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**Fr. Doc. E6-20402**

DEPARTMENT OF LABOR

Employee Benefits Security Administration

RIN 1210-AB13

Prohibited Transaction Exemption for Provision of Investment Advice  
to Participants in Individual Account PlansAGENCY: Employee Benefits Security Administration, Department of  
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 Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code (the Code) to add a prohibited transaction exemption for the provision of investment advice to participants and beneficiaries of individual account plans that permit the direction of assets in their accounts, and for certain related transactions, if the investment advice is provided under an "eligible investment advice arrangement," as defined in the statute. The purpose of this notice is to request information from the public relating to the requirements in the new provisions that a computer model which serves as the basis for an eligible investment advice arrangement be certified as meeting specific criteria, and that information regarding certain fees and compensation be provided to participants and beneficiaries.

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-ORI@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 Regulations and Interpretations, Employee Benefits Security Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, Attention: 401(k) Plan 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: Katherine D. Lewis or Ruel B. Pile,  
Office of Regulations and Interpretations, Employee Benefits Security  
Administration, Room N-5669, U.S. Department of Labor, Washington, DC

20210, telephone (202) 693-8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

In General

The prohibited transaction provisions in section 406 of the Employee Retirement Income Security Act of 1974 (ERISA), prohibit various types of transactions between a plan and persons who are parties in interest (as defined in ERISA section 3(14)) with respect to the plan, and also prohibit, among other things, a plan fiduciary (as defined in ERISA section 3(21)(A)) from dealing with assets of the plan in his own interest or for his own account, or receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.<sup>1</sup>

Section 601(a) of the Pension Protection Act of 2006 (PPA) (P.L. 109-280) amended ERISA by adding new sections 408(b)(14) and 408(g). Section 408(b)(14) of ERISA provides conditional exemptive relief from ERISA section 406 for certain transactions in connection with the provision of investment advice (as described in ERISA section 3(21)(A)(ii)) if the requirements of new section 408(g) of ERISA are met. Under section 408(g), subsection (b)(14) applies if the investment advice provided by a "fiduciary adviser" is provided under an "eligible investment advice arrangement."<sup>2</sup> Persons who may act as fiduciary advisers, as defined in section 408(g)(11)(A), include, but are not limited to, investment advisers registered under the Investment Advisers Act of 1940, certain banks and similar financial institutions, insurance companies qualified to do business under the laws of a State, and brokers or dealers registered under the Securities Exchange Act of 1934.

The term "eligible investment advice arrangement" is defined in ERISA section 408(g)(2) to mean an arrangement which either (i) 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 of any investment option selected, or (ii) uses a computer model under an investment advice program meeting the requirements of section 408(g)(3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and with respect to which the requirements in section 408(g)(4) through (9) - which includes a requirement pertaining to the disclosure of certain fees - are satisfied.

Computer Model

In order for an investment advice program using a computer model to meet the requirements of section 408(g)(3), the program must satisfy subparagraphs (B), (C) and (D) thereof. Section 408(g)(3)(B) requires, in particular, that the investment advice provided under the investment advice program must be provided pursuant to a computer model that:

(i) Applies generally accepted investment theories that take into account the historic returns of different asset classes over defined

periods of time,

(ii) utilizes 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,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates 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

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

Under section 408(g)(3)(C), an "eligible investment expert" must certify, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary of Labor (Secretary), that the computer model meets the requirements described in section 408(b)(3)(B). Additionally, if, as determined under regulations prescribed by the Secretary, there are material modifications to the computer model, a certification must be obtained with respect to the computer model as modified. In relevant part, section 408(g)(3)(C) defines "eligible investment expert" to mean any person which meets such requirements as the Secretary may provide, and does not bear any material affiliation or contractual relationship with certain persons.

#### Disclosure of Fee-related Information

Regardless of whether an arrangement provides for non-varying fees (section 408(g)(2)(A)(i)) or uses a computer model under an investment advice program (section 408(g)(2)(A)(ii)), the arrangement also must satisfy section 408(g)(4) through (9) in order to qualify as an "eligible investment advice arrangement." In particular, section 408(g)(6) requires that a fiduciary adviser provide to participants and beneficiaries written notification of "all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property." ERISA section 408(g)(6)(A)(iii). Section 408(g)(8)(A) requires that this notification be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and be sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of the information required to be provided in the notification. For the disclosure of fees and compensation described in section 408(g)(6)(A)(iii), section 408(g)(8)(B) directs the Secretary to issue a model form which meets the section 408(g)(8)(A) standards.

#### B. Issues Under Consideration

The ERISA section 408(g)(3)(C) computer model certification

requirements provide for regulatory guidance in three areas. First, section 408(g)(3)(C)(i) requires that an "eligible investment expert" must certify, in accordance with rules prescribed by the Secretary, that a computer model meets the criteria set forth in section 408(g)(3)(B). Second, under section 408(g)(3)(C)(ii), the Secretary may prescribe regulations which provide guidance regarding "material modifications" to a computer model that also require certification. Third, under section 408(g)(3)(C)(iii), the Secretary may establish requirements that a person must satisfy in order to qualify as an "eligible investment expert." The Department is interested in comments that would assist in the development of regulatory guidance and in the assessment of economic costs and benefits in these three areas.

