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Fr. Doc. E6-20401

Department of Labor

Employee Benefits Security Administration

Prohibited Transaction Exemption for Provision of Investment Advice
to Individual Retirement and Similar Plans

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Request for Information.

SUMMARY: Section 601 of the Pension Protection Act of 2006 (the PPA) (P.L. 109-280) amended section 408 of the Employee Retirement Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1986 (the Code) to add an exemption from certain prohibited transactions restrictions of ERISA and from certain taxes imposed by the Code for the provision of "investment advice" to participants and beneficiaries of covered employee benefit plans, and certain related transactions, if the investment advice is provided under an "eligible investment advice arrangement." The exemption conditions relief upon satisfaction of a number of requirements more fully described in the statutory provisions. In particular, to be covered, the investment advice must be provided under an eligible investment advice arrangement that uses a computer model, which meets the requirements of the exemption. The purpose of this document is to solicit information from the public concerning the feasibility of the application of computer model investment advice programs for Individual Retirement Accounts and similar types of plans (hereinafter, IRAs).¹ The PPA directs the Secretary of Labor, in consultation with the Secretary of the Treasury, to determine, based on the information received from the solicitation, whether there is any computer model investment advice program which may be utilized to provide investment advice to IRA beneficiaries.²

DATES: Written or electronic responses should be submitted to the Department of Labor on or before January 30, 2007.

Responses: To facilitate the receipt and processing of responses, EBSA encourages interested persons to submit their responses electronically by e-mail to e-OED@dol.gov, or by using the Federal eRulemaking portal at www.regulations.gov (follow instructions for submission of comments). Persons submitting responses electronically are encouraged not to submit paper copies. Persons interested in submitting written responses on paper should send or deliver their responses (preferably, at least three copies) to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, Attention: IRA Investment Advice RFI. All written responses will be available to the public, without charge, online at www.regulations.gov and www.dol.gov/ebsa, and at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington,

DC 20210.

FOR FURTHER INFORMATION CONTACT: Christopher Motta or Brian Buyniski, Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5700, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693-8540. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

As a general matter, the provision of investment advice by a plan fiduciary as defined under section 3(21)(A) of ERISA to the plan would give rise to prohibited self-dealing under section 406(b)(1) of ERISA and section 4975(c)(1)(E) of the Internal Revenue Code of 1986 (the Code) if the fiduciary has an interest in the outcome of the advice which may affect its best judgment as a fiduciary (e.g., the fiduciary or its affiliate receives additional fees from investment options with respect to which advice is given).³ Section 601(a) of the Pension Protection Act of 2006 (PPA) amended ERISA by adding new sections 408(b)(14) and 408(g). Section 408(b)(14) of ERISA provides conditional exemptive relief from the prohibitions of ERISA section 406 for certain transactions in connection with the provision of investment advice (as described by ERISA section 3(21)(A)(ii)) to a participant or beneficiary of an individual account plan, if the requirements of new section 408(g) are met.⁴

Section 601(b) of the PPA similarly amended the Code by adding new Code sections 4975(d)(17) and 4975(f)(8). Section 4975(d)(17) of the Code provides conditional exemptive relief from the prohibitions described in section 4975(c) for certain transactions in connection with the provision of investment advice (as described in Code section 4975(e)(3)(B))⁵ to a participant or beneficiary of a plan, if the requirements of section 4975(f)(8) are met.

Under section 4975(f)(8) of the Code, the investment advice must be provided by a fiduciary adviser pursuant to an "eligible investment advice arrangement." The term "eligible investment advice arrangement" is defined in section 4975(f)(8)(B) to mean an arrangement which either: (1) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis or any investment option selected, or (2) uses a computer model under an investment advice program meeting the requirements of section 4975(f)(8)(C) in connection with the provision of investment advice by a fiduciary adviser to a participant and beneficiary, and with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H) and (I) of section (f)(8) are met.

Under section 4975(f)(8)(C) of the Code, the computer model utilized by an investment advice program must: (1) Apply generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time; (2) utilize relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments; (3) utilize prescribed objective criteria to provide asset allocation portfolios comprised of investment options available

under the plan; (4) operate in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser; and (5) take into account all investment options under the plan in specifying how a participant's account balance should be invested and not be inappropriately weighted with respect to any investment option.

The PPA restricts the use, under the exemption, of a computer model investment advice program to provide investment advice to an IRA (or similar plan (hereinafter, an IRA)) beneficiary.⁶ In this regard, section 601(b)(3)(C)(i)(I) of the PPA provides that a computer model investment advice program will not apply to an IRA unless and until the Secretary of Labor determines under section 601(b)(3)(B) or (D) of the PPA that there is a computer model investment advice program described in section 601(b)(3)(B) of the PPA. Section 601(b)(3)(A) requires that the Secretary of Labor, in consultation with the Secretary of the Treasury, solicit information as to the feasibility of the application of computer model investment programs for IRAs.⁷

Section 601(b)(3)(B) requires that the Secretary of Labor, in consultation with the Secretary of the Treasury, determine, based upon the information received from the solicitation, whether there is any computer model investment advice program which may be utilized to provide investment advice for IRA beneficiaries. Among other things, such computer model investment advice program for IRA beneficiaries must: (1) Utilize relevant information about the beneficiary, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments; (2) take into account the full range of investments, including equities and bonds, in determining the options for the investment portfolios of the beneficiary; and (3) allow the beneficiary, in directing the investment, sufficient flexibility in obtaining advice to evaluate and select investment options.⁸

Upon completion of its determination, the Secretary of Labor shall report the results of such determination to the Committee on Ways and Means and the Committee on Education and the Workforce of the House of Representatives and the Committee on Finance and the Committee on Health, Education, Labor, and Pensions of the Senate no later than December 31, 2007.

