

Fiduciary Advisers

"Fiduciary Advisers" may provide investment advice to participants in an "eligible investment advice arrangement", and plan sponsors may reduce their fiduciary liability if certain monitoring and disclosure rules are followed (effective 2007). The Pension Protection Act of 2006 (PPA-06) creates a statutory prohibited transaction exemption for "fiduciary advisers" who deliver investment advice as part of an "eligible investment advice arrangement." The Department of Labor has also proposed a class exemption for the provision of investment advice.

Meeting the requirements of the prohibited transaction and class exemptions reduces the overall plan liability for a plan sponsor because the plan sponsor is not responsible for the specific investment advice given by the fiduciary adviser. The plan sponsor is still responsible for the prudent selection and monitoring of the available investments under the plan and the fiduciary adviser. The next section outlines the fiduciary adviser and eligible investment advice arrangement requirements.

Who May Be A Fiduciary Adviser?

Under PPA-06, and subsequent Department of Labor guidance, a fiduciary adviser is defined as a person who is a fiduciary of the plan by reason of the provision of investment advice to participants or beneficiaries, and who is also

- registered as an investment adviser under the Investment Advisers Act of 1940 or under State laws;
- a bank, a similar financial institution supervised by the United States or a State, or a savings association (as defined under the Federal Deposit Insurance Act), but only if the advice is provided through a trust department that is subject to periodic examination and review by Federal or State banking authorities;
- an insurance company qualified to do business under State law;
- registered as a broker or dealer under the Securities Exchange Act of 1934;
- an affiliate of any of the preceding; or
- an employee, agent or registered representative of any of the preceding who satisfies the requirements of applicable insurance, banking and securities laws relating to the provision of advice.

Eligible Investment Advice Arrangement

In order to meet the prohibited transaction exemption, the fiduciary adviser must meet several requirements. The exemption is available only if the investment advice offering of the fiduciary adviser is part of an eligible investment advice arrangement.

To be an eligible investment advice arrangement the program must either

- a level-fee arrangement;
- a computer model arrangement; or
- an off-model arrangement.

Level Fee Requirements

Any fees or other compensation that a fiduciary adviser receives may not vary on the basis of any investment option selected by a participant. An affiliate of the fiduciary adviser is not subject to the level fee requirement unless the affiliate is also a provider of investment advice.

Computer Model Requirements

An eligible investment expert must certify, before the computer model is used, that the model meets certain requirements. If a computer model is used to provide investment advice, the model must

1. apply generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time;
2. use relevant information about the participant or beneficiary;
3. use appropriate objective criteria to provide asset allocation portfolios comprised of investment options under the plan;
4. operate in a manner that is not biased in favor of any investment options offered by the fiduciary adviser or related person or inappropriately favor investment options that may generate greater income for the fiduciary adviser; and
5. take into account all designated investment options under the plan (except brokerage windows and qualifying employer securities) in specifying how a participant's or beneficiary's account should be invested without inappropriate weighting of any investment option.

In addition, if a computer model is used, the only investment advice that may be provided under the arrangement is the advice generated by the computer model, and any investment transaction pursuant the advice must occur solely at the direction of the participant or beneficiary. This requirement does not preclude the participant or beneficiary from requesting additional investment advice, but the request cannot come as a result of any solicitation from anyone connected with carrying out the investment advice arrangement.

Other Requirements

Additionally, the investment advice program must meet several other requirements to qualify for the prohibited transaction exemption.

1. The eligible investment advice arrangement must be authorized by a plan fiduciary who is not the fiduciary adviser.

2. Every year the investment advice program must be audited by a qualified independent auditor to verify that it meets the requirements. The auditor is required to issue a written report to the plan fiduciary that authorized the arrangement.

3. Before the initial investment advice is given, the fiduciary adviser must give written notification to plan participants or beneficiaries, which includes information regarding

- the role of any related party in the development of the investment advice program or the selection of investment options under the plan;
- past performance and rates of return for each investment option offered under the plan;
- any fees or other compensation to be received by the fiduciary adviser or affiliate;
- any material affiliation or contractual relationship of the fiduciary adviser or affiliates in the security or other property involved in the investment transaction;
- the manner and under what circumstances any participant or beneficiary information will be used or disclosed;
- the types of services provided by the fiduciary adviser regarding the provision of investment advice;
- the adviser's status as a fiduciary of the plan in connection with the provision of the advice; and
- the ability of the recipient of the advice to separately arrange for advice by another adviser that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property. The notification must be written in a way that can to be understood by the average plan participant, and is sufficiently accurate and comprehensive to inform the participants and beneficiaries of the required information.

The DOL has developed a model form for the required disclosures of fees and other compensation. Additionally, the fiduciary adviser must maintain all of the information required to be disclosed in the notification, deliver the notice to participants at least annually, provide a revised notice to participants timely when any material change occurs, and upon request at no charge.

4. The fiduciary adviser must provide disclosures as required by all applicable securities laws.

5. The plan participant must provide the sole direction to effect the transaction.

6. The compensation received by the fiduciary adviser must be reasonable.

7. Any transaction must be at least as favorable to the plan as an arm's length transaction would be.

8. Finally, the fiduciary adviser must maintain records necessary to prove compliance with the requirements of the fiduciary adviser's eligible investment advice arrangement for six years after the provision of advice to plan participants and beneficiaries.

Class Exemption Off-Model Requirements

The DOL has proposed a class exemption that would allow for individualized investment advice after a fiduciary adviser provides the participant or IRA owner with computer-model generated recommendations or, in the case of IRAs, the furnishing of certain investment educational material. The level fee requirements would only apply to the employee, agent or registered representative providing the advice on behalf of the fiduciary adviser.

Fiduciary Adviser Regulations

In August 2008, the DOL issued proposed regulations and a proposed class exemption addressing fiduciary advisers, and advice for plan participants and IRA owners. The regulations are proposed to be effective 60 days after being published in final form, and the class exemption is proposed to be effective 90 days after being published in final form.

On January 21, 2009, the DOL published final advice regulations under ERISA Section 408(g). The regulations were scheduled to go into effect on March 23, 2009, but on February 3, 2009, the DOL released a notice that extended the effective date to May 22, 2009.

Link to published regulations

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21997>