ERISA FEE DISCLOSURE DEVELOPMENTS

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BY

JEFFERY MANDELL, ESQ.*
THE ERISA LAW GROUP, P.A.
205 North 10th Street, Suite 300
Boise, ID 83702
(208) 342-5522
(208) 342-7672 – facsimile
jeff@erisalawgroup.com

www.erisalawgroup.com

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Commentary (direct, looser and perhaps easier to digest than this outline) regarding the proposed Department of Labor fee disclosure regulation can be found in our June 2008 *ERISA Newsletter*.

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I.
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA")

A. ERISA Application

1. ERISA covers all "employee pension benefit plans" and "employee welfare benefit plans," with the exceptions listed below.

2. An "employee pension benefit plan" is defined in ERISA § 3(2) as any plan, fund, or program established or maintained by an employer or an employee organization, or both, to provide retirement income to employees, or which results in a deferral of income by employees for periods extending to the termination of employment or beyond. IRAs do not fall within this definition of employee benefit pension plans. Department of Labor ("DOL") Regulation ("Reg.") § 2510.3-2(d).

3. An "employee welfare benefit plan" is defined in ERISA § 3(1) as any plan, fund, or program established or maintained by an employer or an employee organization, or both, for the purpose of providing the participants or their beneficiaries medical, surgical, or hospital benefits; benefits in the event of sickness, accident, disability, death, or unemployment; vacation benefits; apprenticeship or other training programs; day care centers; scholarship funds; or prepaid legal services.

4. *Exceptions to ERISA's Coverage (but not the Internal Revenue Code)*

(a) Governmental Plans. ERISA does not apply to a governmental plan as defined in ERISA § 3(32). "Governmental" includes governmental units at the federal, state and local level.

(b) Church Plans. ERISA does not apply to a church plan as defined in ERISA § 3(33) unless the church plan has made an election to be treated as a qualified plan under Internal Revenue Code ("Code") § 401(d) and thus to be subject to the rules for ERISA retirement plans.

(c) Disability/Worker's Compensation/Unemployment Compensation. ERISA does not apply to a plan maintained solely for the purpose of complying with applicable worker's compensation laws, unemployment compensation laws, or disability insurance laws.

(d) Foreign Plan. ERISA does not apply to a plan maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens.

(e) Excess Benefit Plan. ERISA does not apply to a plan which is an excess benefit plan as defined in ERISA § 3(36). An excess benefit plan is a plan maintained solely for the purpose of providing benefits for a limited number of employees in excess of the limitations for contributions to qualified plans under Code § 415. In order for this exception to apply, the excess benefit plan must be unfunded.

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(f) Individual Retirement Accounts. IRAs are not subject to ERISA so long as: (i) no contributions are made by the employer, (ii) participation is completely voluntary for employees, (iii) the sole involvement of the employer is to permit the sponsor (for example, a bank) to publicize the IRA to employees and to collect contributions through payroll deductions and remit them to the sponsor, and (iv) the employer receives no more than reasonable compensation for the payroll deduction services. *IRAs are, however, subject to the prohibited transaction rules of the Internal Revenue Code*.

5. *Plan Without Employees*. ERISA does not apply to a plan without employees. DOL Reg. § 2510.3-3(b) provides that a plan without employees shall not be an employee benefit plan. Under the rules determining who is an "employee," the DOL Regulation states that an individual and his or her spouse shall not be deemed to be employees of a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse. A partner in a partnership and his or her spouse shall not be deemed to be employees for purposes of this exception. If no other individual who participates in the plan is an employee of the employer sponsoring the plan, the plan is not an employee benefit plan and the provisions of ERISA do not apply to the plan.

6. ERISA applies to severance programs and to HRA plans.

7. SEPs, SIMPLEs, SARSEPs and nonqualified deferred compensation plans are ERISA plans but benefit from some streamlined ERISA rules.

