ASSOCIATION OF CORPORATE COUNSEL

TITLE: **401 (k) Fees – An Update on Regulatory Actions Affecting Service Providers**

DATE: **July 23rd, 2008**

PRESENTED BY: ACC Financial Services Committee

SPONSORED BY: **Steptoe & Johnson LLP**

FACULTY: **Melanie Nussdorf,** Partner, Steptoe & Johnson LLP
Eric Serron, Partner, Steptoe & Johnson LLP

MODERATOR: **Ed Mervine**, VP & General Counsel, Pathfinder Bank & ACC Financial Services Committee Chair

*****

Operator: Just a reminder. Today's conference is being recorded.

Sandy: Welcome to this ACC webcast. Ed, please go ahead.

Ed Mervine: Thank you, Sandy. This is Ed Mervine and I want to thank everybody for attending today's webcast. Good afternoon to everyone or good morning depending upon where you're calling in from or attending. I am the Chair of the Financial Services Committee of ACC. And this webcast this afternoon is being presented in lieu of our monthly meetings that are held before Wednesday every month. So I encourage all of you who are not members of the Financial Services Committee to join our committee and we'd be happy to have you.

This afternoon's webcast is being presented by our sponsor, Steptoe & Johnson. Our sponsor's been a very good sponsor of our committee and we thank them for their efforts.

The particular presenters this afternoon will be Eric Serron. Eric is a partner of the Washington office of Steptoe & Johnson. He's a member of the litigation department and he practices primarily in the employee benefits area with a particular emphasis on ERISA compliance. Joining Eric will be his partner Melanie Nussdorf. Melanie is a partner as well in the Washington office of Steptoe where she's a member of the tax and employee benefits group. She represents a number of financial institutions, including major banks, brokerage houses, and insurance companies.

Before I turn the webcast over to Eric and Melanie, there are a couple of administrative details that I'd like to advise our participants of. First is that you can submit a question, and we encourage you to submit a question, to a our participants by typing down in the left-hand corner of screen and sending – and pushing the send button, and the questions will be collected by me and at the very least gone over at the end of the presentation. We might be able to interject them as we go along as well. So if anybody has any questions, please type them and send them in to us.

The second administrative matter is you'll see on the left-hand side of your screen a links box. And that links box provides some information about the – Melanie and Eric and some frequently asked questions, information on Steptoe & Johnson, and also a copy of the presentation slides that Melanie and Eric will be going through.

So with that brief introduction, without further ado I'd like to turn it over to Melanie and Eric. And, once again, please submit your questions and we'll try to get our experts to answer them. Thank you.

Eric Serron: Thank you, Ed. As many of you know, service provider fee arrangements with ERISA plans are now under scrutiny at pretty much every government level. In the courts we've seen a flurry of ERISA-based law suits challenging allegedly excessive fees paid to 401(k) plan service providers. There are about 30 of those – or at least 30 of those cases pending in courts across the country right now. Most of them are against plan sponsors and fiduciaries of the plans in question. A number of them also though have joined service providers as defendants, and there is one group of cases out there where only service providers are the defendants. Then in Congress there's proposed legislation pending in both houses that deals with service provider fee issues in the context of participant directed individual account plans.

In addition to Congress and the courts, the Department of Labor has also been looking carefully at service provider fee arrangements. The focus of the DOL's attention has been fee transparency issues and also potential conflicts of interest in the area again of participant-directed individual account plans. Why the focus on participant individual account plans? Well, there are now about 437,000 of these plans covering about 65 million participants and holding about 2.3 trillion in assets. Along with the growth of these plans has come what many view as a bewildering array of different types of service provider fee arrangements, some of which have been difficult for plan sponsors to get a good handle on. And in some cases the fee arrangements have raised concerns about conflicts of interest, particularly in the area of investment advice provided to fiduciaries and participants of these plans.

The department of course has a strong interest in making sure that the sponsors of these plans have all the information they need to make prudent choices since the sponsors have a duty to act prudently, both in selecting service providers and in choosing investment options for these plans. And it also wants to encourage plan sponsors themselves to give participants of these plans all the advice and information they need to make informed decisions in investing their individual accounts.

