

Impact Analysis

**How the 2010 Advice Regulation Proposal
Affects Adviser Business Activity and
Probability of Enactment of Regulation**

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DALBAR Due Diligence & Audit Services

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INTRODUCTION

The Vice President, Joe Biden announced new Department of Labor regulations that will govern investment advice to IRA and 401(k) participants. These regulations seek to neutralize the conflicts of interest that exist when advisers or their affiliated firms receive compensation from the sponsors of investments they recommend.

These new regulations follow the cancellation of similar regulations developed under the Bush administration that were three years in developing, following the Pension Protection Act of 2006.

Probability

The long history of these regulations raises the question of whether the 2010 proposals will in fact be finalized and enacted. The likelihood that they will actually materialize is somewhat higher than in the past, when the financial services industry's credibility was greater and the administration was more open to input.

Our estimate is that there is an 80% probability that some form of these regulations will be in force by the November 2010 elections. This estimate is based in part on the pronouncements of those in power in Washington. A sampling of these quotes follow.

Quotes

White House briefing document
on the proposed rule changes
February 25, 2010

"Some kinds of investments are more profitable for financial institutions than others, but those investments may not be the best ones for workers."

"As a result, if investment advisers get a commission or other compensation for steering workers into investment options with high fees and expenses, they face conflicts of interest that can undermine the reliability of their advice."

Joe Biden, Vice President
Announcing 2010 Initiatives of the White House Task Force on
the Middle Class
February 26, 2010

"A lot of folks are not getting the best advice."

"...[we] have identified a number of specific proposals."

"...as we move forward making the retirement system safer, the Labor Department has what sounds like dry regulations. These dry regulations [of investment advice] can make a whole lot of difference between whether or not someone has something to retire on that is consistent with the effort they put in and the investment they made."

"These initiatives are really an important first step on the promises we made a long time ago."

EBSA News Release 10-0251-NAT
February 26, 2010

"During the past year, the Middle Class Task Force has focused on solutions to the challenges facing America's middle class – including retirement security and the need for high-quality jobs for middle class workers. The report details the year's work of the task force, and it includes a proposed rule on investment advice. The department also is announcing the publication of a final rule on multiemployer plan transparency."

"The first of the two rules would ensure workers receive unbiased advice about how to invest in their individual retirement accounts or 401(k) plans. If the rule is adopted, it would put in place safeguards preventing investment advisors from slanting their advice for their own financial benefit. Investment advisors also would be required to disclose their fees, and computer models used to offer advice would have to be certified as objective and unbiased. The department estimates that 2 million workers and 13 million IRA holders would benefit from this rule to the tune of \$6 billion."

U.S. Deputy Secretary of Labor Seth Harris
EBSA News Release 10-0251-NAT
February 26, 2010

"These rules will strengthen America's private retirement system by ensuring workers get good, objective information. When that happens, workers make the kind of decisions that are good for their families and the nation as the whole."

Annual Report of the
White House Task Force
on the Middle Class
February 2010

"...the gradual shift from defined-benefit pensions to 401(k)s and other defined-contribution retirement plans, which has been taking place for decades, has left more workers than ever before to plan their retirements for themselves and to bear the risk of investing for retirement alone. Many of these workers, even those who save at recommended rates over long periods, have seen the returns on their retirement savings eaten away by high fees and expenses, leaving them with less than they had hoped for."

"This Administration recognizes that the current system does not provide sufficient retirement security for millions of Americans, which is why we are proposing a set of initiatives to help more workers save for retirement, to help those who already have retirement accounts start saving more, and to help workers with 401(k)s save with confidence."

"A majority of American workers with retirement plans rely on 401(k)-style defined-contribution plans, making it critical that the 401(k) system be safe, transparent, and well-regulated."

Impact Analysis -2010 Advice Regulation Proposal

"We need to do more to give families better choices to reach a secure retirement. To ensure that workers have good options to save for retirement, and to provide workers with all the information they need to make the best choices about their retirement savings, the Administration is improving the regulation of 401(k)s to make the system more reliable and transparent."

"These regulatory actions include... Encouraging plan sponsors to make unbiased investment advice available to workers, helping workers avoid common errors that undermine retirement security, while providing strong protections against conflicts of interest."

SCOPE OF REGULATION

These regulations affect all advisers affiliated with firms that receive any form of compensation from sponsors of investments that they may recommend to either IRA or 401(k) participants. Advisers who receive no such compensation and are not affiliated in any way with firms that do are not affected by these new regulations.