Additionally, ERISA section 408(g)(8)(B) directs the Secretary to issue a model form for the disclosure of fees and other compensation required by section 408(g)(6)(A)(iii) that meets the standards for presentation of information prescribed in section 408(g)(8)(A). The Department is interested in comments that would assist in the development of a model form for this purpose and in the assessment of the economic costs and benefits of a model form for this purpose.

Commenters may provide information with respect to either or both sets of issues. A list of some of the issues with respect to which comments are requested is included below. Other information pertinent to the Department's consideration of the issues described above is also invited.

#### Request for Information

#### Computer Model Certification

1. What procedures and information would be necessary and adequate to determine whether a computer model used in connection with an investment advice program satisfies the criteria described in ERISA section 408(g)(3)(B)? For example, would it be necessary to examine underlying computer programs/algorithms, computer software/hardware, or input data including investment-specific information; would it be possible to make a determination based on the results of applying the investment advice program to a sample set of the input data? (Commenters are requested to explain by reference to each of the five computer model characteristics described in section 408(g)(3)(B), summarized above.)

2. What types (e.g., technological, financial, other) and levels (e.g., educational, professional experience, professional certification) of expertise would be required to determine whether a computer model used in connection with an investment advice program satisfies the criteria described in ERISA section 408(g)(3)(B)? (Commenters are requested to explain by reference to each of the five computer model characteristics described in section 408(g)(3)(B), summarized above.)

3. With respect to currently-available computer models or programs for providing investment advice to plan participants or beneficiaries in the form of asset allocation portfolios comprised of plan investment options:

a. What is the process for designing, developing and implementing the computer model/program? What parties are involved, and what are their

roles? What hardware and software technologies are used to construct computer model investment advice programs? What direct economic costs are associated with the process for designing, developing and implementing the computer model/program?

b. What types of modifications are made to the computer model/program after use has begun? Why and how often are the modifications made (e.g., changes in methodology, technology, economy, marketplace, or plan), and how do the modifications affect the investment advice provided? What parties are involved in the modification process, and what are their roles? What direct economic costs may be associated with the modifications?

c. What economic costs and benefits are associated with the use of the computer model/program for providing investment advice, including changes in investment performance and in retirement wealth due to the provision of such advice? What are the indirect costs and benefits, such as impact on markets for financial services, including investment advice services, and impact on financial markets, including demand for and pricing of securities?

4. Would the responses to 3.a., 3.b., or 3.c. differ in the case of a computer model / investment advice program intended to satisfy the requirements of ERISA section 408(g)(3)(B)?

5. With respect to the Department's development of regulatory guidance, what special considerations, if any, should be made for small businesses or other small entities? Are there unique costs and benefits for small businesses or other small entities?

#### Model Form for Disclosure of Fees and Other Compensation

1. In general, what types of information relating to fees received by fiduciary advisers and their affiliates would be helpful to participants and beneficiaries in making their investment decisions?

2. What types of fees and compensation (including those provided by third parties) would be encompassed by ERISA section 408(g)(6)(A)(iii)? In relevant part, this provision refers to "all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property."

3. What challenges might be encountered in assembling and/or presenting the information on fees and compensation described in section 408(g)(6)(A)(iii) in a manner that is clear and understandable by the average plan participant? Are there any suggestions as to how these challenges can be addressed by the Department?

4. Is there a form or format for presenting information on fees and compensation described in section 408(g)(6)(A)(iii) (e.g., narrative, chart, combination of both) that might be particularly suitable in giving participants a clear and understandable description of the fees and compensation received by a fiduciary adviser or its affiliates? Is there an optimal time frame, relative to when the advice is provided, for providing this information to participants and beneficiaries? What impact, if any, will the receipt of a model

form have on investment decisions made by participants and beneficiaries?

5. Persons that may qualify as "fiduciary advisers" are invited to provide forms that they currently use, or might use, to provide the kinds of fee and compensation information described above. As described in ERISA section 408(g)(11)(A), "fiduciary advisers" may include investment advisers registered under the Investment Advisers Act of 1940, certain banks and similar financial institutions, insurance companies qualified to do business under the laws of a State, and brokers or dealers registered under the Securities Exchange Act of 1934. Commenters are reminded that submissions are made solely for the purpose of assisting the Department. Accordingly, no inferences should be drawn as to whether the forms submitted meet the standards for presentation described in ERISA section 408(g)(8)(A).

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

Bradford P. Campbell,

Acting Assistant Secretary,

Employee Benefits Security Administration,

Department of Labor.

1 The Internal Revenue Code (Code) contains similar prohibited transaction provisions in section 4975(c).

2 Section 601(b) of the PPA similarly amended section 4975 of the Code by adding new section 4975(d)(17) and (f)(8), to provide conditional exemptive relief from the prohibitions described in Code section 4975(c) for certain transactions in connection with the provision of investment advice (as described in Code section 4975(e)(3)(B)). 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. The references in this document to specific provisions of ERISA sections 408(b)(14) and (g) should be taken as referring also to the corresponding provisions in Code sections 4975(d)(17) and (f)(8).

3 Commenters are reminded that, as described above, materials submitted in response to this request will be publicly available.

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