

Legal Alert: DOL Issues First Guidance on PPA Investment Advice Provision

February 6, 2007

In [Field Assistance Bulletin \(FAB\) 2007-01](#), dated February 2, 2007, the U.S. Department of Labor issued guidance to its national and regional offices on the investment advice provisions of the Pension Protection Act (PPA). For an overview of these provisions, which took effect January 1, 2007, [click here](#).

The PPA, in new ERISA sections 408(b)(14) and 408(g) (and counterpart provisions under Internal Revenue Code section 4975), provided new prohibited transaction relief for two methods of providing investment advice to participants directing the investment of their plan accounts. In the first written, substantive guidance on the new exemptions, the FAB addresses three significant points:

- Consistent with informal statements by senior DOL officials, the FAB states that past guidance relating to investment advice remains in effect and may continue to be relied upon. The FAB specifically notes the continuing efficacy of (i) Interpretive Bulletin 96-1, distinguishing investment education from investment advice; (ii) the Frost Bank and COUNTRY Trust Bank advisory opinions, approving investment advice that results in additional fees to the adviser or an affiliate so long as those fees are offset or otherwise used for the benefit of the plan; and (iii) the Sun America advisory opinion, concluding that there is no prohibited transaction where fiduciary advice is provided through methodologies controlled by an independent financial expert even if the advice results in additional fees for the fiduciary or an affiliate.
- The FAB articulates an important DOL position that (i) plan fiduciaries have the same responsibilities in selecting and monitoring investment advice providers regardless of whether the arrangement requires the exemption provided by section 408(b)(14), *but also* (ii) where the provider is prudently selected and monitored, plan fiduciaries have no duty to oversee or review the specific advice provided by a provider to individual plan participants, including under arrangements that do not rely on the new exemption. That is, the DOL has concluded that plan fiduciaries should have the same responsibilities and protections for participant-level investment advice under the PPA, the Sun America approach, the Frost Bank/COUNTRY Trust Bank approach, and other ERISA-compliant arrangements.

- Finally, the FAB announces that the “level fee” requirement in section 408(g)(2)(A)(i) (defining one of the two classes of “eligible investment advice arrangements” for which the PPA provides relief) applies only to (i) fees or other compensation received by the individual employee who provides the advice, including “salary, bonuses, awards, promotions or any other thing of value,” and (ii) the fees received by the individual’s immediate employer or other entity supervising that advice. The FAB confirms the logic of the statute and concludes that the fees to affiliates of the investment adviser – apparently including affiliates managing proprietary options within the scope of the investment advice program – need not be level unless that affiliate is providing investment advice to plan participants. Absent such an interpretation, the PPA relief for level fee arrangements would have functionally been a nullity.



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