



**Comments to the U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Health, Employment,
Labor and Pensions**

**Retirement Security: The Importance of an
Independent Investment Adviser**

March 24, 2009

The American Society of Pension Professionals & Actuaries (ASPPA), the Council of Independent 401(k) Recordkeepers (CIKR), and the National Association of Independent Retirement Plan Advisors (NAIRPA) appreciate this opportunity to submit our comments for the record to the U.S. House of Representatives Committee on Education and Labor Subcommittee on Health, Employment, Labor and Pensions on the very important issue of the provision of investment advice to retirement plan participants.

ASPPA is a national organization of more than 6,500 members who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA a unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to larger financial services companies that primarily are in the business of selling investments and investment products. As a consequence, the independent members of CIKR, many of whom are small businesses, make available to plan sponsors and participants a wide variety of investment alternatives from various financial services companies without bias or inherent conflicts of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 70,000 plans covering three million participants holding in excess of \$130 billion in assets.

NAIRPA is a national organization of firms, not affiliated with financial services companies, that provide independent investment advice to retirement plans and participants. NAIRPA's members are registered investment advisors whose fees for investment advisory services do not vary with the investment options selected by the plan or participants. In addition, NAIRPA members commit to disclosing expected fees in advance of an engagement, reporting fees annually thereafter and agreeing to serve as a plan fiduciary with respect to all plans for which it serves as a retirement plan advisor.

The Federal Reserve reported last week that American household wealth dropped \$11.1 trillion, or about 18 percent, during calendar year 2008. For the last quarter of 2008, households lost \$5.1 trillion of their wealth. This is the most significant loss in one quarter in the 57-year history of the recordkeeping by the Federal Reserve.

Now more than ever Americans need access to independent and professional investment advice as they manage their 401(k) plans. As demonstrated during the past year, the consequences of concentrated investments, made without regard to risk tolerance or investment horizon, can be dire for participants and beneficiaries who often lack access to professional, prudent investment guidance.

Department of Labor Investment Advice Regulations

ERISA and the Internal Revenue Code generally prohibit plan fiduciaries from rendering any investment advice to plan participants and beneficiaries that would result in the payment of additional fees to the fiduciaries or their affiliates. The Pension Protection Act of 2006 (PPA) §601 provided a statutory prohibited transaction exemption to the rule [codified at ERISA §§ 408(b)(14) and 408(g) and IRC §§ 4975(d)(17) and 4975(f)(8)] for certain transactions that may occur in connection with the provision of "eligible investment advice" by a "fiduciary adviser," subject to specific requirements. In particular, the final PPA investment advice provision allowed two specific permissible investment advice exceptions: (1) certain "fee-leveling" arrangements; or (2) certified computer model arrangements.

On August 22, 2008, the Department of Labor (DOL) issued proposed investment advice regulations interpreting PPA §601. On the same date, the DOL issued a separate prohibited transaction class exemption (Class Exemption) that provided relief for certain transactions that went beyond the scope of relief contemplated in the statutory language. DOL issued final investment advice regulations (Final Regulation) on January 21, 2009, that incorporated the separate Class Exemption into the Final Regulation. However, the status of these regulations is unclear at this point. The day before the final investment regulations were published in the Federal Register, January 20, 2009, Rahm Emanuel, Assistant to the President and White House Chief of Staff, issued a memorandum directing Agency Heads to consider extending for 60 days the effective date of regulations that had been published in the Federal Register but not yet taken effect. In response to the memorandum, on February 4, 2009, the DOL proposed extending the effective date for the investment advice rules from March 23 until May 22, 2009 to allow the public to comment on whether the rules raise significant policy and legal issues. ASPPA and CIKR submitted comments in support of the extended effective date due to the uncertainty surrounding the final disposition of the regulations.

The Final Regulation's interpretation of the statutory exemption in PPA will make it more likely that participants and beneficiaries may obtain assistance in diversifying investments and appropriately reflecting their own risk tolerances and investment horizons in asset allocations. However, the portion of the Final Regulation which implements the non-statutory Class Exemption (*i.e.*, the portion that does not relate to the statutory exemption from the prohibited transaction rule enacted in PPA) may expose participants and beneficiaries to conflicted investment advice without sufficient protection from the effects of an adviser's conflicts of interest. Furthermore, this exemption is contrary to Congressional intent.

The Class Exemption provides additional relief for the provision of individualized or "off-model" investment advice by a fiduciary adviser following delivery to a participant of investment recommendations generated through a computer model arrangement, and further applies the statutory fee-leveling limitation in that circumstance solely to the compensation received by the individual fiduciary adviser providing the advice (as distinguished from compensation received by the adviser's employer or affiliate). In providing this additional relief, the DOL set forth a number of disclosure and audit conditions to be met in order to obtain the relief provided under the Class Exemption.