The regulations spell out two methods in which firms that do receive compensation from sponsors of investments can avoid the conflicts of interest prohibitions of the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Service Code ("Code"). The first method for affected advisers and firms to comply with these regulations is for advisers to operate in a level-fee affiliate, in which no compensation is derived from sponsors of investments. The compliant level-fee affiliate does not receive any compensation from sponsors of investments and neither does any representative, agent, employee or officer.

The second method of complying is the use of a certified computer model. The certification validates that the model is unbiased and meets the requirements of the regulation.

This Report

The purpose of this report is to identify the discrete proposals contained in the overall regulation and the various segments of the adviser community that is affected.

The report describes 16 discrete proposals that affect advisers in the IRA and/or 401(k) business as well as their associated firms. These discrete proposals are first presented in summary with more detailed descriptions later in the report.

A grid is used to show which of these discrete proposals affect what adviser activity. This grid is intended to permit the readers to locate the details of the discrete proposal that affect them.

The adviser grid is followed with the impact statement for broker/dealers, listing alternative strategies that are possible in the context of the regulations.

The details include a brief comment and the text from the proposed regulation. Where possible, references to the proposed regulations are also given.

SUMMARY OF DISCRETE PROPOSALS

- P1 Regulations apply to both IRAs and 401(k)
- P2 Follow-up to computer model advice requires a fiduciary adviser
- P3 Fiduciary adviser may not receive any compensation based on investments used by participants
- P4 Neither fiduciary adviser nor its employees may receive any form of compensation that favor certain investments
- P5 Disregard investment returns except for asset classes
- P6 Inquiry: Define what generally accepted investment theories are
- P7 Inquiry: Define what participant criteria should be considered in making asset allocations
- P8 Participant advice is purely optional for plan sponsors with no consequences or incentives to provide it
- P9 All existing regulations, exemptions, interpretive or other guidance remains in effect
- P10 Participant advice may be delivered through a level fee adviser or a computer model
- P11 Computer models must be certified by independent experts
- P12 All fiduciary advisers must be audited annually
- P13 All fiduciary advisers must disclose status as fiduciary, compensation and conflicts of interest
- P14 All participant transactions must be directed by the participant
- P15 Rollover activity can be handled by disclosure to participants
- P16 Computer model providers are treated as fiduciary advisers and subject to annual audits

ADVISER IMPACT ANALYSIS GRID

Impact of each proposal on adviser business activity	Proposals															
	P1	P2	P3	P4	P5	P6	P7	P8	P9	P10	P11	P12	P13	P14	P15	P16
Probability of Enactment→	80%	80%	50%	75%	25%	50%	50%	70%	80%	80%	80%	80%	80%	80%	70%	80%
Adviser Business Activity																
Provide advice to 401k plan sponsors	Yes	-	-	-	-	-	-	Yes	Yes	-	-	-	-	-	-	-
Provide fee-only advice to participants (note 1)	Yes	-	-	-	-	-	-	Yes	Yes	-	-	-	-	-	-	-
Provide advice to participants under SunAmerica (note 2)	Yes	-	-	-	-	-	-	Yes	Yes	-	-	-	-	-	-	-
Provide advice to participants as 3(38) manager (note 3)	Yes	-	-	-	-	-	-	Yes	Yes	-	-	-	-	-	-	-
Provide advice to participants other than fee only, SunAmerica or 3(38)	Yes	Yes	Yes	Yes	-	Yes										
Provide advice to IRAs	Yes	Yes	Yes	Yes	-	Yes	Yes	-	-	Yes	Yes	Yes	Yes	Yes	-	Yes
Provide advice as level-fee fiduciary adviser	Yes	-	Yes	Yes	-	Yes	Yes	Yes	Yes	Yes	-	Yes	Yes	Yes	Yes	-
Provide participant education under IB 96-01 (note 4)	Yes	Yes	-	-	-	-	-	-	Yes	-	-	-	-	-	-	-
Receive compensation under Frost (note 5)	Yes	Yes	Yes	Yes	-	-	-	-	-	-	-	-	-	-	-	-
Provide computer model	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Yes						

Legend: - = Not Applicable

Notes to Adviser Impact Analysis Grid

1. Fee only advice refers to the situation where the adviser does not and has no affiliation with a firm that receives compensation from a sponsor or affiliate of a firm that offers investments that the adviser can recommend.
2. SunAmerica refers to the Department of Labor opinion (2001-09A) that permits a provider to use a third party to provide 401(k) participant advice.
3. 3(38) manager refers to ERISA section 3(38) that permits a fiduciary to act with discretion on plan or participant on behalf of an ERISA plan.
4. IB 96-01 refers to the Department of Labor Interpretive Bulletin concerning ERISA plans, that defines the boundaries between "education" and "advice". Advice being a fiduciary act and education, not.
5. Frost refers to the Department of Labor Advisory Opinion 1997-15A that permits mutual funds to pay third parties (advisers) providing that such payments would "either be a dollar-for-dollar offset against the fees the Plans would be obligated to pay... or as amounts credited directly to the Plans."

