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*The Department of Labor's Employee Benefits Security Administration (DOL/EBSA) announced new guidance as featured below. You can subscribe to [DOL/EBSA's website homepage](#) for updates.*

### Proposed Definition of “Fiduciary” of Employee Benefit Plans

On September 19, DOL/EBSA announced that it will re-propose its rule on the definition of a fiduciary. The decision to re-propose is in part a response to requests from the public, including members of Congress, that the agency allow an opportunity for more input on the rule.

The decision to re-propose means that this initiative will benefit from additional input, review and consideration. The agency agrees with stakeholders and lawmakers that more public input and greater research will strengthen the rule. This extended input will supplement more than 260 written public comments already received, as well as two days of open hearings and more than three dozen individual meetings with interested parties held by the agency.

Consistent with the president's executive order, the extended rulemaking process also will ensure that the public receives a full opportunity to review the agency's updated economic analysis and revisions of the rule. DOL/EBSA will continue to coordinate closely with the Securities and Exchange Commission and the Commodities Futures Trading Commission to ensure that this effort is harmonized with other ongoing rulemakings.

Specifically, the agency anticipates revising provisions of the rule including, but not restricted to, clarifying that fiduciary advice is limited to individualized advice directed to specific parties, responding to concerns about the application of the regulation to routine appraisals and clarifying the limits of the rule's application to arm's length commercial transactions, such as swap transactions.

Also anticipated are exemptions addressing concerns about the impact of the new regulation on the current fee practices of brokers and advisers, and clarifying the continued applicability of exemptions that have long been in existence that allow brokers to receive commissions in connection with mutual funds, stocks and insurance products. The agency will carefully craft new or amended exemptions that can best preserve beneficial fee practices, while at the same time protecting plan participants and individual retirement account owners from abusive practices and conflicted advice.

The agency is seeking to amend a 1975 regulation, which defines when a person providing investment advice becomes a fiduciary under the Employee Retirement Income Security Act, in order to adapt the rule to the current retirement marketplace. The proposal's goal is to ensure that potential conflicts of interest among advisers are not allowed to compromise the quality of investment advice that millions of America's workers rely on, so they can retire with the dignity that they have worked hard to achieve. When finalized, this important initiative will safeguard workers who are saving for retirement as well as the businesses that provide retirement plans to America's working men and women.

The new proposed rule is expected to be issued in early 2012. For more information on the proposed rule, visit DOL/EBSA's website at <http://www.dol.gov/ebsa/regs/cmt-1210-AB32.html>.

### Investment Advice

On October 25, DOL/EBSA published a [final regulation](#) implementing a prohibited transaction exemption under an amendment to ERISA and the Internal Revenue Code as part of the Pension Protection Act of 2006.

The prohibited transaction rules in ERISA and the IRC generally prevent a fiduciary investment adviser from recommending plan investment options if the adviser receives additional fees from the investment providers. Although these rules protect participants from conflicts of interest, ERISA provides exemptions from the rules in appropriate circumstances and permits DOL/EBSA to grant exemptions that have participant-protective conditions. The new regulation implements an exemption enacted as part of the PPA to improve participant

access to fiduciary investment advice, which contains safeguards and conditions to prevent investment advisers from providing biased advice that is not in the participant's best interest.

To qualify for the exemption, investment advice must be given through the use of a computer model that is certified as unbiased by an independent expert or through an adviser compensated on a "level-fee" basis, meaning that the fees do not vary based on investments selected. Both types of arrangements must also satisfy several other conditions, including the disclosure of the adviser's fees and an annual audit of the arrangement for compliance with the regulation.

## **DOL, SEC Coordinate on 401(k) Plan Fee Disclosure Rule**

On October 27, DOL/EBSA and the Securities and Exchange Commission released a [SEC no-action letter](#) relating to DOL/EBSA's participant-level fee disclosure regulation and Rule 482 under the Securities Act of 1933. The letter states that the information required by and that complies with the fee disclosure regulation that is provided by a plan administrator, or designee, to plan participants or beneficiaries will be treated as a communication that satisfies the requirement under Rule 482. The letter's intent is to resolve concerns about potential differences between DOL/EBSA's participant disclosure requirements and the SEC rules on advertising that may apply to plan investment options.

