From: Garvelink, Todd K. [mailto:tgarvelink@morrisoncohen.com]
Sent: Wednesday, February 06, 2008 10:57 AM
To: EBSA, E-ORI - EBSA
Subject: Proposed Amendments to 408(b)(2) Regulations

Dear Sir or Madam:

This correspondence is respectfully submitted to provide comments to the Department of Labor's proposed regulations under Section 408(b)(2) of ERISA, which were published in the Federal Register on December 13, 2007. These comments are primarily concerned about service providers who unintentionally become fiduciaries to ERISA plans despite reasonable expectations to the contrary. They also propose to limit the scope of the final regulations where the costs to comply with their disclosure requirements would almost certainly outweigh the potential benefits to plan participants. They are further described under each of the following headings.

Accidental Fiduciaries. Many private investment funds have been structured to avoid ERISA regulation by limiting investments from ERISA plans, as permitted by Section 3(42) of ERISA. However, a private investment fund's general partner or investment manager may incorrectly (yet reasonably) believe that the fund has little or no participation by ERISA investors (i.e., less than 25% of any class of equity); this misconception could arise, for example, because of inaccurate representations by the fund's investors. If such an error occurs, the proposed regulation does not allow for retroactive compliance with its disclosure requirements, even if a fund manager has diligently monitored participation by ERISA investors. Another reasonable accommodation would allow such a private investment fund to avoid the regulation's disclosure requirements by redeeming a sufficient portion of its ERISA investors once the fund discovers that it has exceeded the 25% limitation, or thereafter comply with the disclosure requirements on a prospective basis (assuming there are no other fiduciary violations).

Service Provider/Fiduciary Status. Other direct service providers to an ERISA plan may incorrectly believe in good faith that they are not fiduciaries to the plan. For example, they may incorrectly (yet reasonably) believe that the scope of their brokerage services does not involve the rendering of "investment advice" within the meaning of ERISA; this treatment is often unclear and is the subject of considerable litigation. The proposed regulation does not appear to provide any relief for these mistaken fiduciaries, who will have represented that they are not fiduciaries when making a good faith effort to comply with the regulation. An alternative accommodation would allow a service provider to make a good faith representation of the parties' intentions with respect to the service provider's fiduciary status. This accommodation would avoid turning a service provider into the guarantor of an uncertain legal outcome, but it would still ensure that responsible fiduciaries and their service providers have a complete understanding of the contracted scope of services.

No-Cost Services. In diversified financial institutions, in-house managers and other service providers may provide services to the institution's ERISA plans at no cost to the plans. In other contexts, service providers may provide services that are acquired and paid for by the sponsoring employer (and not charged to the plan). Requiring intra-company disclosures, or disclosures when no direct or indirect fees are being incurred by the plan, may not be meaningful and may result in an unnecessary use of plan resources, and the final regulation should clarify that its disclosure obligations do not apply in these circumstances. Allowing an exemption for no-cost services would also be consistent with 2550.408b-2(e)(3), which addresses the possibility of self-dealing prohibited transactions when services are provided to a plan without the receipt of compensation or other consideration.

Transition Issues. The proposed regulation and its preamble did not appear to specify whether existing agreements with ERISA plans (or plan asset funds) will need to be amended before the new regulation becomes effective. The proposed regulation did indicate that it will take effect 90 days after the final regulation is published; however, it did not appear to be clear whether contracts that are in place prior to this effective date will be exempted from compliance with the new disclosure requirements. I submit that requiring plan fiduciaries to undertake amendments to their existing agreements would consume plan resources that are disproportionate to any resulting cost savings, and that an explicit grandfathering exemption is appropriate.

I hope this correspondence is helpful and constructive. Thank you very much for the opportunity to submit these comments.

Sincerely,

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