

## DOL Issues Field Assistance Bulletin 2007-01

On February 2, 2007, the U.S. Department of Labor ("DOL") issued guidance relating to the new statutory exemption, added by the Pension Protection Act of 2006 ("PPA"), covering the provision of investment advice to retirement plan participants and beneficiaries.<sup>1</sup> This new statutory exemption applies to investment advice provided by a "fiduciary adviser" through an "eligible investment advice arrangement" to plan participants and beneficiaries (but not plan sponsors or other plan fiduciaries).

In response to numerous inquiries regarding the status of prior guidance issued by the DOL and the scope of the statutory exemption, the DOL issued Field Assistance Bulletin ("FAB") 2007-01.<sup>2</sup> This update provides a summary of FAB 2007-01.

### Impact on Prior Guidance from DOL Concerning Investment Advice

FAB 2007-01 states that except for (i) providing that persons who develop or market certain computer models or who market investment advice programs using such models are fiduciaries, and (ii) requiring advisers to expressly acknowledge their fiduciary status, the new statutory exemption does not alter ERISA's framework for determining fiduciary status or recast otherwise permissible forms of investment advice as prohibited for purposes of Section 406 of ERISA.

As a result, the new statutory exemption does not affect prior guidance of the DOL concerning investment advice and such prior guidance continues to be applicable. In particular, the DOL clarifies that Interpretive Bulletin 96-1 (relating to participant investment education) and Advisory Opinion Nos. 97-15A, 2001-09A, and 2005-10A continue to represent the views of the DOL.<sup>3</sup> Thus, the DOL states it is its view that a plan sponsor or other fiduciary will not fail to meet its ERISA fiduciary responsibilities solely by reason of offering a program of investment advice services that is not an "eligible investment advice arrangement."

### Standards for Selecting and Monitoring a Fiduciary Adviser

The FAB provides that, generally, the same fiduciary duties and responsibilities apply to the selection and monitoring of an investment adviser for participants and beneficiaries in a participant-directed individual account plan, whether or not the program is an "eligible investment advice arrangement" under the new statutory exemption.

The DOL states that it is the DOL's view that plan fiduciaries that prudently select and monitor an investment adviser will not be liable for the advice provided by the adviser whether or not the advice is provided pursuant to the new statutory exemption. Accordingly, plan fiduciaries have a duty to prudently select and

<sup>1</sup> Section 601 of the Pension Protection Act of 2006 added section 408(b)(14) to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and added Section 4975(d)(17) to the Internal Revenue Code of 1986, as amended (the "Code").

<sup>2</sup> Available at [www.dol.gov/ebsa](http://www.dol.gov/ebsa).

<sup>3</sup> These Advisory Opinions dealt with investment advisory programs utilizing fee offsets and waivers to achieve fee leveling (in the case of Advisory Opinion ("AO") 97-15A and AO 2005-10A) and asset allocation models developed and maintained by an entity that is independent of the adviser (in the case of AO 2001-9A).

periodically monitor the arrangement (although they do not have a duty to monitor the specific investment advice given) and the investment adviser itself.

The monitoring process must avoid self dealing, conflicts of interest, or other improper influence. As part of this monitoring plan, fiduciaries should:

- Engage in an objective process that is designed to elicit information necessary to assess the provider’s qualifications, quality of services offered, and reasonableness of fees charged
- Take into account the experience and qualifications of the adviser, including the adviser’s registration under applicable federal and/or state securities law, the adviser’s willingness to assume fiduciary status and responsibility, and the extent to which the advice will be based upon generally accepted investment theories
- Periodically review the extent to which there have been any changes in the information that served as the basis for the initial selection of the investment adviser, including whether the adviser continues to meet applicable federal and state securities law requirements, and whether the advice being furnished to participants and beneficiaries is based upon generally accepted investment theories
- Consider whether the investment advice provider is complying with the contractual provisions of the engagement, the utilization of the investment advice services by the participants in relation to the cost of the services to the plan, and participant comments and complaints about the quality of the furnished advice

Finally, the exemption clarifies that plan assets can be used to pay reasonable expenses in providing investment advice to participants and beneficiaries, including investment advice services that are not “eligible investment advice arrangements,” and with respect to which exemptive relief is not required.

### Level Fee Requirement

One way under the statutory exemption to qualify as an “eligible investment advice arrangement” is for

the arrangement to provide that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets, do not vary depending on the basis of any investment option selected.

In the FAB, the DOL explains that under the new statutory exemption, this requirement does not extend to affiliates of the fiduciary adviser—an affiliate will be subject to the varying fee limitation only if that affiliate is providing investment advice to plan participants and beneficiaries. The DOL notes that Congress did not intend for the requirement that fees not vary depending on the basis of any investment options selected to extend to affiliates of the fiduciary adviser, unless the affiliate is also a provider of investment advice to a plan.

The DOL emphasizes that if the fees and compensation received by the affiliates of a fiduciary that provides investment advice do not vary or are offset against those received by the fiduciary for the provision of investment advice, no prohibited transaction under ERISA would result and therefore there would be no need for a prohibited transaction exemption.

The FAB further provides that when an individual acts as an employee, agent, or registered representative on behalf of an entity engaged to provide investment advice to a plan, that individual, as well as the entity, must be treated as the fiduciary adviser for purposes of the exemption and that individual would likewise be subject to the “level fee” requirement.