IMPACT ANALYSIS -BROKER/DEALER FIRMS

If enacted, the new regulations will require B/D firms to institute structures, practices and procedures that conform to new standards. While several firms may already have these in place, they may have to be revised to comply with the new regulations. The critical decisions are:

- Establish or adapt an RIA that conforms to the standard to support reps that advise IRA and/or 401(k) participants. Given the prospective IRA rollover business, this would appear to be a foregone conclusion.
- Provide a conforming computer model that is used for “fiduciary business” to reduce the exposure to poor practices by errant reps. The efficiency and ease of compliance suggests that this is a likely course.
- Support the 401(k) participant advice business so as to have first access to rollover assets. The cost/benefit of advisers serving 401(k) participants must be evaluated. It may be advantageous to establish a lower level staff to support this business.
- Construct level-fee IRAs in which fiduciary activities are performed by a certified computer model. This arrangement permits the rep to continue to earn commissions, 12b-1 fees, etc. by separating the business activities that are subject to the regulations.

In any case it will be necessary to introduce compliance procedures that respond to the Department of Labor for 401(k) and the IRS for IRA business.

PROPOSAL DETAILS

P1 Regulations apply to both IRAs and 401(k)

The Pension Protection Act of 2006 instructed the Department of Labor to develop regulations that would apply to both types of retirement structures:

Section 601 of the Pension Protection Act of 2006 (PPA) added sections 408(b)(14) and 408(g) of ERISA. The PPA also added parallel provisions to the Code at sections 4975(d)(17) and 4975(f)(8). Under Reorganization Plan No. 4 of 1978 (43 FR 47713, Oct. 17, 1978), 5 U.S.C. App. 1, 92 Stat. 3790, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this notice to specific sections of ERISA should be taken as referring also to the corresponding sections of the Code.

P2 Follow-up to computer model advice requires a fiduciary adviser

The earlier regulations permitted a person that did not qualify as fiduciary adviser to assist clients in using the results of a certified computer model. This permission is withdrawn in the 2010 regulations:

The Department notes that, while relief would have been available under the withdrawn class exemption, the statutory exemption does not provide prohibited transaction relief for any individualized advice rendered to individuals following the furnishing of investment recommendations generated by a computer model described in the statute unless such advice on its own meets the requirements of the statute (i.e., is generated by a computer model under a computer-model arrangement or is rendered under a fee-leveling arrangement).

P3 Fiduciary adviser may not receive any compensation based on investments used by participants

The 2010 regulation narrows the requirements outlined in the Field Assistance Bulletin that permitted advisers to act as a fiduciary adviser for certain clients and at the same time receive un-level compensation from others for the same investments. The 2010 regulations prohibit this:

...the Department is emphasizing in the proposal that, as stated in Field Assistance Bulletin 2007-1 (February 2, 2007) (FAB 2007-1), the receipt by a fiduciary adviser of any payment from any party (including an affiliate of the fiduciary adviser), or used for the benefit of such fiduciary adviser, that is based, in whole or part, on investments selected by participants or beneficiaries would be inconsistent with the fee-leveling requirement of the statutory exemption.

FAB 2007-1 provides that “the fees or other compensation (including salary, bonuses, awards, promotions or any other thing of value) received, directly or indirectly from an employer, affiliate or other party, by a fiduciary adviser (or used for the adviser’s benefit) may not be based, in whole or part, on the investment options selected by participants or beneficiaries.” See FAB 2007-1, footnote 11 (emphasis added).

P4 Neither fiduciary adviser nor its employees may receive any form of compensation that favor certain investments

This proposal extends the level-fee requirement to all employees of an affiliate that acts as a fiduciary adviser:

The Department also is further clarifying that this limitation applies both to an entity that is retained to render advice, and to any employee, agent, or registered representative of such an entity. Thus, even though an affiliate of a fiduciary adviser may receive fees that vary depending on investment options selected, any provision of financial or economic incentives by an affiliate (or any other party) to a fiduciary adviser or any individual employed by such fiduciary adviser (e.g., an employee providing advice on its behalf or an individual responsible for supervising such an employee) to favor certain investments would be impermissible. These are reflected in the proposal at paragraph (b)(3)(i)(D) of Sec. 2550.408g-1.

