

Department of Labor Issues Final Regulations on Providing Investment Advice to Retirement Plan Participants

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On October 24, 2011, the U.S. Department of Labor ("DOL") issued a final rule that further outlines the conditions required when fiduciaries provide investment advice to participants and beneficiaries in self-directed individual account plans and IRAs (the "Final Regulations"). DOL Reg. §§ 2550.408g-1 and 2.

The prohibited transaction rules in the Employee Retirement Income Security Act ("ERISA"), and the parallel provisions under the Internal Revenue Code (the "Code"), generally prevent a fiduciary investment adviser from recommending plan investment options if the adviser receives additional fees as a result of the advice.

A prohibited transaction exemption was added in 2006 to both ERISA and the Code, permitting plan fiduciaries to provide investment advice to participants and beneficiaries pursuant to "eligible investment advice arrangements" (the "Statutory Exemption").

To qualify for the Statutory Exemption, investment advice must either come through a "level-fee" arrangement, which means that the adviser's fees do not vary as a result of the particular investments selected, or through a computer model that is certified as unbiased by an independent expert.

The Final Regulations mirror and augment the Statutory Exemption by outlining additional conditions that level-fee arrangements must satisfy. For example, the investment advice must be based on generally accepted investment theories and take into account investment fees and certain information relating to an individual participant's investment strategy (such as investment preferences, age, risk tolerance and current investments). The Final Regulations also provide greater detail regarding permissible computer models and augment the requirements regarding proper disclosures under the Statutory Exemption, including the addition of a model disclosure notice.



The Statutory Exemption provides that a person who develops or markets a computer model used in an eligible investment advice arrangement will be treated as a fiduciary, unless one fiduciary adviser elects to be treated as a fiduciary for such purposes. The Final Regulations outline the conditions that must be satisfied in order for a fiduciary adviser to make such an election.

The Final Regulations will become effective December 27, 2011, and will be applicable to covered transactions occurring on or after that date. The Final Regulations are separate from the DOL's proposed rules broadening the definition of the term "fiduciary" under ERISA.

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