8. Application of ERISA requires compliance with a host of rules.

II.
FIDUCIARY RESPONSIBILITY AND PROHIBITED TRANSACTION RULES

A. Definition of a "Fiduciary"

1. ERISA defines a fiduciary as anyone who (a) exercises any discretionary authority or control with respect to the management of a plan or who exercises any authority or control with respect to the management or disposition of a plan's assets; (b) renders investment advice for a fee or other compensation, directly or indirectly, with respect to any monies or property of a plan, or who has any authority or responsibility in that regard; or (c) has any discretionary authority or discretionary responsibility in administering the plan.

2. "Named fiduciaries" are individuals or institutions who must be identified in the plan document and whose very roles automatically make them fiduciaries. *Plan administrators, plan sponsors, and trustees* will always be fiduciaries.

3. Aside from named fiduciaries, whether or not someone is a fiduciary depends on the person or entity's actions, not whether they are formally acknowledged as a fiduciary or even whether they realize they are a fiduciary.

4. Corporate officers and directors are often fiduciaries because they have authority to appoint, retain and monitor the activities of other fiduciaries, such as the activities of the trustee or the investment advisor. Corporate decisions relating to the creation, termination and design of employee benefit plans are "settlor" functions exempt from ERISA's fiduciary duties.

5. *Other "Actors" Who May or May Not Be Fiduciaries, Depending on Their Functions.* The "plan administrator" is the person specifically designated as a plan administrator by the plan

document. ERISA § 3(16)(A). The plan administrator is generally the person, persons (for example, a "plan committee") or entity that is responsible for the everyday administration of the plan. The "plan sponsor" is the employer maintaining the plan or, in the case of plans maintained by more than one employer and one or more employee organizations, the association, committee, joint board of trustees or other representatives of the parties who establish or maintain the plan. ERISA § 3(16)(B). The plan sponsor may or may not act as the plan administrator. The "trustee" is the entity that is responsible for the plan assets held in trust — generally a bank or trust company, although some employers are trustees of their own plans.

B. Basic Duties of a Fiduciary

1. ERISA states that a fiduciary must discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and of defraying reasonable expenses of administering the plan. ERISA § 404(a)(1)(A).

2. A fiduciary must act in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with ERISA's provisions. ERISA § 404(a)(1)(D).

3. A fiduciary must act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims. ERISA § 404(a)(1)(B).

4. With regard to plan investments, a fiduciary is charged with diversifying investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. ERISA § 404(a)(1)(C). A fiduciary is held to the prudent person standard outlined above in its choice of investments for the plan.

5. A fiduciary generally may not favor the interests of the employer/plan sponsor or a third party without violating the fiduciary's duty under ERISA.

C. General Liability under ERISA for Breach of Fiduciary Duty

1. A fiduciary is personally liable for any losses the plan incurs by reason of its breach. A fiduciary who has breached its duty is liable to restore to the plan any profits the fiduciary made through its use of plan assets and for any other equitable or remedial relief deemed appropriate by the court, including removal of the fiduciary. ERISA § 409.

2. The DOL can also assess a civil penalty against a fiduciary who breached its duty or any person who knowingly participated in a breach in the amount of 20% of the amount recovered in a settlement with the DOL or awarded in a civil suit. ERISA § 502(l).

3. There are potential criminal penalties including fines up to $500,000 and imprisonment up to 10 years for willful violations of ERISA's reporting and disclosure provisions (or the associated guidance). ERISA § 501.

4. Injunctive or other equitable relief may be available to prevent or redress ERISA violations. ERISA § 502(a)(3). Such relief may include removal or suspensions of fiduciaries or rescission of illegal transactions.

5. Prohibited transactions are also subject to an excise tax, as explained below.

6. In certain circumstances, a fiduciary may be held personally liable for a breach of fiduciary duty by a co-fiduciary.

D. Rules Against Prohibited Transactions

1. Both the Code and ERISA prohibit certain persons from engaging in certain transactions with the plan. These persons are subject to monetary sanctions if they engage in any one of the specifically enumerated prohibited transactions. The prohibited transaction rules under the Code apply not only to qualified plans but also to IRAs.

2. The individuals or entities considered to be "disqualified persons" or "parties in interest" to which the prohibited transaction rules apply generally include, without limitation, any fiduciary of the plan, a person who provides services to a plan, an employer sponsoring the plan, an owner of 50% or more of the employer or employee organization sponsoring the plan, family members (spouse, ancestors, lineal descendants, or spouse of a lineal descendant) of any individual described above, or an employee, officer, director, or 10% or more shareholder of a person or entity described above.