P5 Disregard investment returns except for asset classes

This proposal would eliminate the use of past performance in certified computer model selections on the basis that they are not reliable predictors of future results:

The proposed regulation also provides, in connection with investment advice arrangements that use computer models, that a computer model shall be designed and operated to avoid investment recommendations that inappropriately distinguish among investment options within a single asset class on the basis of a factor that cannot confidently be expected to persist in the future (paragraph (b)(4)(i)(E)(3)). While some differences between investment options within a single asset class, such as differences in fees and expenses or management style, are likely to persist in the future and therefore to constitute appropriate criteria for asset allocation, other differences, such as differences in historical performance, are less likely to persist and therefore less likely to constitute appropriate criteria for asset allocation. Asset classes, in contrast, can more often be distinguished from one another on the basis of differences in their historical risk and return characteristics.

P6 Inquiry: Define what generally accepted investment theories are

Earlier forms of this regulation offered no interpretation of what constituted “generally accepted investment theories” but the question is asked here as to whether such an interpretation is required:

What investment theories are generally accepted for purposes of § 2550.408g-1(b)(4)(i)(A), and what investment practices are consistent or inconsistent with such theories?
Should this regulation specify such theories and require their application?
Should the regulation dictate the bases for model parameters such as the probability distribution of future returns to assets classes or particular investments?
Should the regulation specify certain practices as required by generally accepted investment theories, or certain other practices as proscribed by such theories?
What are examples of investment theories that are not generally accepted?
Should this regulation expressly proscribe the application of certain such theories?

P7 Inquiry: Define what participant criteria should be considered in making asset allocations

Basic criteria for selecting investments were provided in earlier versions of the regulation but the 2010 version is trying to determine if these should be further defined:

What types of criteria are appropriate and objective bases for asset allocation pursuant to proposed § 2550.408g-1(b)(4)(i)(D)?

Should this regulation expressly designate some criteria as appropriate and objective and/or other criteria as not appropriate or not objective?

Should it do both, thereby establishing a list of criteria that models must consider to the exclusion of all others? For example, the regulation could provide that computer models must consider only the historical risks and returns of different asset classes as a whole, information about the participants, and the expenses and asset allocation of each investment option under the plan.

Is a fund's past performance relative to the average for its asset class an appropriate criterion for allocating assets to the fund?

Under what if any conditions would it be consistent with generally accepted investment theories and with consideration of fees pursuant to § 2550.408g-1(b)(4)(i)(B) to recommend a fund with superior past performance over an alternative fund in the same asset class with average performance but lower fees? Should the regulation specify such conditions?

On what if any bases can a fund's superior past performance be demonstrated to derive not from chance but from factors that are likely to persist and continue to affect performance in the future?

Should the use of a fund's superior past performance as a criterion for allocating assets to the fund be conditioned on such demonstration?

How, if at all, should a model take into account investment management style? For example, all else equal, should a model ascribe different levels of risk to passively and actively managed investment options?

P8 Participant advice is purely optional for plan sponsors with no consequences or incentives to provide it

The regulation makes it clear that plan sponsors are under no obligation to offer participant advice.

(a)(2) Not Mandated

(2) Nothing contained in ERISA section 408(g)(1), Code section 4975(f)(8), or this regulation imposes an obligation on a plan fiduciary or any other party to offer, provide or otherwise make available any investment advice to a participant or beneficiary.

P9 All existing regulations, exemptions, interpretive or other guidance remains in effect

The regulation seeks to avoid disruption of advisers who currently comply with regulations that are currently in effect:

(a)(3) Existing Regulations Remain In Effect

(3) Nothing contained in ERISA section 408(g)(1), Code section 4975(f)(8), or this regulation invalidates or otherwise affects prior regulations, exemptions, interpretive or other guidance issued by the Department of Labor pertaining to the provision of investment advice and the circumstances under which such advice may or may not constitute a prohibited transaction under section 406 of ERISA or section 4975 of the Code.

P10 Participant advice may be delivered through a level fee adviser or a computer model

The alternative for level fee or certified computer model is consistent with earlier versions. The class exemption in earlier versions that introduced a third option has been deleted:

(b) Statutory Exemption Defined

(b) Statutory exemption. (1) General. Sections 408(b)(14) and 408(g)(1) of ERISA provide an exemption from the prohibitions of section 406 of ERISA for transactions described in section 408(b)(14) of ERISA in connection with the provision of investment advice to a participant or a beneficiary if the investment advice is provided by a fiduciary adviser under an "eligible investment advice arrangement." Sections 4975(d)(17) and (f)(8) of the Code contain parallel provisions to ERISA sections 408(b)(14) and (g)(1).

