

## COMMENT LETTER

January 30, 2007

# Institute Comment Letter on Investment Advice to IRAs (pdf)

January 30, 2007 Office of Exemption Determinations Employee Benefits Security Administration (EBSA) Room N-5700 U.S. Department of Labor 200 Constitution Avenue, N.W. Washington, DC 20210 Attn: IRA Investment Advice RFI Ladies and Gentlemen: The Investment Company Institute appreciates the opportunity to comment on the Request for Information on the provision of investment advice.<sup>1</sup> The purpose of the RFI is to solicit information from the public concerning the feasibility of computer model investment advice programs for individual retirement accounts and other similar plans (collectively, "IRAs"). The Institute's comments primarily address whether there are computer model advice programs that take into account the full range of potential IRA investments, including equities and bonds. To address this question, the Institute undertook a survey of its members and did not find a single Institute member that has such a computer model. As a result, the Institute urges the Department to take quick action to issue a broad prohibited transaction class exemption for IRAs. The Institute's analysis and survey results supporting this recommendation are set forth below. The interest of the Institute's members in this matter is substantial.<sup>2</sup> Mutual funds are the investment vehicle of choice for both ERISA-covered defined contribution plans and IRAs. At year-end 2005, \$1.7 trillion of the \$3.7 trillion held in IRAs were invested in mutual funds.<sup>3</sup> Mutual fund firms and their affiliates also serve as trustees and custodians of IRAs and provide other services in connection with IRAs, including investment advisory services. For many years, the Institute advocated amending ERISA to expand the availability of advisory services to IRA and defined contribution plan investors. Congress recognized the need 1 71 Fed. Reg. 70427 (Dec. 4, 2006). 2 ICI members include 8,802 open-end investment companies (mutual funds), 656 closed-end investment companies, 287 exchange-traded funds, and 4 sponsors of unit investment trusts. Mutual fund members of the ICI have total assets of approximately \$10.163 trillion (representing 98 percent of all assets of U.S. mutual funds); these funds serve approximately 93.9 million shareholders in more than 53.8 million households. 3 Investment Company Institute, "The U.S. Retirement Market, 2005," Fundamentals, July 2006. Office of Exemption Determinations IRA Investment Advice RFI Page 2 of 3 to provide new options for savers in these markets to obtain advice when it enacted the Pension Protection Act. Background The Pension Protection Act amends ERISA and the Internal Revenue Code to provide a statutory exemption for the provision of investment advice to ERISA plans and IRAs. Under the exemption, a "fiduciary adviser"<sup>4</sup> may provide advice to participants and beneficiaries and receive direct or indirect compensation in connection with the advice under an "eligible investment advice arrangement." The Act provides two alternative means to offer an eligible arrangement. Either the arrangement must meet the "level fees" condition or it must use a computer model that meets certain conditions. A

computer model must use generally accepted investment theories, utilize relevant participant information (which may include age, retirement age, life expectancy, risk tolerance), be objective and unbiased, 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 model also must be periodically "certified" by an "eligible investment expert" as meeting the requirements of the exemption. Congress recognized that the range of investments and services available to ERISA plans and IRAs differ and, as a result, the computer model may not be suitable for the IRA market. The PPA requires the Department to determine if there is any computer model advisory program that is feasible for IRAs. Specifically, the Department must obtain information as to whether models (1) utilize relevant individual information, (2) take into account the full range of investments available to IRAs, including stocks and bonds, and (3) allow individuals sufficient flexibility in obtaining advice to evaluate plan options. If the Department determines that there are no feasible computer models, then the Department is required to issue a class exemption. The Department will have substantial flexibility in determining the conditions of the class exemption. Institute Survey The Code specifically permits IRAs to invest in virtually anything other than collectibles and life insurance.<sup>5</sup> And, many providers of IRAs permit IRA holders to invest in a very wide range of investments. The Institute estimates that there are around 6,200 mutual funds available to IRA investors.<sup>6</sup> In addition, 4 A "fiduciary adviser" is defined to mean (1) a person who is a fiduciary by reason of providing investment advice who is a (2) registered investment adviser, bank, insurance company, broker dealer, and any of their affiliates and all of their employees and agents (including employees and agents of affiliates). ERISA § 408(g)(11)(A). 5 Internal Revenue Code §§ 408(e), (m). 6 Calculated based on confidential data submitted to the Institute for the monthly trends report; data as of November 2006. Office of Exemption Determinations IRA Investment Advice RFI Page 3 of 3 there are over 5,000 U.S. publicly traded operating companies that offer stocks and/or debt securities,<sup>7</sup> and there are a multitude of government debt securities. The Institute conducted a survey of its members to determine if any member companies have advisory programs that meet the requirement to be "feasible," including the requirement to take into account all investment options available through an IRA. (A copy of the survey is attached.) Twenty Institute members responded. At year-end 2005, these survey respondents held over \$4.2 trillion in mutual fund assets, of which \$831 billion were IRA assets. This represents about 50% of the total IRA assets that are invested in mutual funds. The firms that responded include most of ICI's largest members and have very large retirement businesses and developed investor services. No respondent to the Institute's survey indicated that it has a computer model advisory program that takes into account the full range of IRA investments. Conclusion Based on the results of the Institute's member survey, the Institute believes that there is no computer model that can account for all of the investment options generally available to IRAs, including individual equities and bonds. As a result, the Institute urges the Department to reach this conclusion promptly and to report its findings to Congress well before the end of the year. The Institute further asks that the Department begin working on a proposed IRA class exemption with a goal of proposing the class exemption in the next six months and finalizing the exemption by year end. The Department's class exemption should recognize that Congress intended that there be two alternative paths for providing advice under the exemption in connection with IRAs. If the second path, a computer model, is not feasible, the class exemption that replaces a computer model must be flexible enough to provide IRA savers with real and new options for advice. The Institute believes that the foundation of a class exemption should be robust upfront and ongoing disclosures of the financial interests and investment affiliations of the fiduciary adviser. The Institute looks forward to working closely with the Department on this

important project. Sincerely, /s/ Mary S. Podesta Mary S. Podesta Senior Counsel – Pension Regulation Attachment 7 Figure from World Federation of Exchanges as of December 2006.

INVESTMENT COMPANY INSTITUTE IRA INVESTMENT ADVICE SURVEY Fund Complex Name: \_\_\_\_\_ Does your complex currently offer an investment advice computer model to IRA investors that meets the Department of Labor’s stated criteria to be “feasible” (see below), including the requirement to take into account the full range of investments, including equities and bonds? YES \_\_\_\_\_ NO \_\_\_\_\_ If your answer is yes, we will follow up with you for more information, including as to the distribution channel (direct sold, adviser/broker sold, etc.) for which the computer model is available. DOL’s RFI asks whether IRA investment computer models: (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. Name of person completing survey \_\_\_\_\_ Telephone number of person completing survey \_\_\_\_\_ Please fax your response to Brenda Turner at (202) 326-5841 no later than January 18, 2007. Please call Mary Podesta at (202) 326-5826 or Mike Hadley at (202) 326-5810 if you have any questions regarding this survey.

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