3. *Transactions that Are Prohibited*. The following transactions are prohibited:

(a) The sale or exchange, or leasing, of any property between a plan and a party in interest disqualified person). This applies regardless of which party is selling and which is purchasing the property. A contribution of property other than cash to a defined benefit plan (and even to a money purchase plan or other plan with a contribution obligation already fixed) is deemed to be a sale or exchange of that property to the plan.

(b) The lending of money or other extension of credit between a plan and a party in interest (disqualified person). This even includes loans to a plan that are guaranteed by a party in interest (unless it falls within the special exemption for ESOPs). *See* Legislative History of ERISA, Conference Report 5088.

(c) The furnishing of goods, services, or facilities by a plan to a party in interest (disqualified person), or vice versa. But there is an exemption for reasonable compensation for services rendered.

(d) The direct or indirect transfer to, or use by or for the benefit of, a party in interest (disqualified person) of any assets of a plan.

(e) Generally, the acquisition or holding of any employer security or any employer real property (except under certain circumstances not discussed in this outline).

4. *Additional Prohibitions*

(a) A fiduciary may not deal with the assets of a plan in its own interest or for its own account.

(b) A fiduciary may not act in a transaction that involves the plan if a fiduciary is acting on behalf of a person whose interests are adverse to the interests of the plan, its participants or its beneficiaries. This rule is intended to avoid conflicts of interest.

(c) Also prohibited is the direct or indirect receipt of personal consideration by a fiduciary from any party dealing with the plan in connection with a transaction involving the assets of the plan. This rule is intended to prevent kickbacks to a fiduciary.

5. *Penalty for Prohibited Transactions*. If a prohibited transaction occurs, significant taxes and penalties may be imposed. The excise tax on prohibited transactions is 15% of the amount involved for each taxable period the transaction is not corrected. There is an additional excise tax of 100% of the amount involved if the prohibited transaction is not corrected within the taxable period. Code § 4975.

III.
NEW PROPOSED FEE DISCLOSURE RULE

A. Background

1. The DOL proposed regulations on December 13, 2007 regarding service providers' disclosure of fees to plan sponsors.

2. Alleged recent changes in the way services are provided to employee benefit plans has made it difficult for sponsors and fiduciaries to understand the expenses plans pay for services and also the potential conflicts of interest that may exist with these services and payments.

3. ERISA requires fiduciaries to act prudently and solely in the interest of participants, and for the exclusive purposes of providing benefits and defraying reasonable expenses of administering the plan – including when selecting or monitoring service providers.

4. The regulations' preambles state:

> **In recent years, there have been a number of changes in the way services are provided to employee benefit plans and in the way service providers are compensated. Many of these changes may have improved efficiency and reduced the costs of administrative services and benefits for plans and their participants. However, the complexity of these changes also has made it more difficult for plan sponsors and fiduciaries to understand what the plan actually pays for the specific services rendered and the extent to which compensation arrangements among service providers present potential conflicts of interest that may affect not only administrative costs, but the quality of services provided.**
>
> **Despite these complexities, § 404(a)(1) of ERISA requires plan fiduciaries, when selecting or monitoring service providers, to act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purposes of providing benefits and defraying reasonable expenses of administering the plan. Fundamental to a fiduciary's ability to discharge these obligations is the availability of information sufficient to enable the fiduciary to make informed decisions about the services, the costs, and the service provider.** In this regard, the Department of Labor (Department) has published interpretive guidance concerning the disclosure and other obligations of plan fiduciaries and service providers under ERISA . . . .
>
> Although the Department has issued technical guidance and compliance assistance materials relating to the selection and monitoring of service providers, the Department nevertheless believes that, given plan fiduciaries' need for complete and accurate information about compensation and revenue sharing, both plan fiduciaries and service providers would benefit from regulatory guidance in this area. For this reason, the Department proposes the amendment described below relating to the conditions for a "reasonable contract or arrangement" under § 408(b)(2) of ERISA, as set forth in 29 CFR §2550.408b-2. (*emphasis added*)

5. ERISA § 406(a)(1)(C) generally prohibits the furnishing of goods, services, or facilities between a plan and a "party in interest." Any person providing services to a plan is any party in interest. As a result, absent relief, a relationship between a plan and a service provider would constitute a "prohibited transaction," because any person providing services to the plan is defined by ERISA to be a "party in interest" to the plan.

