

Fact Sheet



U.S. Department of Labor
Employee Benefits Security Administration
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Proposed Regulation to Increase Workers' Access to High Quality Investment Advice

The Pension Protection Act of 2006 (PPA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to create a new statutory exemption from the prohibited transaction rules to expand the availability of investment advice to participants in 401(k)-type plans and individual retirement accounts (IRAs), subject to safeguards and conditions. The Department of Labor (DOL) is publishing in the Federal Register a proposed rule to implement these PPA provisions and make investment advice more accessible for millions of Americans in 401(k) type plans and individual retirement arrangements (IRAs).

Background

- EBSA is responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I of the ERISA. The agency oversees approximately 708,000 private pension plans, including 483,000 participant-directed individual account plans such as 401(k)-type plans, and millions of private health and welfare plans that are subject to ERISA.
- As of 2007, more than one-half of private-sector employees participated in defined contribution plans that allow for participant direction, with these plans covering 60 million active participants and holding about \$3 trillion in assets.
- In general, investment advice given by an investment adviser to plan participants on investments that pay additional fees to the adviser or its affiliates can violate the prohibited transaction rules of ERISA and the Internal Revenue Code. This has limited the types of investment advice arrangements available to participants in 401(k) plans and IRAs.
- Given the rise in participation in 401(k) type plans and IRAs, the retirement security of millions of America's workers increasingly depends on their investment decisions. Thus, there is increased recognition of the importance of investment advice in helping participants avoid costly investment errors.
- The Department published a Request for Information in December 2006, published a proposed regulation in August 2008, and held a public hearing on October 21, 2008. A final rule and related class exemption published in January 2009 were withdrawn in November 2009 in response to concerns raised in public comment letters questioning the adequacy of the final class exemption's conditions to mitigate the potential for investment adviser self-dealing.

Overview of Proposed Investment Advice Regulation

- After review, the Department decided to propose a revised rule limited to the implementation of the PPA statutory exemption relating to investment advice.
- The proposed regulation allows investment advice to be given under the statutory exemption in two ways. One is through the use of a computer model certified as unbiased. The other

way is through an adviser compensated on a "level-fee" basis (i.e., fees do not vary based on investments selected by the participant).

- Several other requirements also must be satisfied, including disclosure of fees the adviser is to receive. The regulation contains some key safeguards and conditions, including:
 - Requiring that a plan fiduciary (independent of the investment adviser or its affiliates) select the computer model or fee leveling investment advice arrangement.
 - Imposing recordkeeping requirements for investment advisers relying on the exemption for computer model or fee leveling advice arrangements.
 - Requiring that computer models must be certified in advance as unbiased and meeting the exemption's requirements by an independent expert.
 - Establishing qualifications and a selection process for the investment expert who must perform the above certification.
 - Clarifying that the fee-leveling requirements do not permit investment advisers (including its employees) to receive compensation from affiliates on the basis of their recommendations.
 - Establishing an annual audit of investment advice arrangements, including the requirement that the auditor be independent from the investment advice provider.
 - Requiring disclosures by advisers to plan participants.

Public Notice and Comment on the Proposal

The Department will publish the proposed regulation in the Federal Register on March 2, 2010. The Notice of Proposed Rulemaking (NPRM) invites public comments from interested persons on the proposed regulation's conditions applicable to investment advice arrangements. Public comments can be submitted electronically by email to e-ORI@dol.gov or by using the Federal eRulemaking portal at www.regulations.gov. All comments will be available to the public, without charge, online at www.regulations.gov and www.dol.gov/ebsa, and at the EBSA Public Disclosure Room.

Benefits of Proposed Investment Advice Regulation

- The Department estimated that over 83,000 defined contribution pension plans with approximately 2 million participants and approximately 13 million IRA beneficiaries will be affected by the proposed rule.
- EBSA believes the proposed regulation will benefit plan participants by facilitating the availability of quality, expert investment advice to more retirement plan participants.
- The increased high quality investment advice will allow plan participants to make better investment decisions and have a higher income after retirement. The improved investment results will reflect reductions in investment errors such as poor trading strategies and inadequate diversification.
- EBSA expects that benefits from the proposed regulation will be approximately \$8 billion annually due to improved investment results of participants. As annual costs are estimated at about \$2 billion per year, the proposed rule is expected to result in net benefits of approximately \$6 billion annually.

Investment Advisory Firms Covered by the Regulation

- The Department estimated that the regulation will affect 16,000 investment advisory firms (including broker-dealers). The main components of the cost of the regulation are: 1) the preparation and sending of 15 million disclosure statements to plan participants by plans annually, 2) the preparation of policies and procedures to assure compliance with the conditions of the exemption, 3) the preparation and maintenance of records, 4) the certification of the computer model investment advice arrangement, and 5) the audit of the investment advice arrangement.
- The costs in the first year for the statutory exemption include \$240 million for the preparation and distribution of disclosures, \$289 million to audit the investment advice arrangement, and \$538 million to certify the computer investment advice arrangement.
- The costs in all subsequent years for the statutory exemption also include \$125 million for the preparation and distribution of disclosures, \$289 million to audit the investment advice arrangement, and \$269 million to certify the computer investment advice arrangement.

This fact sheet has been developed by the U.S. Department of Labor, Employee Benefits Security Administration, Washington, DC 20210. It will be made available in alternate formats upon request: Voice phone: 202-693-8664; TTY: 1-202-501-3911. In addition, the information in this fact sheet constitutes a small entity compliance guide for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.