United Actuarial Services, Inc.
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BENEFIT NEWS BRIEF

DOL Publishes Final Regulation On Investment Advice For Participants In Defined Contribution Plan That Allow Participant Directed Investment

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The Department of Labor (DOL) issued a *Final Regulation* designed to enhance retirement security by improving workers' access to quality fiduciary investment advice. The regulation implements a prohibited transaction exemption under an amendment to the *Employee Retirement Income Security Act* (*ERISA*) and the Code that is part of the *Pension Protection Act of 2006 (PPA).* The *Final Regulation* will apply to investment advisors to defined contribution plans where the participant is allowed to direct his investment, including multiemployer defined contribution plans with participant directed investment. The law does not require plan fiduciaries (trustees) to make investment advice available.

The final rule will become effective on December 27, 2011, and will be applicable to *transactions occurring on or after that date*.

Previously, in 2007, the DOL had issued *Field Assistance Bulletin (FAB) 2007–01* to provide guidance on this *PPA* exemption (*Research Memo 2007-4)* and recently issued the *Proposed Regulations* (*Benefit News Briefs 2010-19)* which formed the basis for these *Final Regulations.* A DOL *Fact Sheet* also provides background for the *Final Regulation*: *http://www.dol.gov/ebsa/pdf/fsinvestmentadvicefinal.pdf.*

By way of reminder, the prohibited transaction rules generally prevent a fiduciary investment adviser from recommending plan investment options if the adviser receives additional fees from the investment providers. Although these rules protect participants from conflicts of interest, *ERISA* provides exemptions from the rules in appropriate circumstances and permits exemptions that have participant-protective conditions. The *PPA* created a prohibited transaction exemption for "*eligible investment advice arrangements*", as found in the regulation.

The new regulation implements an exemption that Congress enacted as part of the *PPA* to improve participant access to fiduciary investment advice, which contains certain safeguards and conditions to prevent investment advisers from providing biased advice that is not in a participant's best interest. (Note, this regulation is

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separate from and does not affect the DOL's proposed rule on the definition of fiduciary investment advice, which the DOL has indicated it will re-propose.) A copy of the *Final Regulation* is available at: *http://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-26261.pdf.* A specially prepared copy of the regulation with a Table of Contents added is available by *"clicking here."*

Overview of the Final Investment Advice Regulation

The statutory exemption allows fiduciary investment advisers to receive compensation from investment vehicles they recommend if either:

(1) the investment advice they provide is based on a computer model certified as unbiased and as applying generally accepted investment theories, or

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

The *Final Regulation* provides detailed guidance to advisers on compliance with these conditions. The regulation also shows advisers how to comply with other conditions and safeguards in the statutory exemption, including:

- Requiring that a plan fiduciary (independent of the investment adviser or its affiliates) authorize the advice arrangement.
- Imposing recordkeeping requirements for investment advisers relying on the exemption.
- 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 level-fee requirement does not permit investment advisers (including their employees) to receive compensation from any party (including affiliates) that vary on the basis of the investments participants select.
- Establishing an annual audit of both computer model and level-fee advice arrangements, including the requirement that the auditor be independent from the investment advice provider.
- Requiring detailed disclosures by advisers to plan participants. A model form disclosure is included in the Appendix.

The *Final Regulation* does not affect the applicability of the DOL's prior guidance on the application of the prohibited transaction rules and existing prohibited transaction exemptions to investment advice arrangements. For example, *Advisory Opinion Nos. 2011-08A, 2005-10A*, *2001-09A* and *1997-15A* continue to apply. See: *http://www.dol.gov/ebsa/Regs/AOs/main.html to access the AOs.*

For questions about the *Final Regulation*, interested parties may contact Fred Wong at (202) 693-8500.

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