6. **ERISA § 408(b)(2) provides an exemption from prohibited transactions for service contracts or arrangements:**

(a) if no more than reasonable compensation is paid for the services,

(b) if the services are necessary for the establishment or operation of the plan, and

(c) if the contract or arrangement is reasonable.

Current DOL regulations expand on this exemption and the conditions regarding its application. *See* DOL Reg. § 2550.408b-2. The current regulation states that a contract is not reasonable unless it permits the plan to terminate the arrangement without penalty on reasonably short notice.

7. **The proposal**, revising DOL Reg. § 2550.408b-2(c), **provides for additional conditions to satisfy reasonableness, primarily by mandating the service provider to disclose certain information to the "responsible plan fiduciary" regarding the service provider's compensation and conflicts of interest.** The proposed rule will make it more difficult to take advantage of the exemption. The regulations' preambles state:

> The Department believes that in order to satisfy their ERISA obligations, plan fiduciaries need information concerning all compensation to be received by the service provider and any conflicts of interest that may adversely affect the service provider's performance under the contract or arrangement . . . Accordingly, under the proposal, an arrangement would not be reasonable unless the service provider agrees to furnish, and in fact does furnish, the required information to the responsible plan fiduciary.

B. Proposed Rules. The primary elements of the proposed regulations are summarized here.

1. **Three types of service providers are required to provide disclosures** in order for the prohibited transaction exemption to apply and to enable the fiduciary to evaluate reasonableness:

(a) those who provide **services as a fiduciary** under § 3(21) of ERISA or the Investment Advisers Act of 1940,

(b) those who provide **"banking, consulting, custodial, insurance, investment advisory (plan or participants), investment management, recordkeeping, securities or other investment brokerage, or third party administration" services**, regardless of the type of compensation or fees that they receive, and

(c) those who provide **"accounting, actuarial, appraisal, auditing, legal, or valuation"** services if they receive indirect compensation.

The regulations' preambles state:

> The Department believes that the compensation arrangements for services provided by the service providers enumerated in paragraphs (c)(1)(i)(A) and (B) [(a) and (b) above] are most likely to give rise to conflicts of interest.

2. **The terms of the contract or arrangement for services must be in writing.**

3. **The contract shall require the service provider to disclose the following matters in writing:**

(a) **All services** to be provided to the plan must be disclosed. The preambles state:

> A service provider must describe all services that it will provide, regardless of whether such services are described in the proposal's applicable scope provision. **For example if a plan consultant will provide appraisal, legal, and administrative services to the employee benefit plan in addition to its consulting services, then all of these services must be described.** (*emphasis added*)

(b) **The compensation or fees** to be received for such services **and the manner of receipt of such fees must be disclosed**. The preambles state:

> **Paragraph (c)(1)(iii)(A)(*1*) broadly defines compensation or fees to include money and any other thing of monetary value received by the service provider or its affiliate in connection with the services provided to the plan or the financial products in which plan assets are invested. Examples of compensation or fees that are covered by this definition include, but are not limited to: gifts, awards, and trips for employees, research, finder's fees, placement fees, commissions or other fees related to investment products, sub-transfer agency fees, shareholder servicing fees, Rule 12b-1 fees, soft dollar payments, float income, fees deducted on a share of gains or appreciate of plan assets, and fees based upon a percentage of the plan's assets . . . . [T]he Department concludes that plan fiduciaries must receive more comprehensive information about the compensation or fees involved in plan administration and investments, including indirect compensation. Indirect compensation includes fees that service providers receive from parties other than the plan, the plan sponsor, or the service provider.** (*emphasis added*)

(i) Service providers also must disclose compensation or fees received by their affiliates from third parties. An "affiliate" of a service provider is any person directly or indirectly (through one or more intermediaries), controlling, controlled by, or under common control with the service provider, or any officer, director, agent, or employee of, or partner in, the service provider. *See* preambles.

