Zacks IFE

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

Via Email: e-ORI@dol.gov

To Whom It May Concern:

Yesterday, the United States Chamber of Commerce, National Association of Manufacturers, and Profit Sharing Council (the "Group") shared with the public their comments on the Department's proposed default investment guidelines. Among other suggestions, they called on the Department to remove its requirement that, in lieu of investment companies (for example a lifecycle mutual fund), only 3(38) managers may control default investments. The Group argues that since employers and separate account managers are capable of allocating participant assets themselves, requiring an independent fiduciary allocator is unnecessary. We would like to point out a misleading representation and a factual error in their argument that, we hope, will lead the Department to ignore their request.

The Pension Protection Act goes a long way towards restoring the trust that 401(k) plans lost in the "age of Enron". To encourage trust in default investments, we believe that the Department placed a 3(38) manager between plan sponsors and plan participants for a reason. The reason was that, without an independent fiduciary, "in-house" control of participant assets may be abused, leaving participants with no recourse should a plan sponsor become insolvent as a result. Therefore, for reasons of *participant safety*, we believe that the Department should ignore the Group's request.

The Group states that a 3(38) allocator is unnecessary because separate account managers currently allocate among existing investments for one basis point. ERISA fiduciaries are required to remove real or potential conflicts of interest, and nothing in the Act changes that. We therefore suggest the Department ask the Group if the one basis point allocation fee charged by these separate account managers is independent of their investment management fees. If not, the Groups seems to be recommending a prohibited transaction, where parties in interest take discretionary control over investments from which they receive variable fees. The best way to eliminate conflicts of interest is to eliminate the potential for parties in interest to self-deal. This does not seem to be the case where separate account managers control allocations. Therefore, for the additional reasons of *prudence*, we believe that the Department should ignore the Group's request.

We agree with the Group's observation that products and services develop quickly in the retirement savings industry. We are, therefore, happy to make them aware of a trend in the marketplace that renders their statement, "The absolute minimum fee to pay an intermediary investment manager as required by the proposed rule is ten basis points" as factually inaccurate. Our firm, along with others, provides construction and management of customized allocation strategies for less than the fee indicated. Our firm is a 3(38) investment manager that certifies, in writing, it is a fiduciary to the plan and participants. We would refer the Group to a recent survey by PIMCO that identifies a number of qualified independent allocators whose fee is less than the "absolute minimum" indicated. By upholding the 3(38) requirement, new independent allocators will come to market, which will further lower fees. Therefore, for additional reasons of *administrative feasibility*, we believe that the Department should ignore the Group's request.

Inserting a 3(38) manager to allocate default investments is safer, more prudent, and administratively feasible. For these reasons, we hope that the Department will ignore the Group's suggestion and affirm its requirement that only an investment company or 3(38) manager may take discretion over participant default allocations.

Thank you for your consideration,

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