B. Issues Under Consideration

Feasibility of Computer Model Investment Advice

The Department is interested in comments regarding the feasibility of applying computer model investment advice programs for IRAs. The information received from the solicitation will assist the Department in making its required determination of feasibility under section 601(b)(3)(B) of the PPA.⁹ A list of issues with respect to which comments are requested is included below. Responses on other issues pertinent to the Department's determination are also invited.

Request for Information

1. Are there computer model investment advice programs for the current year and preceding year that are, or may be, utilized to provide investment advice to beneficiaries of plans described in section 4975(e)(1)(B)-(F) (and so much of subparagraph (G) as relates

to such subparagraphs) (hereinafter "IRA") of the Code which:

(a) Apply generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time;

(b) Utilize relevant information about the beneficiary, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments;

(c) Operate in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser;

(d) Take into account the full range of investments, including equities and bonds, in determining the options for the investment portfolios of the beneficiary; and

(e) Allow the beneficiary, in directing the investment, sufficient flexibility in obtaining advice to evaluate and select investment options.

2. If currently available computer models do not satisfy all of the criteria described above, which criteria are presently not considered by such computer models? Would it be possible to develop a model that satisfies all of the specified criteria? Which criteria would pose difficulties to developers and why?

3. If there are any currently available computer model investment advice programs meeting the criteria described in Question 1 that may be utilized for providing investment advice to IRA beneficiaries, please provide a complete description of such programs and the extent to which they are available to IRA beneficiaries.

4. With respect to any programs described in response to Question 3, do any of such programs permit the IRA beneficiary to invest IRA assets in virtually any investment? If not, what are the difficulties, if any, in creating such a model?

5. If computer model investment advice programs are not currently available to IRA beneficiaries that permit the investment of IRA assets in virtually any investment, are there computer model investment advice programs currently available to IRA beneficiaries that, by design or operation, limit the investments modeled by the computer program to a subset of the investment universe? If so, who is responsible for the development of such investment limitations and how are the limitations developed? Is there any flexibility on the part of an IRA beneficiary to modify the computer model to take into account his or her preferences? Are such computer model investment advice programs available to the beneficiaries of IRAs that are not maintained by the persons offering such programs?

6. If you offer a computer model investment advice program based on nonproprietary investment products, do you make the program available to investment accounts maintained by you on behalf of IRA beneficiaries?

7. What are the investment options considered by computer investment advice programs? What information on such options is needed? How is

the information obtained and made part of the programs? Is the information publicly available or available to IRA beneficiaries?

8. How should the Department or a third party evaluate a computer model investment advice program to determine whether a program satisfies the criteria described in Question 1 or any other similar criteria established to evaluate such programs?

9. How do computer model investment advice programs present advice to IRA beneficiaries? How do such programs allow beneficiaries to refine, amend or override provided advice?

Signed at Washington, DC, this 28th day of November 2006.

Bradford P. Campbell,

Acting Assistant Secretary,

Employee Benefits Security Administration,

Department of Labor.

1 See PPA section 601(b)(3)(A)(i). These plans are: (A) an individual retirement account described in section 408(a) of the Code; (B) an individual retirement annuity described in section 408(b) of the Code; (C) an Archer MSA described in section 220(d) of the Code; (D) a health savings account described in section 223(d) of the Code; (E) a Coverdell education savings account described in Code section 530; or (F) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary of Treasury to be described in any preceding subparagraph of this paragraph [i.e., (A) through (E) above].

2 Under Presidential Reorganization Plan No. 4 of 1978, effective December 31, 1978 [5 USC App. at 214 2000 ed.], the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor and the Secretary of the Treasury is bound by the interpretations of the Secretary of Labor pursuant to such authority.

3 See ERISA section 406(b)(1) and Code section 4975(c)(1)(E).

4 ERISA Section 3(21)(A)(ii) defines a "fiduciary" as including a person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan.

5 Code Section 4975(e)(3)(B) defines a "fiduciary" as including any person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan.

6 This restriction does not affect the application of the exemption to an eligible investment advice arrangement that satisfies Code section 4975(f)(8)(B)(i)(I) (describing arrangement under which fees do not vary). Further, there is no comparable limitation with respect to sections 408(b)(14) and 408(g) of ERISA. In this regard, the Department notes that IRAs are generally not subject to the provisions of Title I of ERISA. See 29 CFR Sec. 2510.3-2(d).

7 In addition to soliciting information from the public in general, section 601(b)(3)(A)(i) of the PPA directs the Secretary of Labor to solicit information regarding the feasibility of the application of computer model investment advice programs from: (1) the "top 50 trustees" of IRAs and similar plans, determined on the basis of assets held by such trustees; and (2) other persons offering computer model investment advice programs based on non-proprietary products.

8 See PPA section 601(b)(3)(B)(i)-(iii).

9 The Department notes that any determination made by the Department under section 601(b)(3)(B) of the PPA regarding the feasibility of the application of computer model investment advice programs for IRAs will not have any affect on existing individual or class exemptions that may provide relief for the provision of investment advice to IRA beneficiaries. In this regard, see Prohibited Transaction Class Exemption 84-24 (49 FR 13208 (Apr. 3, 1984), as corrected at 49 FR 24819 (June 15, 1984), and amended at 71 FR 5887 (Feb. 3, 2006)).

12

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