



## Department of Labor Releases Final Rule on Investment Advice

The Department of Labor Employee Benefits Security Administration has released a final rule on requirements for providing investment advice to retirement plan participants. The final rule goes into effect on December 27, 2011. Sponsors of retirement plans that allow investment advisers to provide investment advice to plan participants need to be aware of this rule.

### Background

The final rule implements a statutory prohibited transaction exemption under Sections 408(b)(14) and 408(g) of the Employee Retirement Income Security Act of 1974 ("ERISA") as well as related Sections 4975(d)(17) and 4975(f)(8) of the Internal Revenue Code (the "Code"). The exemption was added by the Pension Protection Act of 2006. The DOL initially proposed an investment advice rule in 2008 and finalized such rule in January 2009. However, the DOL withdrew the earlier final rule in November 2009. In March 2010, the DOL published a new proposed rule, which has now been finalized.

### Prohibited Transaction Exemption

Generally, a fiduciary includes a person who renders investment advice for a fee or other compensation. The prohibited transaction provisions of ERISA and the Code prohibit a fiduciary from dealing with the assets of a plan in his own interest or account and from receiving consideration for his own account from a party dealing with the plan in a transaction involving plan assets. These requirements have been interpreted as prohibiting a fiduciary from using the authority, control or responsibility that makes it a fiduciary to cause itself, or a party in which it has an interest, to receive additional fees. As a result, in the absence of an exemption, an investment adviser to a retirement plan is prohibited from rendering investment advice to plan participants that would result in the payment of additional advisory and other fees to the investment adviser or its affiliates.

To be eligible for the exemption, the investment advice must be provided by a "fiduciary adviser" under an "eligible investment advice arrangement." An eligible investment advice arrangement is one that utilizes either a "level-fee" (i.e., an arrangement under which the fees do not vary based on investments selected by the participant) or a "computer model." The computer model must be certified as unbiased and as applying generally accepted investment theories by an "eligible investment expert." The final rule provides detailed guidance to fiduciary advisers on compliance with these conditions. The rule also informs fiduciary advisers as to how to comply with other conditions and safeguards in the statutory exemption, including:

- Requiring that a plan fiduciary (independent of the fiduciary adviser or its affiliates) authorize the advice arrangement.
- Establishing an annual audit of both computer model and level-fee advice arrangements, including the requirement that the auditor be independent from the fiduciary adviser.

October 27, 2011

#### AUTHOR



**B. David Joffe**  
615.252.2368  
[djoffe@babbc.com](mailto:djoffe@babbc.com)

#### RELATED ATTORNEYS

**Martha L. Boyd**  
615.252.2357  
[mboyd@babbc.com](mailto:mboyd@babbc.com)

**J. S. Christie, Jr.**  
205.521.8387  
[jchristie@babbc.com](mailto:jchristie@babbc.com)

**Andrew Elbon**  
615.252.2378  
[aelbon@babbc.com](mailto:aelbon@babbc.com)

**B. David Joffe**  
615.252.2368  
[djoffe@babbc.com](mailto:djoffe@babbc.com)

**Gordon Earle Nichols**  
615.252.2387  
[gnichols@babbc.com](mailto:gnichols@babbc.com)

**John M. Scannapieco**  
615.252.2352  
[jscannapieco@babbc.com](mailto:jscannapieco@babbc.com)

**Jay P. Turner**  
205.521.8412  
[jturner@babbc.com](mailto:jturner@babbc.com)

- Imposing record keeping requirements for fiduciary advisers relying on the exemption.
- Requiring that computer models be certified in advance as unbiased and meeting the exemption's requirements through the use of an independent expert.
- Establishing qualifications and a selection process for the investment expert who must perform the computer model certification.
- Clarifying that the level-fee requirement does not permit fiduciary advisers (including their employees) to receive compensation from any party (including affiliates) that vary on the basis of the investments participants select.
- Requiring disclosures by fiduciary advisers to plan participants as well as to the authorizing fiduciary.

The final rule also includes a form Fiduciary Adviser Disclosure.

### Requirements for the Authorizing Fiduciary

The authorizing fiduciary, which could be the employer or a committee or other persons designated by the employer to act with respect to plan administration, must decide whether to allow fiduciary advisers to provide investment advice to participants. If the authorizing fiduciary decides to do so, it must authorize the arrangement and review the basis on which the investment advice is being provided. The authorizing fiduciary will need to obtain the required disclosure from the fiduciary adviser. It will need to obtain and review the annual audit provided by the fiduciary adviser. It will also want to make sure that the fiduciary adviser is providing the required disclosure to participants.

If you have any questions about the new rule, please contact David Joffe or one of the other attorneys in the [Employee Benefits & Executive Compensation](#) Group at Bradley Arant Boult Cummings LLP.

#### BRADLEY ARANT BOULT CUMMINGS LLP OFFICE LOCATIONS:

##### ALABAMA

One Federal Place  
1819 Fifth Avenue North  
Birmingham, AL 35203-2119  
205.521.8000

200 Clinton Avenue West, Suite 900  
Huntsville, AL 35801-4900  
256.517.5100

Alabama Center for Commerce  
401 Adams Avenue, Suite 780  
Montgomery, AL 36104  
334.956.7700

##### WASHINGTON, DC

1615 L Street, N.W.  
Suite 1350  
Washington, DC 20036  
202.393.7150

##### MISSISSIPPI

188 E. Capitol Street, Suite 400  
Jackson, MS 39201  
601.948.8000

##### NORTH CAROLINA

100 North Tryon Street, Suite 2690  
Charlotte, NC 28202  
704.332.8842

##### TENNESSEE

1600 Division Street, Suite 700  
Nashville, TN 37203  
615.244.2582

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