Finally, entities that offer investment advisory services should maintain, and be able to demonstrate compliance with, policies and procedures designed to ensure that fees and compensation paid to fiduciary advisers, at both the entity and individual level, do not vary on the basis of any investment option selected. It is anticipated that compliance with such policies and procedures will be reviewed as part of the required annual audit and reporting requirements of the statutory exemption.

■ ■ ■

This update was authored by Susan M. Camillo (+1 617 728 7125; susan.camillo@dechert.com), Anthony H. Zacharski (+1 860 524 3937; anthony.zacharski@dechert.com), Kathleen Ziga (+1 215 994 2674; kathleen.ziga@dechert.com), and Alan Rosenblat (+1 202 261 3332; alan.rosenblat@dechert.com).

## Additional practice group contacts

For more information, please contact the authors, one of the attorneys listed, or any Dechert attorney with whom you are in regular contact. Visit us at [www.dechert.com/employeebenefits](http://www.dechert.com/employeebenefits) or [www.dechert.com/financialservices](http://www.dechert.com/financialservices).

**Margaret A. Bancroft**  
New York  
+1 212 698 3590  
margaret.bancroft@dechert.com

**Steven Drachman**  
New York  
+1 212 698 5627  
steven.drachman@dechert.com

**John V. O'Hanlon**  
Boston  
+1 617 728 7111  
john.ohanlon@dechert.com

**Allison R. Beakley**  
Boston  
+1 617 728 7124  
allison.beakley@dechert.com

**Jennifer O. Epstein**  
London  
+44 20 7184 7403  
jennifer.epstein@dechert.com

**Fran Pollack-Matz**  
Washington, D.C.  
+1 202 261 3442  
fran.pollack-matz@dechert.com

**Sander M. Bieber**  
Washington, D.C.  
+1 202 261 3308  
sander.bieber@dechert.com

**Ruth S. Epstein**  
Washington, D.C.  
+1 202 261 3322  
ruth.epstein@dechert.com

**Jeffrey S. Poretz**  
Washington, D.C.  
+1 202 261 3358  
jeffrey.poretz@dechert.com

**Stephen H. Bier**  
New York  
+1 212 698 3889  
stephen.bier@dechert.com

**Susan C. Ervin**  
Washington, D.C.  
+1 202 261 3325  
susan.ervin@dechert.com

**Jon S. Rand**  
New York  
+1 212 698 3634  
jon.rand@dechert.com

**Susan M. Camillo**  
Boston  
+1 617 728 7125  
susan.camillo@dechert.com

**Joseph R. Fleming**  
Boston  
+1 617 728 7161  
joseph.fleming@dechert.com

**Robert A. Robertson**  
Newport Beach  
+1 949 442 6037  
robert.robertson@dechert.com

**Christopher Christian**  
Washington, D.C.  
+1 202 261 3321  
christopher.christian@dechert.com

**Jane A. Kanter**  
Washington, D.C.  
+1 202 261 3302  
jane.kanter@dechert.com

**Keith T. Robinson**  
Washington, D.C.  
+1 202 261 3386  
keith.robinson@dechert.com

**Timothy M. Clark**  
New York  
+1 212 698 3652  
timothy.clark@dechert.com

**Stuart J. Kaswell**  
Washington, D.C.  
+1 202 261 3314  
stuart.kaswell@dechert.com

**Alan Rosenblat**  
Washington, D.C.  
+1 202 261 3332  
alan.rosenblat@dechert.com

**Elliott R. Curzon**  
Washington, D.C.  
+1 202 261 3341  
elliott.curzon@dechert.com

**George J. Mazin**  
New York  
+1 212 698 3570  
george.mazin@dechert.com

**Frederick H. Sherley**  
Charlotte  
+1 704 339 3100  
frederick.sherley@dechert.com

**Douglas P. Dick**  
Newport Beach  
+1 949 442 6060  
douglas.dick@dechert.com

**Jack W. Murphy**  
Washington, D.C.  
+1 202 261 3303  
jack.murphy@dechert.com

**Patrick W. D. Turley**  
Washington, D.C.  
+1 202 261 3364  
patrick.turley@dechert.com

**Brian S. Vargo**  
Philadelphia  
+1 215 994 2880  
brian.vargo@dechert.com

**Jane A. Kanter**  
Washington, D.C.  
+1 202 261 3302  
jane.kanter@dechert.com

**Kathleen Ziga**  
Philadelphia  
+1 215 994 2674  
kathleen.ziga@dechert.com

**David A. Vaughan**  
Washington, D.C.  
+1 202 261 3355  
david.vaughan@dechert.com

**Anthony H. Zacharski**  
Hartford  
+1 860 524 3937  
anthony.zacharski@dechert.com

---

Dechert  
LLP

[www.dechert.com](http://www.dechert.com)

**U.S.**

Austin  
Boston  
Charlotte  
Harrisburg  
Hartford  
New York

Newport Beach  
Palo Alto  
Philadelphia  
Princeton  
San Francisco  
Washington, D.C.

**U.K./Europe**

Brussels  
London  
Luxembourg  
Munich  
Paris

---

© 2007 Dechert LLP. All rights reserved. Materials have been abridged from laws, court decisions, and administrative rulings and should not be considered as legal opinions on specific facts or as a substitute for legal counsel.