Now, the focus of our attention today will be various initiatives coming out of the department that are intended to improve fee disclosures to the public, to plan sponsors, and to participants of participant-directed individual account plans. And the timing couldn't be better, because just this week we've seen two important developments coming out of the Department of Labor. On Tuesday this week the department published a FAC on its Web site that provides guidance on the recent changes for the Schedule C of the Form 5500. Melanie will be talking about that in a moment. And then just today, hot off the presses, the DOL published a proposed regulation in the federal register dealing with disclosures to participants of participant-directed individual account plans. So both of these are very recent developments and we'll try to give you a heads up on those here today.

We'll also talk about the department's proposed amendments to its 408B2 regulation dealing with service provider contracts and spend a few minutes at the end talking about the DOL's recent focus on gifts on gratuities.

Now, before we go any further, let me just say a few things about the PowerPoint we'll be using in this presentation. It is both over-inclusive and under-inclusive. On the over-inclusive side, some of the slides are included only to provide you with some background information that you can review at your leisure. And examples would be the summary of the Form 5500 Schedule C changes at the beginning, and then several slides at the end dealing with gifts and gratuities. We'll be skipping over quite a few of those slides. And then on the under-inclusive slide, the proposed regulation issue today is noted only briefly in the PowerPoint. Rather than try to re-do the PowerPoint in the couple of hours we had, we included a separate ERISA advisory that our firm released yesterday which I believe in your materials would be either number five or number six. Let me just scroll down here. It looks like it's number six.

So that introduction let me turn it over to Melanie to talk about the latest developments involving the Schedule C to the Form 5500.

Melanie Nussdorf: One thing I'd like to start with is the Department of Labor's Web site is really quite terrific in terms of giving you guidance on what they're doing. You can get links to all of the proposed and final regulations as well as the frequently asked questions that came out this week. The Web site is www.dol.gov/ebsa. And I highly recommend it. It also has all the department's exemptions on it and all their advisory opinions and information letters.

So the Form 5500. Planned sponsors have been filing 5500 as long as ERISA has been enacted. That's more than 30 years. And the 5500 has always had a Schedule C for service provider fees. If you are a service provider earning more than $5,000 from the plan, you provide the information for the plan administrator to actually fill out his own 5500 Schedule C. That information was really quite slim, and the department four or five years ago decided that plan sponsors needed a lot more information about what its service providers were earning. In part because not all of the fees are paid by the plan. Some are in fact paid by mutual fund complexes, banks, through revenue sharing, service fees, 12B1 arrangements. And therefore the Labor Department believes that unless a service provider gave the plan a really clear understanding of how much it received and from where, the plan sponsor was at a disadvantage understanding whether or not it was over paying for the services it was receiving.

So the Labor Department proposed changes to the 5500 which were finalized in November of last year. And the changes are effective with respect to plan years beginning 1/1/09, next year. That means that the Schedule C for that year will be filed in July of 2010. But any systems or programs necessary to collect this information will need to be in place by January 1, '09.

So one of the biggest comments from the service provider industry in general was there are so many things we don't understand about the instructions we can't possibly get this done by January 1, '09, in order to get systems in place to capture this information. In the department's frequently asked questions came out this past week, the department says in Q&A 40 do your best. The reason why this is important is because the 5500 creates a system whereby a plan sponsor has to report a service provider who has failed or neglected to give complete information to the plan sponsor for the 5500. So nobody wanted their name in lights as being a non-complier, and the plans were at a loss as to whether or not they could impose some reasonable rule when they didn't get all the information they needed.

So the Q&As that the Labor Department put out make clear that if in fact the service provider has diligently done its best, it does not have to be listed as a non-complier. The other provisions of the 5500 that are really important is that the department has clarified and simplified the kind of information that has be reported to a plan. There is and was an alternative rule for reporting this information that allowed you to provide a narrative giving ranges and estimates of fees and providing information on things like soft dollars for brokers, bundled services without specific dollar allocations. That was intended to deal with the kinds of disclosures that are made by mutual funds in their prospectuses under the 40 act. And the frequently asked questions provide great results here. They say that any accounts, including a separately managed account of a defined benefit plan, can use this alternative reporting rule to provide a narrative that sums up the information that's required by the 5500 without having to provide, for example, the actual brokerage incurred by the account, the legal fees, accounting fees, and other similar kinds of administrative fees that are incurred by the accounts.

