

## Legal Alert: DOL Proposes New ERISA Disclosure Requirements for Plan Service Providers

December 13, 2007

On December 13, 2007, the Department of Labor proposed new disclosure and related requirements under ERISA for certain service providers to employee benefit plans. This is the second of three regulatory projects DOL has announced to deal primarily with the question of indirect compensation in the employee benefit market.

- DOL has already promulgated revisions to Form 5500, and in particular Schedule C, that enhance reporting of indirect compensation to service providers.
- In this most recent proposal, DOL would amend the regulations underlying the prohibited transaction exemption for necessary plan services to require additional disclosure by certain service providers to plan fiduciaries of indirect compensation and other matters (click [here](#) for a copy), and issue a class exemption to provide relief for plan fiduciaries if service providers do not satisfy these requirements (click [here](#) for a copy). DOL has issued a fact sheet describing this proposal (click [here](#) for a copy).
- The final project, expected to be proposed in the first half of 2008, would amend the ERISA section 404(c) regulations or otherwise require additional disclosure of indirect compensation to plan participants or beneficiaries.

In the proposed amendment to the regulations underlying ERISA section 408(b)(2) for necessary plan services, DOL would impose new requirements only on the following types of service providers:

- Services providers that are fiduciaries under either ERISA or the Investment Advisers Act of 1940;

- A service provider that does or may provide banking, consulting, custodial, insurance, investment advisory (plan or participant), investment management, recordkeeping, securities or other investment brokerage, and/or third-party administration; or
- A service provider that does or may receive indirect compensation or fees, within the meaning of the proposed regulation, in connection with accounting, actuarial, appraisal, auditing, legal and/or valuation services.

No other service providers would be affected by the proposal. The proposal does not discuss whether the new rules would apply in the case of IRAs subject to IRC section 4975 but not ERISA section 406.

Service arrangements within the scope of the proposed regulation would be subject to the following requirements, in addition to the “reasonable compensation,” “terminable on reasonably short notice” and other requirements of the existing regulation adopted in 1977:

- The service must be provided pursuant to a written contract.
- The contract (including any extension or renewal) must require the service provider to provide advance written disclosure, to the best of its knowledge, of:
  - All services to be provided to the plan;
  - The compensation or fees to be received by the service provider (or its affiliate, agent or employee) for each service. “Compensation or fees” are defined broadly to include money or any other thing of monetary value. The proposal provides a number of examples and includes indirect compensation received from a party other than the plan, plan sponsor or service provider. If the service provider is not able to describe the compensation or fees in a specific monetary amount, it may provide a formula, asset charge, or per capita charge so long as the description permits the responsible plan fiduciary to evaluate the reasonableness of the compensation or fee. Specific rules are provided for bundled service arrangements;
  - The manner of receipt of such compensation or fees, e.g., direct billing, deduction from plan accounts, or charge against plan investments;

- Whether the service provider or affiliate is providing fiduciary services within the meaning of ERISA or the Advisers Act;
- Whether the service provider or an affiliate expects to participate or acquire a financial or other interest in any transaction to be entered into by the plan in connection with the contract, and, if so, a description thereof;
- Whether the service provider or an affiliate has any material financial, referral or other relationship with a money manager, broker, other client of the service provider, other service provider to the plan or any other entity that does or may create a conflict of interest for the service provider in performing its services, and, if so, a description thereof;
- Whether the service provider or an affiliate will be able to affect its own direct or indirect compensation, without prior approval of an independent plan fiduciary, in connection with the performance of the services, and, if so, a description of the nature of such compensation; and
- Whether the service provider or an affiliate has any policies or procedures designed to prevent the above compensation or fees, relationships or conflicts from adversely affecting its services to the plan, and, if so, a description thereof.

The contract must also include a representation from the service provider that such disclosure was provided. The proposal does not regulate the manner in which the disclosure is provided. It would permit electronic formats, as well as disclosure in multiple documents from multiple sources, including incorporation by reference from a prospectus, Form ADV, or similar document. The proposal also does not specify any particular timing for the disclosure.

- The contract must require the service provider to disclose any material change in the foregoing information to a responsible plan fiduciary within 30 days of acquiring knowledge of the material change.
- The contract must require the service provider to disclose all information related to the contract and compensation and fees received thereunder that is requested by the responsible plan fiduciary or plan administrator to comply with ERISA reporting or disclosure requirements.

- The service provider must comply with the specified disclosure requirements. If the service provider does not comply, the corollary class exemption would provide relief from ERISA section 406(a)(1)(C) for the responsible plan fiduciary if:
  - The plan fiduciary reasonably believed that the contract met the requirements of the proposed regulations, and did not know or have reason to know that the service provider failed to comply with its disclosure obligations;
  - The plan fiduciary, upon discovering the failure, requests in writing that the service provider furnish the required information, if the plan fiduciary has not already received such information;
  - The plan fiduciary notifies DOL if the service provider does not comply with the written request within 90 days. The form and manner of the notification is specified; and
  - The plan fiduciary, upon discovery of the failure, makes a determination whether to terminate or continue the service arrangement.

Written comments on the proposed regulation and class exemption are due by February 11, 2008. They would take effect 90 days after publication in final form in the Federal Register.



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