

U.S. Chamber of Commerce



October 6, 2008

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

Re: Investment Advice—Participants and Beneficiaries

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the proposed rule on Investment Advice—Participants and Beneficiaries; Proposed Class Exemption for the Provision of Investment Advice to Participants and Beneficiaries of Self-Directed Individual Account Plans and IRAs issued by the Department of Labor (“DOL”) on August 22, 2008. We applaud the DOL for the process used in developing the proposed regulation. The DOL began the process by soliciting public comment prior to issuing the proposed rules. We believe that this process not only benefited the DOL but also other parties in the benefits community by enabling an open dialogue before the issuance of the proposed rule. As such, we appreciate the opportunity to continue this dialogue and have provided the following comments for your consideration.

The Chamber Remains Concerned About Unforeseen Liabilities in the Provision of Investment Advice. The Chamber has long advocated for rules that would encourage greater opportunities for employers to provide investment advice to plan participants. As such, we support the effort made in the Pension Protection Act of 2006 (“PPA”) to address employer and participant concerns surrounding the provision of investment advice. However, we remain concerned that plan sponsors, and other fiduciaries, may accrue unforeseen or additional liabilities through the provision of investment advice.

We are pleased that the Department responded favorably to public comments concerning specific credentials for an "eligible investment expert" and not mandating a particular methodology for certification. We believe this flexibility is necessary to encourage the use of the investment advice guidance and to generate beneficial innovation in this area. For the same reason, a number of other requirements for compliance with the regulation – such as the manner in which a computer model is to satisfy certain specifications and the scope and methodology for the annual audit – are addressed generally and are left for advisers to determine specifically. While we

appreciate this flexibility, we remain concerned about possible liabilities, particularly from litigation. As we move forward in this effort, we urge the DOL to use all authority possible to ensure that fiduciaries are not penalized for employing the flexibility included in the regulation.

Favoring Particular Investment Options May be Appropriate. The proposed regulation specifically requests comments on circumstances under which it would be appropriate or inappropriate to favor particular investment options. We believe it would be appropriate to favor options that respond to a participant's stated risk tolerance and stated investment preferences. The proposed regulation specifically allows the computer model to take into account these considerations so it would be odd to not allow the advice to favor investments tailored to such preferences.¹ For example, a participant may state that she prefers to invest in international options. In such a case, a portfolio that favors international investments would be appropriate. Similarly, a participant may state that she has a low risk tolerance – perhaps even lower than what would otherwise be suggested for her age, life expectancy, etc. – so a portfolio that favors low-risk products would be appropriate. Consequently, we recommend that the final regulation state that it is appropriate for advice generated from a computer model to favor investment options that are based upon a participant's stated risk tolerance and/or investment preferences.

The Exemption of Qualifying Employer Securities From the Computer Model is Unclear. We appreciate the Department's attempt to encourage the use of computer models for investment advice by recognizing the issues that may arise by including employer securities in the computer model. However, it is not clear how this exclusion will work in the context of providing investment advice. Will employer securities not be considered as one of the investment options and, therefore, the advice rendered will not include any reference to employer securities? Or will the participants' investment in employer securities be disregarded so that the participant's "portfolio" is made up only of those investments outside of employer securities? In light of the work that has been done to ensure that participants are adequately diversified when it comes to employer securities, it is important for plan sponsors to understand how this provision will work to ensure that they are not subjecting themselves to unexpected liabilities. We recommend that the final regulation include an example of the type of investment advice that would be given when employer securities are excluded from the computer model and an example of the accompanying disclosure statement.

The Proposed Effective Date Does Not Provide Sufficient Time to Comply with the Rule. The preamble states that the final regulation will be effective 60 days after the publication of the final regulations in the Federal Register. We do not think that the proposed effective date provides sufficient time to adequately comply with the rule. Not only will time be needed to put systems in place but plans sponsors will also need time to review the systems and ensure that they comply with the final guidance. Consequently, we recommend that the effective date of the final rule be extended to not less than 12 months after the issuance of the final regulation.

¹ Proposed Regulation section 2550.408g-1(d)(1)(ii).

Again, we fully support the efforts to create an environment where fiduciaries are comfortable providing investment advice to participants and appreciate the hard work of the DOL. Thank you for your consideration of these comments and we look forward to being helpful in any way possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy Johnson", with a stylized flourish at the end.

Randy Johnson
Vice President,
Labor, Immigration,
& Employee Benefits

A handwritten signature in blue ink, appearing to read "Aliya Wong", with a stylized flourish at the end.

Aliya Wong
Director of Pension Policy
Labor, Immigration,
& Employee Benefits