So that was the first clarification. Another clarification that's very important is that the fees and expenses that have to be shown include brokerage fees only on the purchase or sale of a unit of an investment fund. So, for example, 12B1 fees, service fees, revenue sharing, but not the internal brokerage that takes place within the account. The reason why that's important is that most broker dealers don't have systems in place that would have captured and then correctly allocated this information to plans. And so the department has made it clear that what needs to

be reported is a broker's 12B1 fees that he's received on account of plan's purchase and not the institution's commissions for buying and selling securities within the account.

The next issue that I think is quite important is that the originally 5500 appeared to indicate that this information was required from funds like venture capital operating companies and real estate operating companies that don't hold plan assets and aren't subject to ERISA. And the frequently asked questions made clear that no information needs to be provided by these funds. For those people who have invested in hedge funds, which are not treated as covered by ERISA because they have under 25 percent plan investors, it's not absolutely clear whether the 5500 requires reporting from those funds. But it seems to us at least that using the alternative rule and providing the information that the funds generally report to their investors will satisfy the reporting requirements under the alternate reporting rule.

Another question that everyone had related to float. If float on cash participant checks or on cash awaiting a transaction was required to be specifically and accurately provided to a plan administrator, most service providers thought that there was no way that they would be able to create a system to do that since they don't collect that information for any other purpose. The department makes clear that if you can describe the fact of the float and describe the circumstances under which you as a service provider, bank or broker dealer, received that float, and you provide as much information as the department required five or six years ago in field assistance bulletin 2002-'03, the information will be sufficient and you will not have to give a dollar amount for either check float or transaction float.

One of the things the department clarified in their bundled service rule – a group of service providers can – if they provide their services in a bundle can provide the information in a bundle and don't have to allocate it among service providers. One of the things the department made clear is that if someone is separately getting 12B1 fees, shareholder service fees or the like within that group of bundled service providers, that has to be separately disclosed. For both plan sponsors and for service providers who were receiving these fees, the department has made clear that you can provide estimates and you can provide rates. So, for example, 25 basis points times the dollar amount in this particular fund. You don't actually have to do the math and the plan sponsor doesn't actually have to do the math, nor does the plan sponsor have to turn these estimate or ranges into numbers for purposes of displaying it on the 5500 in descending order. The department has walked away from the descending order requirements.

The only other thing I want to say about these frequently asked questions is that the plan sponsors written requirement can be satisfied almost entirely from ADDs, quarterly reports, and the kind of prospectus disclosure that you see in bank collective trusts, that you see in mutual funds, insurance companies separate accounts. So there doesn't have to be any complete rewrite of the kind of information that goes to plans. It just has to be tagged in a way that the plan administrator will be able to put that information in reasonable form for purposes of checking the box on the 5500.

Eric.

Eric Serron: All right, thanks, Melanie.

Two things to note about the Form 5500 schedule C that will help you understand the significance of the DOL's proposed regulation on service provider contracts. First, the form 5500 schedule C is essentially backward looking in the sense that it requires the plan administrator to report at the end of each plan year information about service providers fees that were actually paid during the year. Second, the form 5500, as Melanie I think indicated, imposes really no duty on the plan service providers to provide the information that the plan administrator needs to complete the form 5500 schedule C. And one of the problems faced by plan fiduciaries over the years has been that non-fiduciary service providers did not have or do not have any explicit duty under ERISA to provide this type of information. And the form 5500 simply attempts to deal with this problem through what I would call a bad boy list, by making you essentially list – the plan

administrator list any service provider that didn't give you the information. But that's the only real consequence.

The proposed regulation dealing with service provider contracts attempts to address both of those concerns. It's designed to give plan sponsors and fiduciaries the information they need up front in deciding whether to hire a particular plan service provider. And in addition, it also imposes an explicit duty on non-fiduciary service providers to provide the information that the plan administrator needs to complete the form 5500 schedule C. So that the two – the initiatives are tied together very closely.

