May 5, 2010

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

Attn: 2010 Investment Advice Proposed Rule

Ladies and Gentlemen:

On behalf of the U.S. Chamber of Commerce, the Profit Sharing/401k Council of America ("PSCA"), and The ERISA Industry Committee ("ERIC"), we are writing this letter in response to the 2010 proposed rule on Investment Advice—Participants and Beneficiaries issued by the Department of Labor ("DOL" or "Department") on February 26, 2010, which amends guidance issued in 2009.

In general, we appreciate that the proposed rule maintains the Congressional intent of the Pension Protection Act in allowing employers to provide investment advice to workers.

We are also pleased that the proposed rule reiterates that it applies exclusively with respect to advice provided pursuant to the statutory exemption provided under sections 408(b)(14) and 408(g)(1) of ERISA and sections 4975(d)(17) and 4975(f)(8) of the Internal Revenue Code, and that no inferences should be drawn with respect to other methods to provide investment advice. The final rule should retain this finding.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

PSCA is a 63-year old non-profit association representing companies that sponsor profit sharing, 401(k), and similar plans. PSCA speaks for over 1,200 companies who employ approximately 5 million plan participants throughout the United States. PSCA's members range in size from very small firms to conglomerates with hundreds of thousands of employees. All regard their defined contribution plans as vital factors in their business success.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber represents a wide management spectrum by type of business and location. Each major classification of American business - manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states, as well as 105 American Chambers of Commerce abroad.

Our comments below ask for further clarification of the rules and responds to the DOL's questions.

The DOL Should NOT Regulate Generally Accepted Investment Theories. In the preamble to the proposed rule, the DOL requests comments on whether it should provide regulations on what constitutes generally accepted investment theories. These questions are limited to the computer model, but any finding by the Department will have repercussions beyond that. We emphatically urge the DOL to reject this idea.

The concept that the Department might prescribe specific parameters on what constitute a generally accepted investment theory is inconsistent with the statute and the Department's long-standing positions on the operation of a retirement plan in compliance with ERISA's fiduciary requirements. Section 408(g)(3)(B)(i) requires the computer model to use generally accepted investment theories. The statute, wisely, does not define this term.

Section 408(g)(5) requires an annual audit of all the requirements of the subsection, including generally accepted investment theories, by an "independent auditor, who has appropriate technical training or experience and proficiency, and so represents in writing." In the preamble to the January 2009 final rule, which is applicable to this regulation, the Department declined to prescribe the auditor's qualifications. Rather, the Department recommended that a fiduciary consider any licenses, certifications, or other evidence of technical training, the relevance of that training to the audit, and the individual or organization's experience and proficiency in conducting similar types of audits. The 2009 final rule states, "In this regard, it is the view of the Department that the selection of an auditor is a fiduciary act and, therefore, must be carried out in a manner consistent with the prudence requirements of section 404(a)(1), taking into account the nature and scope of the audit and the expertise and experience necessary to conduct such an audit."

We believe that Congress recognized that "generally accepted investment theory" is a fluid concept with general principles and subject to change. The statute and the Department's own guidance recognize that an auditor will apply their expertise and training, not a strict methodology, in determining whether an investment theory is generally accepted. This methodology, that favors prudent process over narrowly prescribed rules, permeates the Department's discussions of the fiduciary obligations to select and monitor all plan services. For example the Department's publication, Selecting and Monitoring Pension Consultants – Tips for Plan Fiduciaries, provides a set of helpful questions to assist a fiduciary prudently and objectively select a plan advisor or consultant. It does not and should not limit the generally accepted investment theory to be utilized by the adviser.

Furthermore, a need for the Department to set limits on generally accepted investment theory has not been demonstrated. The term "generally accepted investment theories" was first used in an ERISA context in 1996, in Interpretive Bulletin 96-1, which described information that, when provided to plan participants, constitutes "investment education" rather than "investment advice." The bulletin required that two categories of investment education information, asset allocation models and interactive investment materials, be based on "generally accepted investment theories." The use of this terminology was seen as a way to reference industry standards while also retaining flexibility, so as not to impose any particular investment approach or philosophy that could become dated over time. (The concept was also utilized in the regulation adopted in 2007 Qualified Default Investment Arrangement regulation, without further specification.) This flexible standard, as adopted in Interpretive Bulletin 96-1, was implicitly adopted by Congress in 2006 when it incorporated almost identical language into the participant investment advice exemption, again without further definition. In light of this history and the understanding that has developed around this standard and the advantages of using a flexible approach, there is no need or reason to set arbitrary limits on an approach that has worked well.

