

## AllianceBernstein Defined Contribution Investments

# DC Regulatory Update

### DOL Proposes New Participant Investment Advice Regulations

On February 26, 2010, at a White House forum hosted by Vice President Joe Biden, the Department of Labor (“DOL”) announced that it would be publishing a new proposed regulation for providing investment advice to defined contribution retirement plan participants. The unusually high visibility of the proposed regulation’s launch, plus the significant changes it makes to regulations issued by the Bush administration, has garnered significant attention.

#### Background

The Pension Protection Act of 2006 (“PPA”) created a new prohibited transaction exemption that would allow “fiduciary advisers” to provide investment advice to defined contribution plan participants. The PPA outlined a fee-leveling approach—in which the fiduciary adviser’s fees do not vary depending upon the outcome of the advice—and a computer-model approach—in which the advice is generated by a computer model that has been certified by an independent investment expert. The adviser must disclose information to participants such as the fees they will receive, the rates of return of investment options and that the adviser is an ERISA fiduciary. In addition, the advice program must be audited annually by an independent auditor, and a copy of the written audit report must be furnished to the plan sponsor. The DOL was required to write rules to implement the details of the PPA investment advice provisions.

The DOL under the Bush administration issued “final” PPA investment advice regulations on January 21, 2009, along with a somewhat controversial prohibited transaction class exemption that allowed greater flexibility to advisers than the regulations themselves did. Shortly after President Obama’s inauguration, the Obama administration put these rules on hold; it later withdrew them completely, promising to start over by re-proposing new rules. In fulfillment of that promise, the DOL’s new proposal was published in the *Federal Register* on March 2, 2010.

#### Highlights of the Proposed Regulation

##### Fee-Leveling Approach

- **Advisers Cannot Receive Incentives to Favor Certain Investments**

The new proposed regulations contain a provision that appears to be designed to prevent any party from giving the fiduciary adviser an incentive to favor certain investments. It says that a fiduciary adviser (or its employees, agents or representatives) cannot receive “directly or indirectly, any fee or other compensation (including commissions, salary, bonuses, awards, promotions or other things of value) that is based in whole or in part on a participant’s or beneficiary’s selection of an investment option.”

- **Level Fees Required for Fiduciary Adviser**

The new proposed regulations require the fees of both the fiduciary adviser and its employees, agents or representatives to be level. Under the Bush administration guidance, as long as the compensation of the individual employee or representative of a fiduciary adviser who provided the advice was level, his or her employer's (that is, the fiduciary adviser's) compensation could vary.

- **Fees of Affiliates May Vary**

The regulations clarify that the fees received by an affiliate of a fiduciary adviser may vary depending on the investment options selected.

## **Computer Model Approach**

- **Cannot Consider Historical Performance**

The PPA provided that any computer-advice model, among other conditions, must be unbiased and apply generally accepted investment theories. In the proposed regulations, the DOL takes the position that the model cannot take into account the historical performance of particular investment options within an asset class but must take into account the investment-management and other fees and expenses of the recommended option. Some have questioned whether this requirement will cause computer-advice programs to necessarily favor lower-cost indexed funds over actively managed funds.

- **No "Off Model" Advice**

Unlike the Bush administration guidance, the new proposed regulations do not permit the fiduciary adviser to provide off-model advice after presenting the advice generated by a computer model.

- **Existing Advice Models Still Valid**

The DOL makes it clear that the proposed regulations do not invalidate existing advice arrangements that the DOL had previously authorized. This would include, for example, programs modeled on the "SunAmerica" exemption, where the advice is generated by a computer model developed by a party that is independent of the entities who provide investment options to the plan.

The DOL invites comments on the proposed regulations, which are due May 5, 2010.

For a copy of the proposed regulations, go to <http://www.dol.gov/ebsa/>

AllianceBernstein does not offer tax advice. We encourage you to consult with your tax or legal professional.

**AllianceBernstein Defined Contribution Investments** is a unit of AllianceBernstein L.P. and **AllianceBernstein Investments** is an affiliate of AllianceBernstein L.P. and is a member of FINRA.

AllianceBernstein® and the AB logo are registered trademarks and service marks used by permission of the owner, AllianceBernstein L.P.

© 2010 AllianceBernstein L.P.

17093