Now, the proposed regulation would amend labor regulation 2550.408B2 to clarify what constitutes a reasonable contract or arrangement and to require more disclosures concerning plan contracts with service providers. You have to know a little bit about how ERISA's ((inaudible)) transaction rules work to understand how this operates. Without going into excruciating detail, ERISA section 406A prohibits transactions between parties and interest in plans. And parties and interest include service provider arrangements or service providers. So virtually any contract between a plan and a service provider is going to be prohibited by section 406A. And then you have section 408B2 that provides an exemption for reasonable service contracts or arrangements. What this proposed amended regulation does is it interprets the exemption for reasonable contracts or arrangements. And …

Melanie Nussdorf: One thing strikes me – I hope everybody knows the prohibited transaction provisions, if you violate them you have to reverse the transaction and put the plan back in the position it would have been in had the transaction not occurred. You have to disgorge your profits if you're a fiduciary. And there is an excise tax of 15 percent per year that goes on forever without the statute of limitations ever running. So the cost of violating the prohibitive transaction provisions is high, and getting it right under 408B2 is important. Otherwise all of the fees that a service provider gets are subject this excise tax.

Eric Serron: Correct. Pretty draconic results if you don't comply with it. Now, like 408B2 and the existing – there is an existing regulation of course in this, but it doesn't – this proposed goes further. But like the existing regulation, the proposed amendment applies without exception to all types of ERISA covered plans. So it's not just limited to participant directed individual account plans. And I would note that the same is true of the form 5500 schedule C changes that Melanie was talking about. Those apply across the board to all types of plans provided that the plans have 100 or more participants.

So what does the proposed amendment to 408 – the 408B2 reg do. Like the form 5500 schedule C changes, the proposed regulation focuses on the disclosure of direct and indirect compensation received by service providers as well as on potential conflicts of interest. And it does that – the department did that by proposing – or – when the department did this it attempted to limit the scope of these required disclosures by narrowing the group of service providers whose contracts or arrangements would be subject to the regulation. And in particular it – it tried to focus the proposed changes on service providers who were thought to be most likely to raise concerns about the receipt of indirect compensation or conflicts of interest. And you can see those here on the PowerPoint slides. The first category would be fiduciary service providers, and then also subject to this regulation would be providers of banking, consulting, custodial, insurance, investment advisory or management, record keeping, securities brokerage or third party administration services. And then there's another category of providers who receive indirect compensation for accounting, actuarial, appraisal, auditing, legal evaluation services. So those are the types of service providers whose contracts would be subject to this proposed regulation.

Now, for these types of service providers the proposed regulation would require certain disclosures both at the inception of the contract and then additional disclosures on an ongoing basis there after. So let's look first at the disclosures required at contract inception.

First there are required disclosures of the services to be provided and the compensation. The proposed regulation says that the contract must require the provider to disclosure information about all services to be performed and all compensation that will be received directly or indirectly from parties other the plan or the plan sponsor. In addition, it will require disclosure by the service provider of conflicts of interest, information about relationships or interests that may raise conflicts for the provider in performing planned services, and any policies or procedures that the provider has in place to address those conflicts. And in addition, the proposed regulation imposes an explicit requirement that the service provider not only include those provisions in its contract but that it in fact the required disclosures. And, again, as Melanie pointed out, the failure to do either of those things is going to result in a prohibited transaction that would require the entire thing to be undone and subject the provider to penalties.

Melanie Nussdorf: So one of the issues that people have raised is what if you provide a whole lot of disclosure, way more than you're providing now as the service provider, but you fail to provide one fact. That you're receiving, if you're an investment manager, receiving soft dollar services from you know more than the six brokers you named. In fact, there's a seventh. Does that one little failure invalidate the entire service contract and have you giving back all of your fees, or is there some rule that says if you've done a diligent job that's good enough. I think Eric may have mentioned the department got more comments on this regulation than I think they've ever gotten on any regulation they've ever issued.

Eric Serron: Over 100 comment letters.

Melanie Nussdorf: And, you know, pretty much 99 percent of them were negative. And so most people are picking over these requirements, especially because this just a proposed regulation, trying hard to understand whether a foot fault is going to be fatal.

