

Department of Labor Finalizes Investment Advice Regulations

The Department of Labor has released long-awaited final regulations that will generally allow a range of investment advice to be provided to participants in 401(k) and similar individual account retirement plans. In particular, the new regulations implement rules added by the Pension Protection Act of 2006 that permit “fiduciary advisers” to receive compensation from investment providers for giving investment advice to ERISA plan participants who manage their own accounts. The regulations will take effect December 27, 2011.

The regulations relate to two types of “eligible investment advice arrangement” under which a fiduciary adviser may receive fees from recommended investments, including those offered by an affiliate: fee-leveling arrangements, under which the fiduciary adviser and its employees cannot receive, directly or indirectly, any compensation that varies based on the selection of investment options, and arrangements involving computer models, which must use appropriate objective criteria to provide recommended portfolios and must be independently certified as being unbiased. Both types of arrangement must (i) apply generally accepted investment theories that take into account the historic risks and returns of different asset classes over defined periods of time; (ii) take into account fees and expenses paid by the recommended investments; and (iii) request specific information from the participant such as age, risk tolerance, and current investments, and use the information that is furnished.

The regulations establish a variety of specific safeguards against conflicts of interest, including:

- Arrangements are subject to an annual audit by an independent auditor, which must send a copy of any report that identifies any noncompliance to the Department of Labor within 30 days.
- Fiduciary advisers must send a notice to participants and beneficiaries with detailed disclosures, 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.
- Fiduciary advisers must also send a written notice to the appointing fiduciary stating that they intend to comply with various specific requirements.

The Department of Labor sees the new regulations as an important step toward ensuring retirement security for the millions of Americans who are responsible for directing the investment of their 401(k) accounts and IRAs. The regulations are the culmination of an extended regulatory process that saw final regulations issued in the last days of the Bush administration, then suspended on the first day of the Obama administration and ultimately withdrawn, with revised regulations being re-proposed in 2010.

The final regulations are generally similar to the regulations proposed in 2010, but contain a few new rules. Among the substantive changes are:

- Removal of an exception that would have allowed computer models to disregard a participant’s investments in employer securities and target date funds.
- Addition of a rule permitting computer models to take into account a participant’s request to exclude from consideration certain investment options.

- Addition of a rule precluding certification of a computer model by a person who developed the model.
- Specification of requirements intended to ensure the auditor's independence and standards for the auditor's report.

Details about the new regulations are available in a [fact sheet](#) issued by the Department of Labor. For further information, please contact any member of Ropes & Gray's [Benefits Practice Group](#).