The additional prohibited transaction relief provided in the Class Exemption portion of the Final Regulation clearly goes beyond the scope of the investment advice prohibited transaction relief as enacted by PPA. In the Joint Committee on Taxation Explanation accompanying PPA, the explanation explicitly stated that "if a computer model is used, the only investment advice that may be provided under the arrangement is the advice generated by the computer model." Both the U.S. House of Representatives and the U.S. Senate have weighed in on the subject as well.¹ The DOL itself acknowledges in Section B(4)(b) of the supplementary information of the Final Regulation that the allowance of individualized investment advice to plan participants and beneficiaries was "not clearly encompassed by the statutory exemption or implementing regulations."

Congress spent a considerable amount of time examining and debating the optimum way to encourage employers to provide investment advice and education to their employees without removing the carefully crafted protections from conflicted advice originally put in place over 30 years ago. While ASPPA, CIKR and NAIRPA fully support the policy behind making professional prudent investment advice more available to plan participants and beneficiaries, we are concerned that the DOL does not overstep the protections carefully considered by Congress (*i.e.*, the computer modeling and fee-leveling requirements).

¹ In an October 6, 2008 comment letter to the DOL, Sens. Edward Kennedy (D-MA), Charles Grassley (R-IA) and Jeff Bingaman (D-NM) concluded that "the Department's proposed regulation and class exemption run contrary both to the clear language of PPA and Congress' clear intent in enacting PPA to protect the retirement security of millions of American workers." Likewise, in an October 8, 2008 comment letter to the DOL, House Education and Labor Committee Chairman George Miller (D-CA) and Subcommittee on Health, Education, Labor and Pension Chairman Rob Andrews (D-NJ) urged the immediate withdrawal of the Department's proposed regulation and class exemption as they stated that the Department "ignored Congressional intent and overstepped its authority by impermissibly expanding the 'eligible investment advice' exemption."

In particular, we have concerns that working Americans should not have their retirement assets exposed to conflicted investment advice where the adviser has a financial interest in what investment choices to recommend, regardless of what disclosure is being provided. Although the Final Regulation provides that plan participants can always hire an independent investment adviser on their own, as a practical matter, most plan participants would be unlikely to take this additional step and would thus be a “captive” audience. Even with the fiduciary adviser being subject to fee-leveling in the Class Exemption, there is no protection to ensure that investments for which the adviser’s employer has a financial interest are not favored over other plan investment options. Accordingly, if the Class Exemption were to be enacted as finalized, there is a high likelihood that plan participants and beneficiaries would be subjected to investment advice that is not in their best interest as a result of conflicts of interest that could benefit the fiduciary adviser.

Accordingly, ASPPA, CIKR and NAIRPA recommend that the DOL withdraw the Class Exemption portion of the Final Regulation. The enactment of ERISA §§ 408(b)(14) and 408(g) reflect Congressional desire to provide very limited relief for providing conflicted investment advice. The Final Regulation expands this relief in a manner that does not provide adequate protection to participants and beneficiaries.

Independent Investment Advice Legislation

With the growth of participant-directed individual account plans, the importance of investment advice to participants and beneficiaries of retirement plans has become increasingly clear. The majority of Americans are not experts on how to appropriately invest their retirement savings. However, due to the shift from defined benefit to defined contribution plans, many Americans are required to do just that.

ASPPA, CIKR and NAIRPA believe that working Americans should not have their retirement assets exposed to conflicted investment advice where the adviser has a financial interest in what investment choices to recommend. Instead, American workers should have access to independent investment advice provided by qualified advisers.

We commend Chairman Andrews for his past leadership in support of independent investment advice for plan sponsors and participants. Legislation providing a safe harbor for plan sponsors with respect to independent investment advice provided to plan participants would be a significant step toward encouraging plan sponsors to make available independent advice.

One of the challenges in encouraging independent advice is to define what constitutes an independent advisor. NAIRPA has developed criteria for membership that we believe could serve as a model for providing independent advice. Specifically, a member firm:

- Does not receive compensation for retirement plan advisory services that varies with the investments selected by the plan sponsor or participants.
- Agrees in its engagement letters to serve as a plan fiduciary with respect to all plans for which it serves as a retirement plan advisor;

- Agrees to clearly disclose all fees expected to be received in connection with retirement plan advisory services in advance of any engagement and all such fees actually received at least annually thereafter;
- Is either a federally or state regulated registered investment advisor; and
- Is not directly or indirectly part of a controlled group that includes a financial services firm (i.e., an investment manufacturer).

Encouraging plan sponsors to base plan investment offerings on independent advice, and making independent advice available to plan participants, would be a major step forward in securing America's retirement.

Summary

During these difficult economic times, Americans need access more than ever to independent and professional investment advice. ASPPA, CIKR and NAIRPA commend the Chairman for holding this timely hearing. Furthermore, to ensure adequate protection to participants and beneficiaries, ASPPA, CIKR and NAIRPA recommend that the DOL withdraw the Class Exemption portion of the final, DOL investment advice regulation. We also encourage Congress to consider legislation that encourages the provision of independent investment advice to retirement plans and participants.