

# Qualified Plan News

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## Helpful Web Links

Department of Labor  
[www.dol.gov/](http://www.dol.gov/)

Taking the Mystery Out of  
Retirement Planning  
[www.dol.gov/ebsa/publications/nearretirement.html](http://www.dol.gov/ebsa/publications/nearretirement.html)

Internal Revenue Service  
[www.irs.gov/](http://www.irs.gov/)

## DOL Releases Final Investment Advice Regulations Strong Opposition Makes Rescission Likely

### OPN Highlights

- **Action Required:** *None. This QPN is for informational purposes only.*
- *The final regulations provide relief for the provision of investment advice to participants by product providers, related transactions and the receipt of compensation by the adviser.*
- *Applies to ERISA self-directed individual account plans and to IRAs.*
- *Final regulations implement PPA fee-leveling and computer modeling exemptions and extend additional administrative relief.*
- *Final regulations are consistent with the proposed regulations.*
- *Effective date is March 23, 2009.*
- *These regulations are highly controversial and may be rescinded by Congress and the new Administration before their effective date.*

On January 21, 2009, the Department of Labor (DOL) published final regulations for the provision of investment advice to participants and beneficiaries in self-directed individual account plans subject to Title I of ERISA and to IRAs.

The final regulations implement the investment advice provisions in the Pension Protection Act (PPA), as discussed below. The regulations also contain an important administrative exemption that extends the scope of relief well beyond the PPA statutory exemptions.

**Background** – The act of providing investment advice for a fee to a plan sponsor or to participants, under a self-directed plan, is a fiduciary act. The prohibited transaction rules of ERISA and the Internal Revenue Code generally prohibit a fiduciary adviser from providing investment advice that could cause the adviser or its affiliates to receive additional compensation. The PPA created a new prohibited transaction exemption for investment advice that either is (i) based on a computer model, or (ii) does not generate additional compensation for the adviser based on the recommended investment option (i.e., where the adviser's income is level across all investment options). The final regulations implement the PPA relief and add to it with an administrative exemption for advice that generates additional compensation for the fiduciary advisor's firm, but maintains level compensation for the individual representative or employee providing the advice.



**Overview of Final Regulations** – The final regulations make no significant changes from the proposed regulations (released August 21, 2008) and earlier DOL guidance in Field Advisory Bulletin 2007-41. The differences are clarifying changes made in response to suggestions from commenters. Under the regulations advice must be provided under an Eligible Investment Advice Arrangement (EIAA) that is one of the following:

**Fee-Leveling Arrangement** – Under the PPA’s statutory exemption, this is an arrangement where 1) fees and other compensation received directly or indirectly by any employee, agent or registered representative that provides investment advice do not vary based on the investment option selected *and* 2) fees and other compensation received by the fiduciary adviser for investment advice do not vary based on the investment option selected. In other words, so long as both the adviser itself and its representatives receive level compensation, the exemption would be available even if the investment adviser’s corporate affiliates earn additional compensation as a result of a recommended transaction.

**Computer Modeling Arrangement** – Under the PPA’s statutory exemption, the provision of investment advice based on a computer model must be designed and operated to:

- Utilize appropriate objective criteria to provide asset allocation portfolios comprised of investment options available under the plan;
- Avoid investment recommendations that favor options offered by the fiduciary adviser or an affiliate or that may generate greater income for the fiduciary adviser or affiliates;
- Take into account all investment options offered under the plan equally. Brokerage accounts, life-cycle type funds and existing annuities are not required to be taken into account however a general description of these options and how they operate should be provided. Employer securities are included unless the participant asks that they be excluded, and
- Prior to using the computer model the fiduciary adviser must obtain a written certification from an eligible investment expert (as described in

the regulations) that the model meets the requirements of the regulations. If the computer model is modified a new certification must be obtained prior to its use.

**Other conditions apply** – The final regulations include a number of other conditions for both the fee-leveling and computer model arrangements such as a 30-day notice requirement (model notice is provided), record retention and an annual audit requirement.

**DOL’s Administrative Extensions to the PPA’s Statutory Relief – Key Points** – The DOL used its authority to grant administrative prohibited transaction relief to add considerably to the PPA’s statutory exemptions. The final regulations contain the following significant additional relief:

**Fee-leveling relief** – When the fee-leveling arrangement is used *instead of* the computer modeling arrangement, the fee-leveling requirement applies only to compensation received by the individual employee, agent or representative and not to the level of the financial institution (i.e., the fiduciary adviser).

**Computer modeling relief** - If the computer modeling arrangement is used the adviser is permitted to provide individual advice that may be different than that generated by the computer, to the participant or beneficiary, after providing the advice generated by the computer. In other words, the adviser could provide “off-model advice”. Compensation for this advice is not required to comply with the fee-leveling rules. If such advice is provided, within 30 days, the adviser must provide a written explanation of the advice including an explanation of any additional compensation to the adviser and why this personalized advice is best for the participant or beneficiary.

In addition, the computer model must:

- Meet all the requirements of the final regulations if the computer model is developed by the financial institution itself, or
- Meet the requirements of the final regulations with the exception of the certification

requirements, if the computer model is developed by an unaffiliated financial expert.

*Other conditions apply* – The additional relief includes other conditions for both the fee-leveling and computer modeling arrangements that are similar to those required under the final regulations.

*Definition of fiduciary advisor* – Under both the regulations and the additional relief a fiduciary advisor is one of the following:

- A person registered as an investment adviser under the Investment Advisers Act of 1940, or under the laws of the State where the fiduciary maintains its principal office;
- A bank or similar financial institution as defined in the regulations;
- An insurance company qualified to do business under the laws of a State;
- A person registered as a broker or dealer under the Securities Exchange Act of 1934;
- An affiliate, as defined in the regulations, of any person described above, or
- An employee, agent or registered representative of a person described above (other than an affiliate).

*Other Noteworthy Clarifications* – The provision of investment advice is optional. A fiduciary advisor is permitted to provide advice to its own employees when certain conditions are met. The relief under 404(c) for participant directed investments continues to apply to all plan fiduciaries except the investment advisor. Please also keep in mind that the final regulations do not invalidate or otherwise affect any prior regulations, exemptions or guidance issued by the DOL concerning investment advice (i.e., SunAmerica and other guidance remains available and may continue to be relied upon).

*Final Regulations may be rescinded* - It is likely that Congress and the new Administration will rescind the regulations before they become effective. Rep. George Miller (D-Calif.), Chairman of the House of Representatives Education and Labor Committee, has stated that he is determined to block the rule because he feels it provides too much opportunity for conflict of interest on the part

of financial services firms. The President's Chief of Staff has also issued a memo to the heads of all executive departments and agencies requesting a 60 day extension of the effective date of regulations that have been published in the Federal Register, but have not yet taken effect. We are watching this closely and will report any new developments.

*IRS Circular 230 Disclosure*

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