(ii) If a service provider cannot disclose compensation or fees in terms of a specific monetary amount, then the service provider may disclose compensation or fees by using a formula, a percentage of the plan's assets, or a per capita charge for each participant or beneficiary. The service provider must describe its compensation or fees in such a way that the responsible plan fiduciary can evaluate its reasonableness. For instance, the service provider must clearly explain any assumptions that would be used in determining the compensation or fees according to any such formula or other charge. *See* preambles.

(iii) The regulations address the disclosures that must be provided concerning **bundled arrangements**. In many cases, administrative and investment services are provided to employee benefit plans in "bundled" arrangements, whereby a package or "bundle" of services is provided, either directly or through affiliates or subcontractors of a service provider. These bundles are priced to the plan by a single service provider as a package, rather than on a service-by-service basis. For example, rather than hiring separate service providers for investment management, recordkeeping, Form 5500 annual report preparation, participant communications and statement preparation, payroll processing, and other functions, a plan fiduciary may arrange for one service provider to have all of these services performed as a bundle. The provider of the bundle may in turn use other affiliated service providers, or unaffiliated subcontractors, to provide some of the services in the bundle. However, the responsible plan fiduciary obtains a "package deal" and will negotiate only with the provider of the bundle. *See* preambles.

Bundled services need not be disclosed by each of the underlying providers or be broken down on a service by service basis, but only must be disclosed in the aggregate by the provider offering the bundle of services. The disclosures must describe all of the services in the bundle and the aggregate compensation/fees to be received directly or indirectly by the provider, any affiliate or subcontractor of the provider, and any other party in connection with the bundled services. There is no requirement to disclose the allocation of fees among those parties, with certain exceptions, for example, if there is a charge separately and directly against the plan's investments (such as management fees by mutual funds to their investment advisors, float revenue, and other asset based fees) or if any compensation or fees are on a transaction basis (such as finder's fees, brokerage commissions, or soft dollars). *See* preambles.

(iv) The regulations require that the service provider also **explain the manner of receipt of compensation**, for example, **whether the service provide will bill the plan, deduct fees directly from plan accounts, or reflect a charge against the plan investment**. *See* preambles.

(c) Whether the provider (or affiliate) will provide any services to the plan as a fiduciary within the meaning of ERISA § 3(21) or the Investment Advisers Act of 1940 must be disclosed.

(d) Whether the provider (or affiliate) expects to participate in, or acquire a financial or other interest in, any transaction to be entered into by the plan in connection with the contract or arrangement and, if so, a description of the transaction and the service provider's participation or interest therein.

(i) The disclosures in this subsection (d) and in (e), (f) and (g), are intended to inform the responsible plan fiduciary of the service provider's relationships or interests that may raise conflicts of interest for the service provider in its performance of services for the plan. The preambles state:

> **As service arrangements have become more complex, so have the ways that service providers are compensated, as well as the relationships among different players in the plan service provider industry. Plan fiduciaries must know of these**

> **relationships and indirect sources of compensation because they may impact the manner in which the provider performs services for the plan. There may be other, oftentimes subtle, influences that may be relevant to a plan fiduciary's assessment of the objectivity of a service provider's decisions or recommendations.** (*emphasis added*)

(e) Whether the provider (or affiliate) has any material financial, referral or other relationship with any party, such as a money manager, broker, other client of the provider, other provider to the plan, or any other entity, that creates or may create a conflict of interest for the provider in performing services for the plan, and, if so, a description of the interests and relationship must be provided.

(f) Whether the provider (or affiliate) will be able to affect its own compensation or fees without the prior approval of an independent plan fiduciary in connection with its services to the plan, and if so, a description of the nature of the compensation must be provided. Examples of this are "incentive, performance-based, float or other contingent compensation."

(g) Whether the provider (or affiliate) has any policies or procedures that address actual or potential conflicts of interest or that are designed to prevent the fees and relationships described above from adversely affecting the provision of services to the plan, and if so, an explanation of those policies or procedures must be disclosed.

4. The contract shall include the provider's representation that before the contract or arrangement was entered into, all of the foregoing information was provided to the responsible plan fiduciary.

