THE WAGNER LAW GROUP

A PROFESSIONAL CORPORATION

Legal Updates in the ERISA & Employee Benefits World

ERISA, Employee Benefits and Executive Compensation Law

October 25, 2010

Table of Contents

The Wagner Law Group News

Super Lawyers magazine has named **Marcia Wagner**, **Russ Gaudreau** and **John Keegan** as Massachusetts Super Lawyers. They were chosen by their peers and through independent research. **Ari Sonneberg** received the Rising Star nod as one of the State's top up-and-coming attorneys.

Roberta Johnnene has joined the firm as an attorney. She has formidable experience in the financial services sector of investments and insurance, as well as the accounting industry.

Alvin Lurie, Of Counsel to The Wagner Law Group in New York, has been named an adviser to the Federal Tax Institute of New England. He was the first person to occupy the statutory position (established under ERISA) of Assistant Commissioner of Internal Revenue in charge of Employee Plans & Exempt Organizations, serving in that capacity from 1974 to 1978. In 2007, he was the first recipient of the Lifetime Achievement Award of the American Bar Association Tax Section's Employee Benefits Committee.

Tax Management of the Bureau of National Affairs published "*EPCRS - Plan Correction and Disqualification*"

The U.S. Department of Labor ("DOL") has released two sets of highly anticipated regulations this month. The timing of these regulations is unusual, in that they were released just one week apart. The first set to be released was the DOL's final regulations on mandatory fee disclosures for plan participants. The second set was the DOL's proposed rulemaking to broaden its "fiduciary" definition under ERISA. This Legal Update provides an overview of both sets of regulations and discusses the potential impact on administrative service providers and financial advisors.

If you have any questions or seek our counsel, please contact any of The Wagner Law Group attorneys, specialists in ERISA, employee benefits and executive compensation law.

To learn more about our team and practice, please visit our website at ***www.erisa-lawyers.com***.

Best Regards,
Marcia Wagner

DOL Issues Final Regulations on Mandatory Fee Disclosures for Plan Participants

On October 14, 2010, the DOL finalized its regulations concerning the fee and investment-related disclosures that must be provided to participants in 401(k) plans and other defined contribution plans with participant-directed investments. The final regulations are generally consistent with the DOL's 2008 proposed rules, reflecting modest changes based on comments received by the agency.

In its press release announcing the issuance of these final rules, the DOL explained that existing law did not require plans to provide workers with "the information they need to make informed investment decisions regarding the investment of their retirement savings," such as fee and expense information. However, the new rules would enable the estimated 72 million affected participants "to meaningfully compare the investment options under their plans."

Types of Plans Covered

The new participant disclosure requirements only apply to participant-directed individual account plans, such as 401(k) plans, and they do not apply to defined contribution plans with employer-directed investments.

Many participant-directed plans are designed to comply with the requirements of ERISA Section 404(c), a provision which relieves plan sponsors of any fiduciary responsibility for the investment allocation decisions of individual participants. However, the new participant disclosure requirements cover all participant-directed

by **Marcia Wagner** and **Diane Cohen**. The comprehensive portfolio discusses the potentially adverse consequences of plan disqualification and the options available to plan sponsors when plans fail to conform with the exacting requirements that the tax law imposes.

Marcia Wagner is the immediate past Chair of IRS Advisory Committee on Tax Exempt and Government Entities, Employee Benefits Subcommittee, which offers advice and consultation to the IRS on pension matters.

Recently Presented Seminars

Below are links to seminar material that Marcia Wagner recently presented.

