

March 4, 2009

DOL Continues to Provide ERISA Relief Facilitating Liquidity for Auction Rate Securities

During the week of February 23, 2009, the Department of Labor continued to support the facilitation of liquidity for auction rate securities (ARS) held by retirement plans and IRAs through ERISA prohibited transaction exemptions.

- On February 27, DOL granted [four individual prohibited transaction exemptions](#) proposed on November 7, 2008. (Click [here](#) for our alert on the proposed exemptions.) Three of the exemptions involve securities firms that acted as brokers, dealers, and principals in the ARS market, and provide ERISA § 406(a) and (b) relief for:
 - The sale of the ARS by the plan to its plan sponsor for par value plus any accrued and unpaid interest, in a cash transaction against prompt delivery;
 - An unconditional exchange of the ARS by the plan to its plan sponsor for (i) certain listed securities, (ii) a U.S. Treasury obligation, (iii) a fixed-income security meeting certain requirements, or (iv) an FDIC-insured certificate of deposit. The exchange must be at fair market value, with the ARS valued again at par value plus any accrued and unpaid interest; or
 - A loan to the plan in connection with its holding of the ARS from the securities firm (or affiliates) or certain other introducing or clearing broker-dealers, where the loan is documented, unsecured and guaranteed by the plan sponsor; bears interest at specified rates; and does not exceed in principal amount the total value of the ARS held by the plan.

These exemptions include special provisions to the extent the ARS are held in a plan sponsored by the securities firm or in an IRA or qualified plan not subject to Title I of ERISA (typically, because the plan does not cover common-law employees).

The fourth exemption involves a securities firm that acted only as a “downstream” broker in the ARS market and provides ERISA § 406(a) relief for the cash purchase by that firm of ARS from client plans at the greater of (i) par value plus accrued and unpaid interest or (ii) fair market value on the date of purchase as determined by an independent appraiser.

- On February 25, DOL also [proposed an exemption](#) for another securities firm (i) for the purchase of ARS initiated by an offer from the firm, on terms comparable to the above, and (ii) also provides relief for purchases of ARS pursuant to a settlement order with a federal or state authority requiring the firm to acquire the ARS. In this latter respect, this proposed exemption represents an expansion of the relief previously provided by DOL, and it imposes as additional conditions:
 - Compliance of the offer and the sale with the terms of the settlement order; and
 - Further requirements for the content of the offer.

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- In addition, on January 21, 2009, DOL published for one of these firms an additional [proposed exemption](#) that would allow loans between the firm and a plan with respect to ARS on a securities lending model. Among other conditions, the proposed exemption requires:
 - Certain advance disclosures as to the securities firm's financial condition;
 - Cash collateral from the firm equal to 100% of the par value of the ARS;
 - A negotiated rebate fee to the firm not in excess of the interest or dividends on the ARS received by the plan;
 - Unilateral termination of the loan by the plan at any time and by the firm under specified conditions; and
 - Certain rights between the parties on loan termination.



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