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New Guidance on Investment Advice Arrangements

By [B. David Joffe](#)



The Department of Labor (DOL) has recently issued Field Assistance Bulletin 2007-01 regarding the provisions of the Pension Protection Act (PPA) relating to “eligible investment advice arrangements.” The Bulletin addresses the prohibited transaction relief under the PPA for providing investment advice to participants in individual account plans--such as 401(k) plans. It essentially reaffirms the DOL’s prior advisory opinions under which investment advice may be provided to participants in certain circumstances without resulting in a prohibited transaction. The Bulletin, however, provides only limited guidance on the new eligible investment advice arrangements under the PPA.

The Employee Retirement Income Security Act (ERISA) generally prohibits a fiduciary who renders investment advice to a plan from receiving additional fees for providing investment advice to participants, absent an exemption. The PPA amended both ERISA and the Internal Revenue Code to add a statutory exemption for providing investment advice to participants under an eligible investment advice arrangement. Such an arrangement generally requires that the fees received by the fiduciary adviser do not vary depending on investments selected or that a permitted computer model be used. Under the exemption, while the plan fiduciary remains responsible for the prudent selection and periodic review of the selected fiduciary adviser, it generally does not have a duty to monitor the specific investment advice given by a fiduciary adviser to participants.

In the Bulletin, the DOL has indicated that the PPA provisions do not invalidate or otherwise affect prior guidance on investment advice. The DOL reviewed prior advisory opinions that distinguished permissible investment education from investment advice, approved of investment advice that results in additional fees to an adviser so long as the fees were used for the benefit of the plan, and determined that there was not a prohibited transaction where fiduciary advice was provided through methodologies controlled by an independent financial expert. Except for the specific compliance conditions in the PPA, the same fiduciary duties and responsibilities continue to apply to the selection and monitoring of an investment adviser regardless of whether the program is subject to the PPA statutory exemption. With respect to the PPA, the Bulletin does confirm that the fee-leveling requirement applies only to the fiduciary adviser--not to its affiliates who are not providing investment advice to the plan, although in most cases the requirement will apply both to the entity and the individual providing the advice.

The Bulletin is helpful in confirming the continued applicability of the advice provided by the DOL in prior advisory opinions, and it provides some welcome relief for affiliates of fiduciary advisers. However, it does not provide any broad guidance on the level-fee or computer model requirements or on the related disclosure and audit requirements. The DOL still needs to issue specific guidance on the application of the PPA requirements, and plan sponsors should proceed cautiously in implementing eligible investment advice arrangements until further guidance is issued.

If you have any questions regarding the new guidance or other employee benefit matters, please contact one of the attorneys on the Boulton Cummings [Employee Benefits and Executive Compensation](#) Team listed below:

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