"**Pension Plans: Everything You Need To Know, But Were Afraid To Ask,"** Greater Boston Chapter of International CEBS Society ~ Fundamentals of Retirement Plans, October 21, 2010 in Norwood, MA

"What is New in DC: The Most Critical Items to the Obama Administration," iShares 401(k) Experience, October 8, 2010 in San Francisco

"March Toward Socialism: What It Means for the Pension Industry," CFDD 2010 Advisory Conference, October 7, 2010 in Chicago

"ERISA Litigation and Trends Update," CFDD 2010 Advisor Conference, October 6, 2010 in Chicago

"Protection of Plan Fiduciaries Through Insurance," CFDD 2010 Advisor Conference, October 6, 2010 in Chicago

"What is New in DC: The Most Critical Items to the Obama Administration," John Hancock Retirement Services Mixer Meeting, October 12, 2010 in Houston

"Pension Plans: Everything You Need to Know, But Were Afraid to Ask," American Society of Otolarngologists 2010 Annual Meeting and OTO Expo, September 27, 2010 in Boston

"What You Need to Know About

plans, even if they are not designed to comply with ERISA Section 404(c). The fiduciary obligation to provide the mandatory disclosures is generally imposed on the plan sponsor.

Coverage of Participants

The new disclosure requirement applies to all eligible employees, and not merely participants who have actually enrolled in the plan. Thus, the entire eligible employee population will need to receive the relevant disclosures on an ongoing basis. The required disclosures include both plan-related information and investment-related information.

Annual and Quarterly Disclosure of Plan-Related Information

Under the DOL's final regulations, participants must be furnished general information about the plan annually, including an explanation of how participants may give investment allocation instructions and information concerning the plan's investment menu. Plan participants must also receive an annual explanation of the *general administrative service fees* which may be charged against their accounts as well as any *individual expenses* charged for individualized services (*e.g.*, plan loan processing fee). With respect to new participants, this information must be provided before they can first direct investments under the plan.

Participants must also receive certain information on a quarterly basis. They must receive statements that include the quarterly dollar amounts actually charged to their plan accounts as general administrative service fees and as individual expenses, as well as a description of the relevant services.

The annual and quarterly fee disclosures for general administrative services and individual expenses only apply to the extent such fees are not already reflected in the total annual operating expenses of the plan's investments. For example, if a service provider is wholly compensated through indirect compensation flowing from a plan's investment funds (*i.e.*, the provider's fees are already reflected in each fund's per-share market value or "NAV"), the provider's fees and services would not be subject to these annual and quarterly fee disclosures. However, if any portion of the fees for general administrative services are paid from the total annual operating expenses of any of the plan's investments (*e.g.*, through revenue sharing or 12b-1 fees), an explanation of this fact must be included in the quarterly statements.

Annual Disclosure of Investment-Related Information

Plan participants must receive certain fee and performance-related information relating to the plan's various investment alternatives in a comparative format, for which the DOL has created a "model comparative chart." This information must be provided on or before the date on which a participant can direct investments, and annually thereafter.

The comparative information which must be provided includes: (a) the name and type of investment option, (b) investment performance data, (c) benchmark performance data, (d) fee information, including both the *total annual operating expenses* of each investment alternative and any *shareholder-type fees* which are not reflected in the total annual operating expenses, such as commissions and account fees, and (e) the internet website address at which additional information is available.

Information That Must Be Available Upon Request

Upon request, participants must be provided copies of fund prospectuses (or other corresponding documents) as well as any shareholder reports and related financial statements provided to the plan.

Form of Disclosure

The annual disclosures required under the DOL's regulations may be provided separately or as part of the plan's summary plan description ("SPD") or participant benefit statements. The required quarterly statements may also be provided

Health Care Reform Compliance," National Health Care Reform Conference, September 22, 2010 in Los Angeles

"Keeping Up With DC," Planadviser Fourth Annual National Conference, September 21, 2010 in Orlando

Articles Published

Below are links to recently published articles written by Marcia Wagner.

"Partial Termination Plan Liability," ***401(k) Advisor***, September 2010

"Plan Sponsor's Duty to Avoid Conflicts of Interest," ***Journal of Pension Benefits,*** Autumn 2010

Television Appearances

Below are recent television appearances by Marcia Wagner.

Fox News - The Strategy Room (with anchor Tracy Byrnes), "State Pensions," October 22, 2010

Fox News - The Strategy Room (with anchor Tracy Byrnes), "Pension Plan Liabilities to PBGC," October 11, 2010

KRON 4 San Francisco - "Auto IRA Act and How this Affects Retirement Plans," October 9, 2010

Webinars & Podcasts

Below is a recently conducted webinar by Marcia Wagner.

