

PRIVATE INVESTMENT FUND UPDATE

DOL Publishes Enforcement Guidelines for Receipt of Gifts and Gratuities by Plan Fiduciaries

October 2008

Over the last eighteen months, the Employee Benefits Security Administration (EBSA) of the Department of Labor (DOL), through its Director of Enforcement, has indicated that it would view the receipt by a fiduciary of any gifts or gratuities from a plan service provider or other third party, even items of modest value, as a potential violation of ERISA's "anti-kickback" rule (ERISA § 406(b)(3)). DOL compounded concern over this issue in its instructions to the revised annual report (Form 5500) for the 2009 plan year. The instructions indicate that plan service providers generally are required to report "indirect compensation" in the form of gifts and gratuities, but also caution that gifts and gratuities of any amount that are received by plan fiduciaries may violate ERISA and give rise to civil and criminal penalties. These various pronouncements have called into question the permissibility of longstanding business practices, but have failed to clarify the boundaries of DOL's seemingly draconian position on business meals and entertainment.

In general, plan sponsors and other purchasers of services on behalf of ERISA

plans are most at risk of being deemed in violation of ERISA's anti-kickback rule through the receipt of gifts, entertainment or other consideration from plan service providers. Violations of ERISA's anti-kickback rule could subject such persons to excise taxes under Section 4975 of the Internal Revenue Code, as well as liability for fiduciary breach. However, persons who provide gifts or entertainment to plan fiduciaries could also have liability for knowingly participating in the fiduciary breach.

In August 2008, DOL added a new section to its enforcement manual to clarify the standards its examiners are expected to apply in evaluating whether to bring enforcement actions against plan fiduciaries for violating ERISA's anti-kickback rule in connection with the receipt of gifts or entertainment from third parties. The new language is set forth in Section 12 of Chapter 48 (the "Fiduciary Investigations Program") of DOL's enforcement manual, available online at <http://www.dol.gov/ebsa/oemmanual/cha48.html>. Although the new language was withdrawn without explanation from the web site soon after

its initial publication, the language has been restored and, as of this writing, remains accessible to the public through DOL's web site.

For convenience, the guidance is reproduced in its entirety below:

12. Fiduciary Violations Involving Gifts and Gratuities. *Investigations may disclose possible fiduciary violations involving a plan fiduciary's acceptance, from a party dealing with the plan, of consideration such as meals, gifts, entertainment, or expenses associated with educational conferences. In such cases, the Investigator/Auditor should determine whether the facts support an allegation that the receipt of gifts, gratuities, or other consideration were for the fiduciary's personal account and received in connection with a transaction or transactions involving the assets of the plan as required for a violation of ERISA § 406(b)(3). The Investigator/Auditor should also determine whether the fiduciary or the plan maintained a reasonable written policy or plan provision governing the receipt of items or services from parties dealing with the plan and whether the fiduciary adhered to that policy.*

Further, for enforcement purposes only, the Investigator/Auditor generally should adhere to the following guidelines:

(1) The Investigator/Auditor should treat as insubstantial, and not as an apparent violation of ERISA § 406(b)(3), the receipt by a fiduciary (including his or her relatives) of the following items or services from any

one individual or entity (including any employee, affiliate, or other related party) as long as their aggregate annual value is less than \$250 and their receipt does not violate any plan policy or provision: (a) gifts, gratuities, meals, entertainment, or other consideration (other than cash or cash equivalents) and (b) reimbursement of expenses associated with educational conferences.

(2) The Investigator/Auditor should not treat the reimbursement to a plan of expenses associated with a plan representative's attendance at an educational conference as a violation of ERISA § 406(b)(3) if a plan fiduciary reasonably determined, in advance and without regard to whether such expenses will be reimbursed, that (a) the plan's payment of educational expenses in the first instance was prudent, (b) the expenses were consistent with a written plan policy or provision designed to prevent abuse, (c) the conference had a reasonable relationship to the duties of the attending plan representative, and (d) the expenses for attendance were reasonable in light of the benefits afforded to the plan by such attendance and unlikely to compromise the plan representative's ability to carry out his or her duties faithfully in accordance with ERISA. The fiduciary's determination should be in writing.

As stated in Section 12 of the Fiduciary Enforcement Program, a fiduciary's receipt of a gift, gratuity or other con-

sideration would not violate ERISA's anti-kickback rule unless it is received "in connection with a transaction or transactions involving the plan," such as the purchase with plan assets of an interest in a fund or the engagement of an investment manager on behalf of a plan. Arguably, routine business meals, educational programs and certain other types of benefits provided by a plan service provider or prospective service provider should not be deemed to be received by the plan's fiduciary in connection with a transaction involving the plan. However, neither ERISA nor interpretations under ERISA establish a *de minimis* standard or afford guidance on where the line should be drawn.

Section 12 for the first time describes a *de minimis* standard under which plan fiduciaries will not be assumed to have violated ERISA's anti-kickback rule if they receive gifts, gratuities, meals, entertainment or other non-cash consideration with an aggregate annual value of less than \$250. This standard is quite similar to the approach adopted by DOL for purposes of the "LM-10" used to report gifts, entertainment and other payments to union officers or employees.

In addition, the new provisions indicate that plan fiduciaries will not be assumed to have violated ERISA's anti-kickback rule if they receive reimbursement of expenses relating to attendance at educational conferences without regard to the \$250 limit, provided certain additional conditions are satisfied. Most

significantly, a plan fiduciary must make an advance determination, which "should" be in writing, that the plan's payment of the educational expenses would be prudent without regard to the reimbursement arrangement, that the plan representative's attendance will be reasonably related to his or her plan-related duties, that the expenses are reasonable in light of the benefits conferred, and that the expenses are consistent with a "written plan policy or provision" designed to prevent abuse.

The enforcement manual does not purport to establish a legal framework for identifying violations of ERISA's anti-kickback rule, but rather describes circumstances under which the receipt of gifts, entertainment or similar compensation will not be treated as an "apparent" violation. The principles set forth in new Section 12 do not constitute a formal interpretation under ERISA, and could be withdrawn or modified in the future. Moreover, DOL's enforcement positions do not necessarily bind private litigants.

However, the standards serve as a reminder to plan fiduciaries of the importance of maintaining a written compliance manual and procedures to ensure compliance with ERISA's fiduciary requirements. In addition, investment managers and other service providers to employee benefit plans should consider incorporating these standards into their compliance manuals or other internal procedures.

If you have any questions regarding the information presented in this Client Update, or would like more information on this topic, please contact any of the lawyers listed below or your usual Mayer Brown lawyer.

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