If you're a plan sponsor you also care about that because you're the fiduciary who's supposed to be getting this information. And while you will have a class exemption that protects you from any excise taxes, if you are inadvertently receiving information that insufficient – if you in fact sign a contract where you know you haven't received the right information, you too could have liability.

Eric Serron: Right. Now, also in addition to the contract inception disclosures, I mentioned that there were some ongoing disclosure requirements. And they're basically two of those. One is that any material change to the information previously furnished must be disclosed within 30 days of the change. And then the other one – and this is where it's tied directly to the form 5500 schedule C – and it's a requirement that the provider disclose compensation or other contract related information requested by the plan administrator to comply with ERISA's reporting and disclosure requirements. In particular, schedule C of the 5500.

Now, along the lines that Melanie was mentioning before, the – in the question of what happens if we – if we blow this, the department did accompany this proposed regulation with a proposed class exemption. But that proposed class exemption provides relief only for the plan sponsors and fiduciaries and not for the party of inter service providers.

So what is the status of this? Well, the comment period on this proposed amendment ended on February 11. As we've already said, the DOL received a huge number of comments letters. And they – the comments were so extensive that it prompted the department to hold public hearings on proposed amendments on March 31 and April 1. During the course of those hearings the DOL indicated that it would receive supplemental written comments through April 21, 2008. And I believe if you go on the Web site you'll see about you know a dozen more comments being submitted in writing by that deadline.

The latest information we have now is that the DOL still plans to issue a final regulation by the end of 2008. Have you heard anything different, Melanie?

Melanie Nussdorf: No. I do think, though, that – from the department's point of view, if they don't get something done by the election it will not get done by the end of the year. So I think there is a lot of progress being made at the Labor Department. But it's almost August and they've got a lot on their plates, which you will see from Eric's next topic.

Eric Serron: Right. Now, this is one that is literally hot off the press. This morning the Department of Labor published in the federal register a proposed regulation that deals with the provision of fee information to participants of participant directed individual account plans. Now, unlike the other two initiatives that we've talked about already, this one affects only participant directed individual accounted plans. And it's directed to the exact areas that some of the pending legislation in Congress is directed at. And one important thing to keep in mind here is that this proposal is not limited just to plans that were intended to meet the requirements of ERISA section 404C. For those of you who don't know, 404C is the provision in ERISA that provides for a limitation of liability for the fiduciaries of participant directed account plans if the plans comply with the requirements of section 404C.

A lot of plans that are participant directed are not meant to comply or they weren't intended to comply with 404C. And in fact because of the detailed nature of the requirements 404C, even a lot of plans where the plan sponsor intended to comply failed to comply. So the department wanted to make this proposal broader than just 404C plans so that it would encompass literally any participant directed individual account plan.

This has been in the works for some time. The department initially requested information from the public back in April of 2007. It received a number of comments from a number of quarters. The – as I said, the proposed regulation was issued this morning. We've given you as part of the materials there's an advisory that we issued yesterday. The proposed regulation asks for public comments and those public comments would be – can be submitted to the department on or before September 8, 2008.

Yes, Melanie.

Melanie Nussdorf: You can actually get the proposed regulation itself from the Labor Department's Web site and we'll aid the Web site to your links. In addition, one of the things that the regulation does is propose a chart that one could follow in providing the fee disclosure to participants. And it is very straight forward and very clear and provides a really excellent framework for a plan sponsor to give this information to participants and for a service provider who's asked to help the plan sponsor fill it out to understand exactly what he's supposed to give.

Eric Serron: Now, the mechanism that the department used to go beyond 404C, which as I said was a limited liability provision, is the general fiduciary responsibility provisions in ERISA section 404. So the way this proposed regulation will work if it's adopted is that it will impose a fiduciary obligation on the plan's fiduciaries to provide the information required by the regulation to the participants of these plans. And the information that is – that is required to be disclosed falls into essentially three broad categories. One is just general plan information, information about the plan itself. And that would include an explanation of the circumstances under which participants can direct investments, an explanation of any limitation on transfers from one fund to another, information about how to submit instructions on voting and tender rights. It would also require disclosure identifying the designated investment alternatives in the plan. Incidentally, the term designated investment alternatives is defined specifically to exclude brokerage windows. So it's only the disclosure of the designated investment alternatives is – doesn't include them.