"A Fiduciary Guide for Target Date Funds," Legg Mason, September 28, 2010

Quoted Articles

Below are links to recently published articles quoting Marcia Wagner.

"Automatic IRA 'Death Knell of Private-Pension System," ***Investment News,*** October 8, 2010

"PANC 2010: Keeping up with D.C.," ***Planadviser.com,*** October 4, 2010

"'I'll Work Till I Die': Older Workers Say No to Retirement," ***CNNMoney.com,*** September 28, 2010

separately or as part of the plan's participant benefit statements. All disclosures must be written in a manner calculated to be understood by the average participant.

Impact on Plan Sponsor's Other Fiduciary Duties

As expressly provided in the new DOL regulations, a plan sponsor's compliance with the new disclosure rules will not relieve it of its fiduciary duty to prudently select and monitor the plan's providers and investments.

The new regulations modify the DOL's existing regulations under ERISA Section 404 (c). As discussed above, a plan sponsor can be relieved of any responsibility over the investment allocation decisions of individual participants, provided that the regulatory conditions under Section 404(c) are satisfied. To comply with the applicable investment-disclosure requirements under the 404(c) regulations, as modified by the DOL's new rules, participants simply need to receive the annual and quarterly disclosures required under the new regulations.

Effective Date

Although the DOL's participant disclosure regulations have been finalized, they have a delayed application date. The new disclosure requirements will be imposed on plan sponsors for plan years beginning on or after November 1, 2011. In the case of calendar year plans, they will go into effect on January 1, 2012.

Potential Impact on Administrative Service Providers

The new regulations will clearly have the greatest impact on third party administrators ("TPAs") and bundled service providers. Given the fact that the DOL's final regulations are generally consistent with its 2008 proposed rulemaking, providers that have already modified their systems based on the DOL's proposed rules are likely to require modest changes only.

There will be one administrative advantage under the new participant disclosure regime. Under existing 404(c) regulations, participants generally must receive a copy of a fund's prospectus prior to the participant's initial investment in such fund. As a practical matter, this burdensome requirement forced recordkeepers to deliver copies of all the plan's fund prospectuses to all new participants. However, as modified by the new rules, prospectuses will only need to be provided upon request by a participant.

Potential Impact on Financial Advisors

Under the new regulations, there is no special disclosure requirement for the fees and services of brokers receiving indirect compensation only (*e.g.*, 12b-1 fees and other types of revenue sharing payments). If the broker's compensation is fully reflected in the total annual operating expenses of the plan's investments, the annual and quarterly fee disclosures of plan-related information, as discussed above, would not apply. To the extent the broker's advisory services were deemed general administrative services, an explanation that a portion of the fees for such services were being paid from the total annual operating expenses of the plan's investments would have to be included in the quarterly statements. However, whether a broker's advisory services should be characterized as general administrative services is somewhat unclear under the new regulations.

With respect to registered investment advisers ("RIAs"), it is similarly unclear if a RIA's separate advisory fee (unrelated to the total annual operating expenses of the plan's investments) should be characterized as a general administrative service fee or a shareholder-type fee. If the advisory fee is deemed to be a general administrative service fee, it would need to be reflected in both the annual and quarterly disclosures, although the RIA's advisory fee would not have to be separately itemized. If the RIA's advisory fee can be categorized as a shareholder-type fee, they would not have to be reflected in the quarterly disclosures.

Even if the impact of the new regulations on many financial advisors will be indirect, it is likely to be significant. Given the detailed level and comparative nature of the

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The Wagner Law Group Description

The Wagner Law Group, A Professional Corporation, is a nationally recognized ERISA, employee benefits, executive compensation and employment firm.

Established in 1996, The Wagner Law Group has 15 attorneys engaged exclusively in employee benefits law. The firm is among the largest ERISA boutiques in the country. The practice is national in scope, with clients in more than 30 states and several foreign countries.

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disclosures that will be provided to participants, many will scrutinize their respective plan's investments and fees. The enhanced disclosures may also prompt them to pressure plan sponsors, asking "hard" questions about the performance of the plan's investments as well as the size of plan fees. This pressure is likely to reinforce the heightened scrutiny of 401(k) fees that is already being applied in the retirement plan market.

