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[New Department of Labor Regulations Offer More Investment Advisers the Opportunity to Provide Advice to Participants in 401\(K\) Plans and IRAs](#)

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On December 27, 2011, new DOL regulations (the New Regulations)^[1] designed to encourage more financial advisers to offer investment advice to participants in participant-directed individual account plans (e.g., 401(k) plans) and individual retirement account (IRA) beneficiaries took effect. The New Regulations provide an exemption from prohibited transaction rules under the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code of 1986, as amended (the Code) that generally prevent an investment adviser acting as a fiduciary (a fiduciary advisor) from rendering advice to plan participants or IRA beneficiaries regarding investments that may result in the adviser or its affiliates receiving additional fees. The New Regulations implement a statutory prohibited transaction exemption adopted under the Pension Protection Act of 2006 (PPA).

Overview of the Final Regulations. Under the New Regulations, relief is provided for investment advice arrangements qualifying as fee-leveling arrangements, "certified" computer model programs, or both.

Fee-Leveling Arrangement. Under a fee-leveling arrangement, the fiduciary adviser's compensation cannot vary depending on the selection of a particular investment option by participants or beneficiaries. This provision is intended to eliminate the potential for a fiduciary adviser to be incentivized to recommend one investment over another. However, the level fee requirement generally does not extend to an affiliate of a fiduciary adviser that is not also providing the investment advice. Accordingly, the compensation of one or more affiliates of a fiduciary adviser may vary depending on participants' or beneficiaries' selections of particular investment options pursuant to the investment advice of the fiduciary adviser.^[2]

Computer Model Programs. Under a computer model program arrangement, the fiduciary adviser's investment advice must be generated through a "certified" computer model that uses objective criteria to recommend an asset allocation that generally takes into account all designated investment options available and appropriately weighing the factors utilized in estimating the future returns of the investment options. In this regard, the computer model should consider qualifying employer securities and asset allocation funds (such as lifecycle or target-date funds) if offered as investment options under the applicable plan or available to the applicable IRA, but does not have to consider brokerage windows allowing a participant or IRA access to a large universe of options, any option the participant or IRA beneficiary requests to be excluded, or an in-plan annuity option, if a description of how the in-plan annuity works is provided simultaneously with the investment advice. The computer model cannot inappropriately favor investment options benefitting the fiduciary adviser or a person with a material affiliation or material contractual relations with the fiduciary adviser. To be "certified," the computer model must have been reviewed in advance for compliance with the requirements of the New Regulations by an independent "eligible investment expert" with certain technical expertise requirements who has provided an appropriate certification.

General Requirements. The New Regulations require that any qualifying arrangement be expressly authorized by a plan fiduciary and be audited every year for compliance with the relief requirements. In addition, the following requirements must be met:

Investment Advice Conditions. In providing investment advice, the fiduciary adviser must:
request specific information from the participant such as age, risk tolerance, and current investments, and use such information if furnished;
apply generally accepted investment theories that take into account the historic risks and returns of different asset classes over defined periods of time; and
take into account fees and expenses paid by recommended investments in its analysis.

Disclosure to Participants and Beneficiaries. The fiduciary adviser including the fees charged and the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in developing the investment advice or in selecting the options.

Record Retention. The fiduciary adviser must retain any records necessary for determining whether the applicable requirements of the New Regulations have been satisfied for at least six years.

Limits to the Relief Granted under the New Regulations. The relief provided under the New Regulations will not apply to any transaction for which the conditions under the New Regulations were not satisfied. Further, if a fiduciary adviser has engaged in a pattern or practice of noncompliance with any of the applicable conditions of the New Regulations, the prohibited transaction relief will not apply to any transaction connected with the provision of investment advice during the period of such noncompliance.

While the foregoing summarizes some of the key aspects of the New Regulations, we encourage you to review the details of the New Regulations at http://www.ofr.gov/OFRUpload/OFRData/2011-26261_P1.pdf and to contact us with any questions before seeking to implement a new advisory services program.

[1] The New Regulations are available at: http://www.ofr.gov/OFRUpload/OFRData/2011-26261_P1.pdf .

[2] For example, if fiduciary adviser X receives level fees regardless of the investments selected, fund managers related to X and other affiliates of X can receive separate compensation resulting from fiduciary adviser X's advice.

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