And then it would require identification of designated investment managers. And then there's a requirement that that information be updated within 30 days after any significant change. And another thing about all these disclosure requirements is that they are generally required to be provided to a participant on or before the first date of the participant's eligibility for the plan and then annually thereafter.

Another category that is required – where the disclosures will be required are plan administration expenses. And in defining plan administration expenses, the department specifically excludes expenses that are taken – or paid out of the assets of the investment alternatives. So that would mean that this particular part of the rule is requiring disclosure of – out of fees that are deducted from the participant's account or paid out of the participant's account either on a per capita basis or some other – some other basis. But not from the asset base fees in the – in the funds.

So in addition to requiring disclosure of the fees and expenses for administrative services that are not included in the net asset value of the investment alternative, they are also going to require disclosure of any individualized fees that are charged to the participants, such as quadro fees, fees for investment advice, fees for taking out participant loans and that sort of thing.

Yes.

Melanie Nussdorf: We're not absolutely sure, but you know we're thinking of the kind of plan that provides a brokerage window. So if there's a $100 fee for being able to be in the brokerage window, we believe that that fee has to be accounted for somewhere. Perhaps it's accounted for here in the individualized fees. But all in all we'll get more information about this when the regulation comments come in and when the regulation is finalized. But that's an interesting issue if you have brokerage windows to keep your eye on.

Eric Serron: Now, the third major category of information that is – that will be required to be provided to participants is information that relates to the investment alternatives. And this is the subject of the chart that Melanie mentioned earlier. The chart is one of the requirements of this disclosure requirement. And you know we would both urge you to go to the department's Web site. Right now it's posted on the very first page of EBSA's part of that Web site, which is www.dol.gov/ebsa. And there up front you're going to see this proposed regulation along with the comparison chart.

But the information that is required under this part of the regulation includes such things as for each investment alternative the name of the alternative, an Internet address where you can get additional information, including the name of the issuer of the investment alternative, the strategies that are being followed by the alternative, the assets held in the alternative, its investment performance and its fees and expenses. And then the Web site is also going to have to disclose the asset class. And this is the general asset class. It's –

Melanie Nussdorf: Large cap growth, large cap value.

Eric Serron: Right. And then also a disclosure of whether the alternative is actively or passively managed. An interesting side of this, a lot of the lawsuits out there are challenging the use of actively managed funds at all. Clearly the department isn't onboard with that challenge. But in addition, the plan fiduciary will have to supply one, five and 10-year returns of the investment if available. And what they mean by if available is if the fund has not been around for longer than two or three years, obviously you can only give you know however much performance history there has been. But – and then there's a requirement also that you include a cautionary statement that past returns are not predictive of future performance. And then there is a requirement in addition that the plan fiduciary supply the type and description of a number of shareholder service type fees that are specifically identified in the regulation. And they include sales charges, deferred charges, surrender charges, redemption fees, and mortality and expense fees.

This proposed regulation if adopted will be effective for plan years beginning on or after January 1, 2009. And we have a few minutes here. I can turn it over to Melanie to talk to you about the gifts and gratuities point.

Melanie Nussdorf: Anybody who's been hanging around ERISA much knows that one of the provisions of ERISA where there's been the most litigation is 406B3, which says a fiduciary shall not receive any consideration for his own personal account from any party dealing with the plan in connection

with a transaction involving the assets of the plan. There is a similar provision in the criminal code which makes it both a crime to take such a payment and also a crime to make such a payment.

The Department of Labor has spent quite a bit of time in the last year and a half talking publicly about gifts and gratuities. They are – if they ever were, they are no longer amused by lavish dinners, lavish lunches, trips, conferences where the content is very limited and the entertainment is very significant. The head of enforcement, Virginia Smith, talks all the time about how golf is per se a problem. In other words, the Labor Department believes that a plan fiduciary is supposed to be solely interested in the plan's investment and the plan's administration and should not be receiving payments which are unusual or lavish or not related to the plan.