The Department also asks several questions about the consideration of an individual investment's historical return being consistent with generally accepted investment theories. We are confident that one constant in generally accepted investment theories is that historical returns should be considered in offering investment advice. Another constant is that historical returns must be carefully analyzed and they should never be the sole criteria in recommending offering an investment. With these constants in mind, a competent adviser will not base a recommendation solely on historical returns.

Active management is premised on the presumption that markets are inefficient and that skilled managers who have information or insight that is not reflected in an asset's price can achieve an above market return net of costs. (That this skill exists is personified by Warren Buffet and his success in active management.) Passive management argues that the likelihood of active managers consistently achieving above market results over time will not exceed the additional costs and that the ability to identify and select the successful manager is remote. Retirement plan fiduciaries recognize these different philosophies and varying participant preferences as evidenced by the inclusion of both active and passive investment options in most individual account plans.

In summary, we believe that all of these decisions are beyond the scope of the agency's role. We respectfully note that the Department does not have jurisdiction or expertise in this matter. Those that do, such as the Securities and Exchange Commission, the Department of the Treasury, and the Federal Reserve have avoided the course that the Department is considering. Furthermore, the plan sponsor and plan professionals have fiduciary obligations to ensure that assets are appropriately invested and managed. If the DOL begins to prescribe investment theory then it will override the fiduciary obligations of the plan sponsor and professionals. Moreover, from a practical perspective, any regulation of investment theory will make that theory the de facto investment model for every plan. This result would be inappropriate, ineffective and potentially detrimental to many plan participants because it would result in a static proscription that would leave no room for new ideas even as they become generally accepted.

The Regulations Require Clarification of the Consideration of Investments Within a Single Asset Class. The proposed rule states that, with respect to model-driven advice, the model not "[i]nappropriately distinguish among investment options within a single asset class on the basis of a factor that cannot confidently be expected to persist in the future."[1]

In the preamble, the DOL explains this statement as follows:

> While some differences between investment options within a single asset class, such as differences in fees and expenses or management style, are likely to persist in the future and therefore to constitute appropriate criteria for asset allocation, other differences, such as differences in historical performance, are less likely to persist and therefore less likely to constitute appropriate criteria for asset allocation. Asset classes, in contrast, can more often be distinguished from one another on the basis of differences in their historical risk and return characteristics.

There are several concerns with this language and the explanation thereof. One concern is how to define an asset class. For example, is an actively managed growth fund in the same "class" as an S&P 500 Index fund? Moreover, it is not clear how to determine within an asset class whether a particular distinction is "inappropriate." The explanation in the preamble implies that historical performance within an asset class may be an inappropriate factor. However, such a reading would create an inappropriate bias toward low-cost index funds because fees and expenses would be the primary or even exclusive consideration for recommending an investment. To avoid this confusion, we ask the DOL to clarify this provision. Specifically, we recommend that the final rule clarify that historical performance is, among others, an appropriate and relevant consideration when distinguishing among investments in the same asset class.

The Regulations Require Clarification of the Fee Leveling Provision. The proposed rule states that no fiduciary adviser may receive any fee or other compensation "that is based in whole or in part on a participant's or beneficiary's selection of an investment option."[2] This appears inconsistent with the statutory fee-leveling exemption found in Section 408(g)(2)(A)(i) of ERISA that requires that fees "received by the fiduciary adviser for investment advice . . . **do not vary** depending on the basis of any investment option selected" [emphasis added]. The intent of the language of the statute does not appear to be that no compensation based upon the investment selected may be received, but rather that no "variable" compensation based upon the investment selected may be received. This is a simple distinction that may be important for fiduciaries that utilize this exemption to provide investment advice. Accordingly, we ask the DOL to clarify this language to state that that no fiduciary adviser may receive any fee or other compensation "that **varies** based in whole or in part on a participant's or beneficiary's selection

[1] 75 Fed. Reg. 9366 (proposed March 2, 2010) (to be codified at 29 C.F.R. pt. 2550)
[2] Id.

of an investment option." That should clear up any confusion and provide consistency between the regulation and the statute.

We thank you for the opportunity to comment on the proposed rule and look forward to continuing to work with you to ensure that plan participants receive adequate and effective investment advice.

Sincerely,

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