DOL Regulatory Proposal to Broaden Its "Fiduciary" Definition Under ERISA

On October 21, 2010, the DOL released its proposed regulations to modify the existing regulatory definition of an "investment advice fiduciary." The DOL's proposed rules broaden the existing regulatory definition of "investment advice" under ERISA considerably.

Two Specific Changes to Regulatory Definition

The proposed regulations, if adopted, would make two specific changes to the existing definition of "investment advice." Under the existing rule, advisors are deemed to provide investment advice if, among other requirements:

- there is a "mutual" understanding or agreement that the advice will serve as the "primary basis" for plan investment decisions, and

- the advice is provided on a "regular basis."

However, under the DOL's proposed rulemaking, an advisor is deemed to provide investment advice if there is any understanding or agreement that the advice "may be considered" in connection with a plan investment decision, regardless of whether it is provided on a regular basis. Under both the existing and the proposed rules, advice will constitute "investment advice" only if it is individualized advice for the particular plan client.

Safe Harbor for Avoiding Fiduciary Status

In addition to broadening the existing "investment advice" definition, the proposal effectively introduces a safe harbor that advisors would need to follow to avoid fiduciary status.

Generally, to avoid being characterized as an investment advice fiduciary, an advisor must be able to "demonstrate" that the plan client knows, or reasonably should know, that (a) the advice or recommendations are being made by the advisor in its "capacity as a purchaser or seller" of securities or other property, and (b) the advisor is not undertaking to provide "impartial investment advice." The proposal does not specifically require a written disclosure to be provided to the plan client (except in the case of platform providers as discussed below), but the proposal clearly contemplates written disclaimers.

Two Specific Activities Exempted Under Safe Harbor

The proposed rules further state that investment education within the meaning of the DOL's longstanding guidance on non-fiduciary education, as provided under Interpretive Bulletin 96-1, shall not constitute investment advice.

Furthermore, investment advice shall not include a platform provider's marketing or making investment alternatives available to a plan (without regard to individual needs of a plan) or providing general financial information to assist a plan fiduciary's selection or monitoring of such investment alternatives, provided that the platform provider discloses in writing that it is not providing impartial investment advice.

Potential Impact on Financial Advisors

If the proposed regulations were finalized in their current form, brokers currently

advising 401(k) plan sponsors and participants in a non-fiduciary capacity would undoubtedly need to change their service model and re-define their role as plan advisors. To avoid fiduciary status, they would effectively be forced to furnish written disclaimers to plan clients, stating that they are not providing impartial advice, as contemplated under the proposed DOL guidance.

If they failed to provide any disclaimer, a broker could be viewed as an "investment advice fiduciary" and any variable compensation, such as 12b-1 fees, received by the broker would trigger a non-exempt prohibited transaction under ERISA. The penalties for a prohibited transaction generally include a right of rescission by the plan client, a "first tier" 15%-per-year excise tax and a "second tier" 100% excise tax, and a 20% civil penalty on any amounts recovered through DOL action.

Alternatively, a broker could avoid these penalties by becoming a dual-registered investment adviser. This action would enable it to charge an asset-based fee (such as a wrap-fee), eliminating the problems associated with variable compensation.

Potential Impact on Other Providers

The proposed regulations, by their terms, would impact platform providers directly. To comply with the proposed safe harbor, they would need to disclose in writing that they are not providing impartial investment advice. This may have a substantial impact on platform providers that deliver advisory services regarding the selection of plan investment alternatives, especially those delivering such services in exchange for any type of direct or indirect compensation. Like brokers, platform providers offering advisory services could provide non-conflicted advice by adopting an asset-based fee, although this change would similarly require the provider to become registered as an investment adviser.

Similarly, TPAs that also provide advisory services in exchange for variable compensation would need to either provide the required disclaimers, or register as investment advisers in order to provide their advisory services for a level fee in a non-conflicted manner.

Submitting Comments to DOL

Written comments on the proposed regulations may be submitted to the DOL on or before January 20, 2011.