

**Remarks by Bert Carmody - Director of Fiduciary Consulting
Fiduciary Risk Management, LLC
To the DOL Hearings over the Proposed Investment Advisor Regulations and
Class Exemption in ERISA §408(g)(1) and 408(g)(2)
October 21, 2008**

Introduction: Good morning. My name is Bert Carmody and I am the Director of Consulting at Fiduciary Risk Management, LLC, an Atlanta based consulting firm whose practice focuses on ERISA Title I matters. We conduct fiduciary reviews of Fortune 1000, large non-profit and governmental sponsored retirement plans. We also provide support in Title I or related litigation.

Overall, we commend and support the Departments efforts to improve investment advisor processes and procedures. We think that laying out more definitive direction will serve retirement plan sponsor fiduciaries, their participants and improve the quality of investment education and advice.

Our suggestions on the proposed regulation and class exemption are to clarify certain areas that were unclear to us.

We concur with the Department in paragraph (d)(2) of the proposed regulations, where a computer model must get written certification.

Likewise, we agree with the Department in (d)(3) about having an outside expert review and certify the models.

Computer Model Certification and Audit: Investment advisors must disclose in (d)(1)(iii)(v) or (f) if the computer model has been changed or modified than the version previously used. Moreover, we urge the Department to consider requiring those providers utilizing a computer model be made to disclose *how*, *when* and *why* a revised version of the model is different than the one previously utilized.

We did not see language for the audit and certification applied to non-computer based advice to participants or beneficiaries. It does not make sense to have a structured process for computer advice models and have a similar review/oversight process in place for non-computerized advice.

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The Department sought comments regarding models that favor particular investment options as discussed in the Federal Register on page 49898 in the third column. We do not favor models favoring particular investment options. While the Department's intents are valid, we are concerned that this could possibly move the participant receiving advice (computer or otherwise) into:

- Less diversified investment options with a higher potential for undue risk, or
- Undermine the overall purpose of this proposed regulation to more expensive investments or those investments that give the advisor additional revenue without adding more value in the investment line-up.

Our major concerns about the proposed regulations and class exemption center on the definition of material affiliation of the eligible investment expert in this important certification action. We urge the Department to consider any material affiliation as identified in (d)(v)(2-5) should be \$0. Any amount above \$0 creates an inherent conflict of interest and that defeats the purpose of having an independent certification.

Likewise, we are concerned about (j)(7)'s definition of "material affiliation" and (f)(i)(3)'s applicability particularly as it applies to the independent audit. We believe that a material affiliation for is compensation greater than \$0. Here too, any payment by an affiliate constitutes a conflict of interest and that defeats the purpose of independence.

Self Directed Brokerage Windows: The commentary on page 49899 referring to (j)(1) defines "designated investment options and does not include self directed brokerage windows. We urge that the providers of such windows be required to disclose fees and particularly any materials urging participants to use that feature as opposed to the designated investment options offered in the plan.

Any effort on the part of a provider offering a brokerage window to not disclose fees, promotional materials or any advice given to participations should be cause to remove the exemption. We see continued abuse in self-directed brokerage accounts and any promotion to get participants to use the window option as opposed the investments offered in the line-up should be disclosed to, reviewed by and approved by plan fiduciaries. Any investment advice provided through

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a plan's brokerage window should be given the same scrutiny as advice on the other investments in the plan.

Disclosure: In (g)(iii) of the proposed regulation, we urge the Department to not only require the disclosure of affiliations (who) but *how much* (expressed as a dollar amount or percentage) does compensation constitutes total income. This identifies from a compensation perspective who paid more and potentially had more influence over the advice giver.

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Thank you for providing the opportunity to speak.