to restrict the investments available to their representatives' clients to ensure levelized compensation under III(f), which as I have noted is impractical if not impossible to do?

I have some questions for the Department about the fee-leveling under Section 2550.408g–1 (c) of the proposed regulations as it applies to private IRAs:

1. If an IRA owner wants to invest his IRA in mutual fund A-shares, will that preclude the advisor from meeting the levelized fee exemption, since many mutual fund companies pay a lower A-share commission for bond funds than equity funds?

2. If a registered investment advisor invests most of his IRA clients in fee-based brokerage accounts with a 1.0% flat fee but invests *even one client* in variable annuities with income guarantees and a commission structure, does the mere use of a different commission structure for that single client preclude the use of the levelized fee exemption for his entire practice? Likewise, does the mere *availability* to him of multiple investment options with different compensation structures preclude his use of the levelized fee exemption?

3. Must advisors liquidate their existing IRA clients' investment options and re-invest their entire client base in investment options that have exactly the same compensation structure if they want to meet the fee-leveling exception?

4. Since as discussed above models will not work with IRAs, and all advice will therefore be "off-model," will the fiduciary advisor need to prepare a Section III(e)(4) report every time it meets with a client, every time a client adds money to its IRA, and/or every time a client changes its investment selections?

These are just a few of my questions that show that fee-leveling is unworkable in the private IRA world.

Discretionary Accounts. Section III(k) of the proposed class exemption states that "the sale, acquisition or holding of a security or other property on behalf of a plan or IRA occurs solely at the direction of the recipient of the investment advice." This rule conflicts with the many discretionary IRAs, in which registered investment advisors make trades based on their clients' suitability but without their clients' specific permission.

In summary, there are many troubling issues in trying to making Section 601 of the Pension Protection Act fit with private IRAs, and most of these issues have not yet been thought of. Section 601 and private IRAs (traditional, rollover, or Roth) do not fit, and no regulation will make them fit. I do not believe it was the intent of Congress to create an entirely new regulatory framework outside of the SEC to govern investments and investment advice, aside from those employer-provided retirement plans governed by ERISA.

In my discussions with broker-dealers and mutual fund companies this week, I have found not a single person who is familiar with the Department's proposed regulations and proposed class exemption and the massive restructuring of the nation's investment world that they will bring about. The investment industry, which already has suffered severe blows with the economic crisis our nation is enduring, is in for a very unpleasant surprise.

Although I am a small businessman with many burdens in running a business, I have spent most of this week, including two very late nights, digesting the law and the Department's proposed regulations and class exemption. The longer I ponder your proposals, the more problems I uncover and the bigger this quagmire becomes. **I believe the only prudent course is to postpone any portion of the regulations dealing with non-ERISA plans – the private investment market – and ask Congress to revisit this issue and properly consider the vast implications of what seemed to be a simple liberalization of the prohibited transaction rules for employer-provided retirement plans.**

I will be happy to discuss any of these concerns with you on the phone or fly to Washington, DC, to meet with you in person. You can contact me at my office (817-877-4405, ext. 3000) or by e-mail (blake@woodardcompanies.com).

Sincerely,

Blake Woodard