5. The terms of the contract or arrangement shall require the provider to disclose to the responsible plan fiduciary any "material" change to the information required to be disclosed not later than 30 days from the date the provider acquires knowledge of such change. The regulations' preambles state:

> If any resulting change to the information previously disclosed to a plan fiduciary would be viewed by a reasonable plan fiduciary as significantly altering the "total mix" of information made available to the fiduciary, or as significantly affecting a reasonable plan fiduciary's decision to hire or retain the service provider, then the change is material.

6. The terms of the contract or arrangement shall require the provider to disclose all information requested by the responsible plan fiduciary or plan administrator to comply with the reporting and disclosure requirements under Title I of ERISA (and the associated regulations and forms, such as the Form 5500).

7. The provider must comply with its disclosure obligations under the contract or arrangement. That is, the contract must not just require disclosure; the provider must actually provide all disclosures.

C. Consequences of Failure to Satisfy the Proposed Regulation

1. If the contract or arrangement fails to require disclosure of the information described in the proposed regulation, or if the service provider fails to disclose such information, then the contract or

arrangement will not be "reasonable." Therefore, the service arrangement will not qualify for the relief from the prohibited transaction rules provided by ERISA § 408(b)(2).

2. The resulting prohibited transaction would have consequences for both the responsible plan fiduciary and the service provider. *See* Section II, C and D above.

(a) The responsible plan fiduciary, by participating in the prohibited transaction, will have violated § 406(a)(1)(C) of ERISA's prohibited transaction rules.

(b) The service provider, as a "disqualified person" under the Code's prohibited transaction rules, will be subject to the excise taxes that result from the service provider's participation in a prohibited transaction under Code § 4975.

3. The DOL believes that this significant result will motivate all parties to service contracts or arrangements to cooperate in exchanging the disclosures required by the proposed regulation.

4. However, the DOL also believes that, in certain circumstances, a responsible plan fiduciary should not be held liable for a prohibited transaction that results when a service provider, unbeknownst to the plan fiduciary, fails to satisfy its disclosure obligations required by the proposed regulation.

(a) Accordingly, the DOL also proposed a prohibited transaction exemption that will provide relief to responsible plan fiduciaries for violations of ERISA § 406(a)(1)(C) that result from a provider's failure to comply with its disclosure obligations under the contract or arrangement. That is, if the provider did not comply, the arrangement would not be "reasonable" and there would then be a prohibited transaction; the exemption would provide relief to a faultless fiduciary.

D. Additional Fee Disclosure Observations

1. The regulations' preambles state that **"the engagement of any particular service provider will not necessarily satisfy the fiduciary's obligations under section 404(a) of ERISA to act prudently and solely in the best interest of the plan's participants and beneficiaries merely because the service provider furnishes the information described in the proposed regulation. Section 404(a) of ERISA requires that the responsible plan fiduciary engage in an objective process designed to elicit information necessary to assess not only the reasonableness of the compensation or fees to be paid for services, but also the qualifications of the service provider and the quality of the services that will be provided."** (*emphasis added*)

(a) The preambles continue: "A responsible plan fiduciary should not consider any one factor, including the fees or compensation to be paid to the service provider, to the exclusion of other factors. Further, a fiduciary need not necessarily select the lowest-cost service provider, so long as the compensation or fees paid to the service provider are determined to be reasonable in light of the particular facts and circumstances."

2. The preambles also state: "The Department's interest in this proposal stems from concerns about the fees paid for by employee benefits plans, and the ability of plan sponsors and fiduciaries to understand these fees which may be paid directly or indirectly by plans. **The Department**

believes that greater understanding of these fees by the affected parties will increase efficiency and competition in the service provider market and generate benefits to plans and thus to plan participants." (*emphasis added*)

3. **The proposed regulations are not limited to 401(k) plans.** They will apply to all employee benefit plans seeking exemption from the prohibited transaction rules under § 408(b)(2) of ERISA, such as health plans.

