



## E&W COMPLIANCE UPDATE: February 13, 2007

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On February 2, 2007, the Department of Labor (“DOL”) released Field Assistance Bulletin No. 2007-01 (the “Bulletin”) setting forth additional guidance regarding statutory exemptions for investment advice offered to 401(k) participants pursuant to the Pension Protection Act of 2006 (the “PPA”). This E&W Compliance Update summarizes the Bulletin as it relates to registered investment advisers (“RIAs”) and broker-dealers seeking to offer these services.

The Bulletin makes clear that RIAs and broker-dealers must be PPA compliant if their advisers/ reps become PPA fiduciary advisers. Consequently, firms are subject to the level compensation, prudent selection, and periodic monitoring requirements contained within

the PPA. The Bulletin expands upon these provisions in the following respects:

### LEVEL COMPENSATION

The investment advice exemption created by the PPA requires that proffered advice be made pursuant to an eligible investment advice arrangement (“EIAA”), which, among other things, requires that any fees (including commissions or other compensation) received by the fiduciary adviser do not vary based upon the investment option selected. The Bulletin clarifies “level compensation” as it relates to affiliates of fiduciary adviser firms by explaining that such affiliates are subject to this requirement only if they are providing investment advice to plan participants and beneficiaries. Nevertheless, because firms must ultimately accept fiduciary liability for participant accounts, affiliated RIAs and broker-dealers seeking to enter this market should consider establishing a separate RIA to ensure compliance with the level compensation requirements as well as the fiduciary standards imposed upon PPA advisers.

### PRUDENT SELECTION

The Bulletin also significantly broadens the prudent selection requirements contained in the PPA. PPA advisers are to be subjected to an objective process, designed to elicit information necessary to assess the adviser’s qualifications, the quality of services offered as well as the reasonableness of fees charged for those services. The process must avoid self dealing, conflicts of interest or other improper influence. It must also take into account the experience and qualifications of the fiduciary adviser, their registration in accordance with applicable federal and/or state securities laws, their willingness to assume fiduciary status and responsibility for the advice under ERISA, and the extent to which the advice is based upon generally accepted investment theories.



#### PERIODIC MONITORING

The Bulletin also requires plan sponsors to review the extent to which there have been any changes in the information that served as the basis for the initial selection of the fiduciary 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 being based upon generally accepted investment theories. The Bulletin further requires plan sponsors to consider whether the fiduciary adviser is complying with the contractual provisions of the engagement and to examine utilization of the investment advice services by the participants in relation to the cost of the services to the plan. It directs plan sponsors to monitor and address participant feedback and complaints about the quality of the furnished advice.

The Bulletin expressly places the burden of establishing compliance with the foregoing provisions on the firm and anticipates that such compliance will be reviewed as part of the required annual audit. For additional information concerning the Bulletin, the PPA, or for assistance with developing procedures to ensure your firm's compliance with the requirements set forth therein, please contact [Jason Roberts](mailto:jroberts@edgertonweaver.com) by phone at (310) 937-2066 or email at [jroberts@edgertonweaver.com](mailto:jroberts@edgertonweaver.com).