



## One Minute Memo®

# Participant Advice Regulations

In February 2009, we advised you that the U.S. Department of Labor (DOL) had released final regulations allowing employers to provide investment advice to 401(k) and other individual account plan participants without violating the fiduciary rules of ERISA, but that (i) the effective date of these regulations were extended for at least 60 days, and (ii) the regulations were to be reopened for comments, in accordance with an order of the President. (See Alert [DOL Delays Final Participant Investment Regulations](#).) In addition, we advised you that several members of Congress were not happy with the regulations. Opponents of the regulations believed that they would cause individuals providing investment advice to have conflicts of interest, and also believed that the regulations did not contain conditions to mitigate such conflicts.

On February 26, 2010, the DOL issued repropoed participant advice regulations which would supersede the 2009 guidance. The newly-proposed regulations are still not in final form and are again open for comments. The newly proposed regulations are substantially identical to the regulations released as final in January, 2009, but with a few major changes.

The newly-proposed regulations, like the January 2009 regulations, require advice to be provided by a "fiduciary adviser" under an "eligible investment advice arrangement," which either uses fee leveling or a computer model. Since many comments were received with respect to the fee modeling provisions, the newly-proposed regulations emphasize that if the fiduciary adviser receives any payment from any party, including an employer or an affiliate of the fiduciary adviser, that is based in whole or part on the investments selected by the participant, such a payment would be inconsistent with the fee leveling requirement.

The biggest change from the January 2009 regulations, however, is that the newly-proposed regulations drop the class exemption issued by the DOL as part of the January 2009 regulations. This was done because the DOL, based on issues raised in comments, determined that there were sufficient doubts regarding whether the conditions imposed by the class exemption were adequate to protect against conflicts of interest. As a result of the withdrawal of the class exemption, there currently may be no relief for individualized advice provided after the use of computer modeling or for advice given to IRA owners when a model is not available.

The effective date of the newly proposed regulations will be 60 days after publication of the final regulations in the Federal Register. Comments may be made on the proposed rule until May 5, 2010, by email to [e-ORI@dol.gov](mailto:e-ORI@dol.gov) (entering 2010 Investment Advice Proposed Rule in the subject line), by using the federal eRulemaking portal at <http://www.regulations.gov>, or in writing to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: 2010 Investment Advice Proposed Rule, Room N-5644, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

*If you have any questions about the Participant Investment Advice regulations, or any other employee benefit plan investment matter, please contact the Seyfarth attorney with whom you work, or any other [Employee Benefits attorney](#) on our website.*

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