4. The DOL is expected to issue regulations regarding disclosures to plan participants.

5. The proposed regulations do not apply to fees paid by a plan sponsor (that is, the employer), as opposed to the plan.

6. The regulations are proposed to become effective 90 days after publication of the final regulations in the *Federal Register*. It is difficult to forecast when the final regulations may be issued, particularly in light of the numerous comments that were made in response to the proposed regulations.

7. Legislation has been introduced in Congress relative to fee disclosures. The primary bill, "401(k) Fair Disclosure for Retirement Security Act" (H.R. 3185) provides for various disclosures from plans to participants and from service providers to plan adminstrators.

IV.
CLASS ACTIONS

A. Recent Class Action Filings

1. Numerous class action cases (more than 2 dozen) have been filed and are pending against employers, individual fiduciaries, and service providers. The filings began in late 2006 and continue to be made.

2. Predominately, the cases have been filed against employers and fiduciaries associated with larger plans. There is little legal precedence regarding the types of allegations that have been made.

3. The complaint's allegations and claims generally include the following:

(a) Inadequate investigation of fees and expenses by fiduciaries.

(b) Inadequate disclosures regarding plan fees and expenses to participants.

(c) Plan assets are too heavily invested in stock of the sponsoring employer.

(d) Payment of active management fees on passive/index-type investment funds.

(e) Limitation of investment options to one fund "family."

(f) Too much service provider discretion over revenue sharing.

(g) Excessive revenue sharing; that is, allegedly more is being paid to providers than would be paid if the applicable services were obtained separately.

(h) Use of investment funds with high expense charges.

(i) Breach of fiduciary duties by providers in negotiating and receiving revenue sharing.

(j) Nonspecific allegations regarding the existence of prohibited transactions.

4. The focus of these cases began with the alleged payment of excessive fees by fiduciaries on behalf of the plans primarily in connection with revenue sharing. The resulting allegation is that the fiduciaries breached their duties. The focus of the cases has expanded to include challenges relating to the plan sponsor's selection of actively managed funds.

5. The primary observation relating to these cases, for now, is that there is tremendous focus on this issue. **This requires fiduciaries to be cognizant of their roles and associated responsibilities, which includes engaging in a "process" to document consideration of investments and fee related issues and ongoing monitoring.** It is the fiduciaries' responsibility to unravel and understand these complicated arrangements.

V.
FORM 5500 – SCHEDULE C CHANGES

A. Schedule C Changes

1. The Form 5500 which must be filed annually by most employee benefit plans contains a "Schedule C" which reports information regarding plan service provider, including fees.

2. The Schedule C has been revised. The revised schedule is not effective/applicable until the 2009 plan year.

3. The revisions to Schedule C are the result of concerns similar to those giving rise to fee disclosure regulations (and other activity) – increasing disclosure of plan fees and expenses will assist plan fiduciaries in fulfilling their duties. Accordingly, the Schedule C revisions generally require more detail regarding fees paid to plan service providers

4. The revisions to Schedule C of the Form 5500 are not alone. There were numerous revisions to Form 5500 that will take effect for the 2009 plan year, including mandated electronic filing.

5. Schedule C is currently only required for "large" plans. Large plans are those with 100 or more participants at the beginning of the plan year. Schedule C is also only required if such a plan paid any service provider $5,000 or more (directly or indirectly from the plan) during the plan year (which presumably will be the case in all instances) or if an accountant or actuary was terminated during the plan year. These requirements are not changed. Thus, plans will less than 100 participants at the beginning of the plan year need not complete or file Schedule C.

6. Notable revisions to Schedule C include:

(a) Separate reporting for direct and indirect payments.

(b) Expansion and revision of the codes that are entered on Schedule C to describe the types of services provide so that the services may be better described and also to better describe the types of fees.

(c) A new section where administrators are to identify service providers who file or refuse to provide information necessary to complete Schedule C.

(d) More detailed information is required relative to indirect compensation.

(e) An alternative reporting option for service providers that receive only "eligible indirect compensation." Eligible indirect compensation includes "certain types of common investment related fees."

* * *

This outline is intended to provide general information only. It does not provide tax or other legal advice or opinions. The application of ERISA law can be complex, and this outline does not apply the law to your particular facts and circumstances. For the impact of the law under your particular situation, you are advised to seek qualified counsel.