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Re: DOL Issues FAQs on Service Provider Fee Reporting for the 2009 Form 5500

Dear Clients and Other Friends:

On July 14, the Labor Department issued "Frequently Asked Questions" regarding service provider fees that must be reported on Form 5500 beginning with 2009 plan years (*see* Web link to the FAQs at the end of this letter). Prior guidance on this subject was in DOL final Form 5500 regulations issued November 16, 2007 (*see* Web link to the Final Form 5500 Regulations at the end of this letter). Plan service providers should get up to speed on this subject soon so that they can adequately disclose the required information to their customers in time to be included on Form 5500 for the 2009 plan year (for calendar year plans, this report generally is due in July 2010). This letter is primarily directed to service provider issues.

However, plan sponsors will also need to be aware of the new requirements in time to include the required fee information on 5500s filed in 2010 and after. Also, today the DOL proposed regulations regarding participant fee disclosures provided by plan sponsors (*see* Web link to these important new DOL proposed regulations at the end of this letter). We will discuss these proposed regulations in a separate letter soon.

Schedule C is used to provide disclosure of service provider fees with Form 5500. Schedule C must be filed for large plans, generally meaning plans with 100 or more participants at the beginning of the plan year. A primary goal of the DOL with respect to these disclosures is to require full disclosure of all "revenue sharing" arrangements among plan service providers.

Generally, Schedule C requires disclosure of fees paid to providers that received \$5,000 or more in fees through the plan year. The FAQs include guidance about how fees may be estimated when determining whether to include a certain provider on Schedule C. The FAQs also include guidance about when gifts and entertainment expenses may need to be included in Schedule C reporting.

Fees to be reported are divided into the categories of "direct compensation" or "indirect compensation." Certain indirect compensation may constitute "eligible indirect compensation" under the final regulations. Such eligible indirect compensation includes fees charged to investment funds and reflected in the value of the investment or return on investment of the participating plan or its participants, including finders' fees, "soft dollar" revenue, float revenue,

and/or brokerage commissions or other transaction-based fees for transactions or services involving the plan that were not paid directly by the plan or plan sponsor. Eligible indirect compensation arrangements may be disclosed by a service provider by an “alternative reporting option” that requires, among other things, disclosure of the amount (or estimate) of the compensation or a description of the formula used to determine the compensation. On Schedule C, such arrangements can be reported as eligible indirect compensation arrangements, where fee methodology rather than fee amounts may have been disclosed by the service provider. Importantly, the FAQs clarified that compensation received in connection with the management and operation of venture capital operating companies, real estate operating companies and other operating companies is not reportable indirect compensation (see Q&A # 7). The FAQs, final Form 5500 regulations and 2009 Form 5500 instructions provide guidance on what constitutes an eligible indirect compensation arrangement and requirements for service provider fee reporting for these eligible and other indirect compensation arrangements.

Generally, for eligible indirect compensation arrangements, the alternative reporting option may be available if a plan administrator can determine from service provider disclosure documents: (a) the existence of the indirect compensation; (b) the services provided for the indirect compensation or the purpose for the payment of the indirect compensation; (c) the amount (or estimate) of the compensation or a description of the formula used to calculate or determine the compensation; and (d) the identity of the party or parties paying and receiving the compensation. A service provider may furnish a separate document identifying other already provided documents – such as a mutual fund prospectus, a registered investment advisor’s Form ADV or a brokerage fee schedule – that contain the information necessary to satisfy the alternative reporting option if the separate document includes references to pages or sections where the disclosures are located in the other documents and advises the plan administrator that disclosures in these documents are intended to satisfy the alternative reporting option (see Q&A # 29). For applicable brokerage fees, post-trade confirmations may serve as written disclosure of brokerage fees and commissions for purposes of the alternative reporting option if, either alone or in conjunction with other disclosures, the plan administrator receives all required information (see Q&A # 32). Also, both proprietary and non-proprietary soft dollar revenue can be treated as “eligible indirect compensation” for purposes of the alternative reporting option if the written disclosure requirements are met (see Q&A # 39).

Importantly, e-mail or other web-based electronic disclosures can be used to satisfy the “written disclosure” requirement for the alternative reporting option, provided that there is some record, retained in accordance with ERISA’s recordkeeping requirements, that affirmatively indicates that such written materials were received by the plan administrator (see Q&A # 30).

The final Form 5500 regulations include a punitive reporting provision requiring plan administrators to report on Schedule C plan service providers that did not provide the required service fee disclosures. Important guidance included in the FAQs asserts that the DOL will not require plan administrators to report service providers on the Schedule C for the 2009 Form 5500 as failing to provide fee and compensation information if the service provider furnishes the plan

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administrator with a written statement that (1) the service provider made a good faith effort to make any necessary recordkeeping and information system changes in a timely fashion, and (2) despite such efforts, the service provider was unable to complete the changes for the 2009 plan year. (See Q&A # 40.)

The requirements for the 2009 Schedule C reporting of service provider fees included in the final Form 5500 regulations, the 2009 Form 5500 instructions and the FAQs issued on July 14 are quite complex. Plan service providers should familiarize themselves with Schedule C requirements prior to January 1, 2009 and assess applicable fee arrangements taking into these requirements.

Please contact us if you would like more information about 2009 Form 5500 Schedule C service provider fee reporting requirements or other service provider fee disclosure matters.

Sincerely,

Ted Rice

TKR/jks

Web links

DOL Frequently Asked Questions on Schedule C Reporting for the 2009 Form 5500:
http://www.dol.gov/ebsa/faqs/faq_scheduleC.html

DOL Final Form 5500 Regulations:
http://www.dol.gov/ebsa/compliance_assistance.html#section5

Published Online Today – Participant Fee Disclosure Proposed Regulations:

<http://www.dol.gov/federalregister/HtmlDisplay.aspx?DocId=20973&AgencyId=8&DocumentType=1>

Published Online Today – Fact Sheet on Participant Fee Disclosure Regulations:

<http://www.dol.gov/ebsa/newsroom/fsfeedisclosures.html>