## **Electronic Disclosure by Employee Benefit Plans**

On September 13, DOL/EBSA issued [Technical Release 2011-03](#) which provides an interim policy regarding the use of electronic media to satisfy the disclosure requirements under DOL/EBSA's [final participant-level fee disclosure regulation](#).

The participant fee disclosure regulation requires employers to disclose more information about plan and investment costs to workers who direct their own investments in ERISA-covered 401(k) and other individual account retirement plans. Under the final rule, plans generally have until at least May 31, 2012 to start giving better information on 401(k) and similar plan fees and expenses.

The technical release allows plan administrators to furnish information required under the participant disclosure rule electronically. This includes the use of continuous access websites, if certain conditions and safeguards are met. The interim policy states that DOL/EBSA will not take enforcement action based solely on a plan administrator's use of electronic technologies to make the required disclosures under the participant fee disclosure regulation if the administrator complies with the conditions in the technical release.

The relief in the technical release is limited to the disclosures required under the final participant fee disclosure regulation.

## **Questions and Answers on Multiemployer Plan Leasing Arrangements**

On October 13, DOL/EBSA issued [questions and answers](#) to help trustees of multiemployer benefit plans understand how to avoid prohibited transactions in common leasing arrangements. The questions and answers describe arrangements in which a multiemployer plan leases office space or classroom space to or from a sponsoring union or other party who has a relationship to the plan and the prohibited transaction rules that are violated by those arrangements. Also addressed are the administrative and statutory exemptions that may apply with an analysis of the specific prohibited transaction provisions that are covered by each exemption. The questions and answers also describe the consequences to a plan fiduciary if the leasing arrangement is prohibited but does not qualify for an exemption.

## **Prohibited Transaction Exemption Procedures**

On October 27, DOL/EBSA published a [final rule](#) updating the procedures for filing and processing applications for prohibited transaction exemptions under ERISA. The final rule consolidates the existing policies and guidance on the exemption process into a single source, and clarifies the types of information and documentation required to submit a complete filing. It also expands the method for transmitting filings to

include electronic submissions, and makes exemptions more understandable for participants and other interested parties. The final rule is effective December 27, 2011, and applies to all exemptions filed on or after that date.

### **Form 5500 Version Selection Tool**

To assist filers, DOL/EBSA has posted the [Form 5500 Version Selection Tool](#) on its website. With the change to an all electronic filing system and changes to the Form 5500 as well, filers may have questions about what to file for plan years prior to the current year or how to amend prior year filings. The Form 5500 Version Selection Tool will help to determine which version of the Form 5500 and which schedules to use. For informational copies of the Forms, visit [www.dol.gov/ebsa/5500main.html](http://www.dol.gov/ebsa/5500main.html). To file, go to [www.efast.dol.gov](http://www.efast.dol.gov). For more information on filing electronically, visit the [EFAST2 FAQs](#).

This tool will not provide detailed instructions specific to a plan's filing requirements. Filers need to review the instructions to the Form 5500/5500-SF for instructions that are applicable to their plan.

Under no circumstances should a filer ever submit the Schedule SSA or any form containing information concerning separated or deferred vested participants electronically to DOL/EBSA. All such information must be filed separately with the IRS. Visit . [www.irs.gov](http://www.irs.gov) for further information.

If you are intending to file a delinquent Form 5500/5500-SF annual return report under the Delinquent Filer Voluntary Compliance Program (DFVCP), filers can use the online [DFVCP Penalty Calculator](#) to be certain they have calculated the amount due correctly. There is also the option to pay the DFVCP penalty electronically. Simply select the "Continue to DFVCP Penalty Calculator and Online Payment" box in this tool to get started.