(2) Eligible investment advice. For purposes of section 408(g)(1) of ERISA and section 4975(f)(8) of the Code, an "eligible investment advice arrangement" means an arrangement that meets either the requirements of paragraph (b)(3) of this section or paragraph (b)(4) of this section, or both.

P11 Computer models must be certified by independent experts

The requirement for certification is consistent with earlier versions:

(b)(4)(ii) Computer Model Certification Requirements

(ii) Prior to utilization of the computer model, the fiduciary adviser shall obtain a written certification, meeting the requirements of paragraph (b)(4)(iv) [*iv is "certification by an eligible investment expert shall"*] of this section, from an eligible investment expert, within the meaning of paragraph (b)(4)(iii) [*iii is "term "eligible investment expert" means"*] of this section, that the computer model meets the requirements of paragraph (b)(4)(i) [*i is "computer model shall be designed and operated to"*] of this section. If, following certification, a computer model is modified in a manner that may affect its ability to meet the requirements of paragraph (b)(4)(i) [*i is "computer model shall be designed and operated to"*], the fiduciary adviser shall, prior to utilization of the modified model, obtain a new certification from an eligible investment expert that the computer model, as modified, meets the requirements of paragraph (b)(4)(i) [*i is "computer model shall be designed and operated to"*].

P12 All fiduciary advisers must be audited annually

The annual audit requirement is consistent with earlier versions of this regulation:

(b)(6) Annual Audit Requirement

(6) Annual audit. (i) The fiduciary adviser shall, at least annually, engage an independent auditor, who has appropriate technical training or experience and proficiency, and so represents in writing to the fiduciary adviser, to:

(A) Conduct an audit of the investment advice arrangements for compliance with the requirements of this section; and

(B) Within 60 days following completion of the audit, issue a written report to the fiduciary adviser and, except with respect to an arrangement with an IRA, to each fiduciary who authorized the use of the investment advice arrangement, in accordance with paragraph (b)(5) [5 is "Arrangement must be authorized by a plan fiduciary"] of this section, setting forth the specific findings of the auditor regarding compliance of the arrangement with the requirements of this section.

P13 All fiduciary advisers must disclose status as fiduciary, compensation and conflicts of interest

The disclosure requirement is consistent with earlier versions of this regulation:

(b)(7) Participant Disclosure

(7) Disclosure. (i) The fiduciary adviser must provide, without charge, to a participant or a beneficiary before the initial provision of investment advice with regard to any security or other property offered as an investment option, a written notification...

P14 All participant transactions must be directed by the participant

Participant direction is carried forward from the 2009 version which permits rebalancing:

(b)(8)(ii) Transactions Occur at Sole Direction of Recipient

(ii) Any sale, acquisition, or holding of a security or other property occurs solely at the direction of the recipient of the advice,

P15 Rollover activity can be handled by disclosure to participants

The model disclosure added to the 2010 version illustrates how rollovers can be captured within the fiduciary requirements:

(if applicable enter, When [enter name of Fiduciary Adviser] recommends that you take a rollover or other distribution of assets from the plan, or recommends how those assets should subsequently be invested, [enter name of Fiduciary Adviser] or affiliates of [enter name of Fiduciary Adviser] will receive additional fees or compensation. These amounts are: [enter description of all other fees or compensation to be received in connection with any rollover or other distribution of plan assets or the investment of distributed assets]. This information should be reviewed carefully before you make a decision to take a distribution.

P16 Computer model providers are treated as fiduciary advisers and subject to annual audits

Requirement that computer model providers be fiduciary advisers is consistent with earlier versions:

a) Computer Model Developers May Be Sole Fiduciary Adviser for Plan

(a) General. Section 408(g)(11)(A) of the Employee Retirement Income Security Act, as amended (ERISA), provides that a person who develops a computer model or who markets a computer model or investment advice program used in an “eligible investment advice arrangement” shall be treated as a fiduciary of a plan by reason of the provision of investment advice referred to in ERISA section 3(21)(A)(ii) to the plan participant or beneficiary, and shall be treated as a “fiduciary adviser” for purposes of ERISA sections 408(b)(14) and 408(g), except that the Secretary of Labor may prescribe rules under which only one fiduciary adviser may elect to be treated as a fiduciary with respect to the plan. Section 4975(f)(8)(J)(i) of the Internal Revenue Code, as amended (the Code), contains a parallel provision to ERISA section 408(g)(11)(A) that applies for purposes of Code sections 4975(d)(17) and 4975(f)(8). This section sets forth requirements that must be satisfied in order for one such fiduciary adviser to elect to be treated as a fiduciary with respect to a plan under an eligible investment advice arrangement

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