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EB/EC (Employee Benefits / Executive Compensation) Law Update

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Withdrawal of Investment Advice Regulations; Other Pending DOL Regulations

DOL Withdraws Investment Advice Regulations and Class Exemption. The Department of Labor in today's Federal Register, [74 F.R. 60156](#) (Nov. 20, 2009) [double-click for hyper-link], has withdrawn the investment advice regulations and class exemption that it published in January of this year.

The Pension Protection Act of 2006 ("PPA") added to ERISA a prohibited transaction exemption for the provision of investment advice by a fiduciary advisor to participants through an eligible investment advice arrangement, as discussed below. In January the Department of Labor finalized regulations implementing the provisions of the statutory exemption for eligible investment advice arrangements for level-fee or computer model arrangements (as described below). [74 Fed. Reg. 3822](#) (Jan. 21, 2009), DOL Reg. § 2550.408g-1(b). The DOL also provided an administrative class exemption in DOL Reg. § 2550.408g-1(d), pursuant to which the fee-leveling or computer model requirements would be liberalized. The effective date was to have been March 23, 2009. The effective date of these regulations (both with respect to the statutory exemption and class exemption) was delayed by President Obama's regulatory moratorium – at [74 Fed. Reg. 4435](#) (Jan. 26, 2009) – for 60 days until May 22, 2009. See 74 Fed. Reg. 11847 (Mar. 20, 2009). The regulations were deferred by the DOL for 180 days to November 18, 2009 (74 Fed. Reg. 23951 (May 20, 2009), and again for another 180 days until May 17, 2010 (74 Fed. Reg. 59092 (Nov. 17, 2009)). Now the DOL has withdrawn these regulations entirely and will apparently issue new proposed regulations.

- ❖ The class exemption is apparently not going to be reinstated, but the regulatory guidance will be repropose.
- ❖ The withdrawal of the regulations is effective January 19, 2010, which is before the extended effective date of the regulations.

The DOL stated that concerns were raised with the original guidance that: (i) the class exemption permits financial interests that would cause a fiduciary adviser (e.g., financial service

firm) and individuals providing investment advice on behalf of a fiduciary adviser (e.g., an affiliated broker) to have conflicts of interest, and does not contain conditions that would adequately mitigate such conflicts; and (ii) the DOL's interpretation of the statutory exemption's fee-leveling requirement permitting the receipt of varying fees by an affiliate of a fiduciary adviser is incorrect, and a fiduciary adviser under such a fee-leveling arrangement has a conflict of interest if influenced by the financial interests of the fiduciary adviser's affiliates.

- ❖ Note that the statutory exemption for investment advice provided by the PPA is still in effect (for advice after 2006), and a good faith compliance should suffice until regulations are refinalized.
- ❖ The withdrawal of the regulations and exemption does not negate the statutory exemption in ERISA § 408 provided for by the PPA for eligible investment advice arrangements, which has been in effect since 2007, as detailed in the following paragraph.

Under ERISA § 408, as amended by the PPA, a prohibited transaction statutory exemption is added for the provision of investment advice by a “fiduciary advisor” to participants of participant-directed plans through an “eligible investment advice arrangement.” [ERISA §§ 408\(b\)\(14\) & 408\(g\)](#). A “fiduciary advisor” is a registered investment advisor, bank, insurance company, registered broker dealer or an affiliate or employee of any of the above. ERISA § 408(g)(11). “Eligible investment advice arrangements” must either (i) provide that fees received do not vary on the basis of the investments chosen (level fee arrangement), or (ii) use a computer model that provides generally accepted investment theories, uses relevant information about participants, uses prescribed objective criteria, does not favor investment options of the advisor and takes into account all of the investment options of the plan. ERISA § 408(g)(2) & (3). The computer model must be certified by an eligible investment expert. ERISA § 408(g)(3)(C). A plan fiduciary must expressly authorize the investment advice program. ERISA § 408(g)(4). An annual audit of the arrangement must be made. ERISA § 408(g)(5). Disclosure by the fiduciary advisor to participants prior to the initial investment advice must be made of the following: the role of any party that has a material affiliation, past performance of the investment options, fees that the advisor receives, any material affiliation the fiduciary or affiliate has in the funds, and certain other matters. ERISA § 408(g)(6).

- ❖ Note that there was guidance in [DOL Field Assistance Bulletin 2007-01](#) (Feb. 2, 2007), that should be able to be relied upon even after withdrawal of the regulations.

Proposed Regulations for Fee Disclosure of Investment Alternatives Not Yet Finalized.

Last year, the Department of Labor issued proposed regulations requiring fiduciaries of individual account plans to provide specific disclosures to participants concerning plan investment options including fees, including: (i) general information about the plan, (ii) information about administrative expenses charged to the plan and to individual participant accounts, (iii) investment-related information (category of investment alternatives, average annual return on the

investments), and (vi) a model comparative chart of investment options. Prop. DOL Reg. § 2550.404a-5. The proposed regulations would also integrate new disclosure requirements for qualified default investment alternatives (QDIAs) with the existing requirements of § 404(c). Prop. DOL Reg. § 2550.404a-5 & Proposed Amendment to DOL Reg. § 2550.404c-1. [73 Fed. Reg. 43014](#) (July 23, 2008). Proposed regulations were put on hold in connection with President Obama's 60 day regulatory moratorium for proposed regulations and regulations not yet effective. 74 Fed. Reg. 4435 (Jan. 26, 2009).

- ❖ These proposed regulations have not been finalized.

Proposed Service Provider Disclosure Regulations Not Yet Finalized. Proposed Amendments to DOL Reg. § 2550.408b-2(c) from December of 2007 would require enhanced disclosure by service providers. [72 Fed. Reg. 70988](#) (Dec 13, 2007). Upon adoption, the regulations would require that contracts and arrangements between plans and certain service providers include provisions that will ensure the disclosure of information to assist plan fiduciaries in assessing the reasonableness of the compensation or fees paid for services that are rendered to the plan and the potential for conflicts of interest that may affect a service provider's performance of services. The proposed regulations were put on hold under President Obama's regulatory moratorium

- ❖ The proposed regulations have not been finalized.
- ❖ See also related proposed administrative class exemption - [72 Fed. Reg. 70893](#) (Dec. 13, 2007) (would relieve a plan fiduciary from a prohibited furnishing of services to a plan, if the fiduciary who enters into or renews a written contract for services when the resulting contract fails to comply with its contractual obligation to disclose certain information).
- ❖ Revised annual Form 5500 Schedule C disclosure provides for expanded requirements for service providers' reporting of direct and indirect compensation, and require fiduciaries to review and approve expenses effective for plan years beginning in 2009. Proposed Amendments to DOL Reg. §§ 2520.103-1 & 2520.104-46. [72 Fed. Reg. 64710](#) (Nov.16, 2007).

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