

Publications

DOL Releases New Proposed Investment Advice Regulation

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SERVICES

The Department of Labor (“DOL”) has released a new proposed investment advice regulation that we expect will be published in the Federal Register on March 2, 2010 (the “Proposed Regulation”). Comments on the Proposed Regulation are due no later than May 5, 2010. The Proposed Regulation implements the statutory exemption for the provision of investment advice to participants in participant-directed individual account plans that was enacted as part of the Pension Protection Act of 2006 (the “PPA”). Under the statutory exemption, the investment advice must be provided by a “fiduciary adviser” under an “eligible investment advice arrangement,” which may be structured in one of two ways: (1) a “level fees” approach, where the fiduciary adviser’s fees do not vary depending on the investment option selected, or (2) pursuant to a “computer model” that is periodically certified by an “eligible investment expert.”

The Proposed Regulation was issued in place of a prior set of regulations (published in the Federal Register on January 21, 2009, but never effective) which also included a class exemption. According to the DOL, the Proposed Regulation is intended to address public comments which “question the adequacy of the final class exemption’s conditions to mitigate the potential for investment adviser self-dealing.” Needless to say, the political reality is that this re-proposal became inevitable with the change in administrations last year. Moreover, it will be interesting to see whether Reps. Miller and Andrews of the House Committee on Education and Labor decide to pursue a legislative solution notwithstanding DOL’s proposal. Thus far, there has been no indication on whether they intend to move forward with H.R. 2989 other than a brief statement in which they called DOL’s proposal “welcome news.”

The attached memo summarizes the provisions of the Proposed Regulation representing key changes from the prior regulation.

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