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February 8, 2008

*By Federal Express*

2008 FEB 11 AM 10:43

Office of Regulations and Interpretations,
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

ATTN: 408(b)(2) Amendment

To Whom It May Concern:

We appreciate the hard work of the professionals at the Department of Labor (the "Department") in proposing this regulation. We hope that these comments will assist the Department in improving the regulation, so that even more plan sponsors benefit.

**Risks for Plan Sponsors**

Small plan sponsors need information concerning conflicts of interest that may occur in connection with asset allocation in tiered asset allocation funds such as lifecycle and target date type funds. The Department highlighted the need for such information when it discussed such conflicts in the preamble to its Default Investment Alternatives Under Participant Directed Account Plans Final Rule, in its discussion of the Regulatory Flexibility Act. The Department states that "[p]lan fiduciaries must take into account potential conflicts of interest and the reasonableness of fees in choosing and monitoring any investment option for a plan, whether covered under the safe harbor or not."

Given this mandate, this regulation should require persons who provide services in connection with tiered asset allocation funds to provide the information necessary for plan fiduciaries to evaluate conflicts of interest inherent in such vehicles. The Department should specifically address whether the following would be required:

- Who determines asset allocation and the relationship of such person to any persons who receives fees by reason of money management.
- Whether there are any safeguards addressing conflicts of interest, and/or whether such safeguards are absent.

- Whether any safeguards address variable profits. (In this connection we note that merely flattening fees does not address this. For example, if a person receives 25 basis points for managing assets itself or for having a third partly manage assets, the latter is it is clearly more profitable since the persons incurs no expense when a third party manages the assets.)
- The basis for any change in asset allocation including how it affects fees, how it affects profits and any safeguards against self dealing incorporated in the process of determining the change, or the absence of such safeguards.

Requiring the provision of such information is critical per the discussion in the preamble of the regulation concerning the benefits of the proposal to small entities. There the Department noted that "[f]iduciaries of small plans may sometimes have trouble obtaining complete disclosure from service providers" and that the Department believes the proposal will assist small plan fiduciaries in obtaining the information they need. We agree with this assessment by the Department. Therefore, consistent with its discussion in this preamble as well as the preamble to its Default Investment Alternatives under Participant Directed Account Plans Final Rule, the Department should require inclusion of this information.

**Application of Excise Tax**

The preamble to the regulation states that:

"2) Consequences of Failure To Satisfy the Proposed Regulation

> If the contract or arrangement fails to require disclosure of the Information described in the proposed regulation, or if the service provider fails to disclose such information, then the contract or arrangement will not be ``reasonable." Therefore, the service arrangement will not qualify for the relief from ERISA's prohibited transaction rules provided by Section 408(b)(2). The resulting prohibited transaction would have consequences for both the responsible plan fiduciary and the service provider. The responsible plan fiduciary, by participating in the prohibited transaction, will have violated Section 406(a)(1)(C) of ERISA's prohibited transaction rules. The service provider, as a ``disqualified person" under the Internal Revenue Code's (Code) prohibited transaction rules, will be subject to the excise taxes that result from the service provider's participation in a prohibited transaction under Code Section 4975."

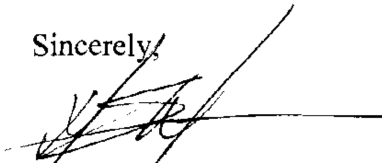
While we agree that the excise tax is a critical component if the proposed regulations are to achieve their goal, we are not clear on how they would be applicable. This is because the proposed regulations would not modify those regulations interpreting the exemption from the excise tax, and would only change the regulations applicable to Title I of ERISA. Therefore, it would be useful if the Department describes why a service provider would be liable for the excise taxes for failure to comply with the proposed regulations if the corresponding regulations under Section 4975 of the Code are not also modified.

We suggest that modifying the Section 4975 regulations in the same manner would be the most straightforward way to rectify this. This would also have the beneficial effect of extending the benefit of receiving this information to persons who direct IRAs, the majority of the assets of which are derived from Section 401(k)-type plans.

* * * *

Thank you for your attention to and consideration of this comment.

Sincerely,



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