Virginia Smith said in a speech in March 2007 where this started, every single one of our regions is going to be investigating this issue. And we're – we've seen quite a few investigations that have already been started and their regular subpoena requires you to say whether or not you have received any gifts, gratuities, meals, trips, or anything of the kind.

Eric Serron: And let me just add to that that the department has underway right now what's called a consultants and advisors project. I think it's called – they refer to it as CAP. And it's an enforcement initiative where they're not only going out and investigating the plans but they're investigating the service providers and they're asking these very same questions about gifts and gratuities to the service providers.

Melanie Nussdorf: And they're saying to service providers if you take a plan fiduciary on a hunting trip, the plan fiduciary is guilty of accepting a payment from a third party, you are guilty as a co-fiduciary of knowing there's an ERISA violation and not doing anything about it. Indeed, you caused it.

So one of the things that many people have said to the Labor Department is you know we can't tell whether or not you're going to go after the cup of coffee at Starbucks, the lunch at McDonald's, or you're only looking for something really great.

So we have urged the department and we believe the department will soon be adding to their investigative manual a provision that tries to put a bright line test out there for people to comply with. And it probably will be a set dollar amount per person, perhaps $250 per person per year. And other than that, it will only take a non-enforcement position with respect to substantive conferences which the plan pays for and is then reimbursed for assuming the plan determines that it is a reasonable expense for the plan to pay for.

The reason the department wants to go this route is to you know separate lunch from the hunting trip. Obviously if the $250 were paid to a plan fiduciary in cash it would not be ignored by the enforcement people at the Labor Department. But generally lunches, dinners, a ball game that comes to under 250 per year per person will – the department will take an non-enforcement position on that.

There is a provision in the 5500 schedule C that requires you to report these gifts and gratuities if they are under – if they're over $10 or in some cases $50. And so it doesn't – it doesn't really change the fact that plan fiduciaries need to be extremely careful about taking meals, gifts, entertainment, sports tickets, theater tickets from service providers to the plan.

I would expect within the next couple weeks that if you find the department's enforcement manual on their Web site you will see this new language included. The department's view on why the plan has to pay for the conference first is quite straight forward. Their view is that a plan fiduciary needs to make the judgment that in fact he's so sure the plan could pay for this, there's a reasonable and appropriate expense of the plan, that he has gone ahead and written the check. Sort of put your money where your mouth is kind of stance. Assuming he has done that and made that judgment, then the service provider can repay the plan.

So I would look forward to that. The department has also the investment advice regulation, which our understanding is pending it – the office of management and budget, we would expect that to be proposed within the next month to six weeks. That's something else to keep your eye on, how can advice but provided to plan participants without violating ERISA. And that will interpret the statutory exemptions that the pension protection act enacted in 2006.

Eric Serron: So with that, Ed, we'll turn it over for questions.

Ed Mervine: Perfect. Thank you very much, Eric and Melanie. Very good presentation and perfect timing, because we have about 10 minutes left for questions. I encourage people who are on the webcast to send in their questions. We've had a couple of them come in so far. If you – if you want to send a question, just type it down in that box and push the send button.

But let me get to the ones that we got so far. Here's the first one. I am general counsel for a plan sponsor. What is the practical to-do list that I must take away from the changes in the 5500 filing requirements?

Melanie Nussdorf: OK. The practical to-do list, starting on 1/1/09, is to make sure all your service providers know that you are expecting from them either the dollar amount of their fees direct or indirect, information that satisfies the alternative reporting rule, or information from a bundled service provider that includes their information, and you are going to expect it shortly after the end of '09. So I would if I were a plan sponsor immediately get out in my conversations with service providers the fact that that information is required, that you are expecting it. It's early notice that at least something that is responsive to the department's frequently asked questions will be required shortly after the end of '09.

Ed Mervine: So and then I guess I want to be clear on the response date. So these would be 5500s that are filed in '09 or …

Melanie Nussdorf: In 2010.

Ed Mervine: 2010. OK. And then I guess a similar question would be what if – what if I'm general counsel to a service provider. What kind of to-do list should I take away from these changes ((inaudible))

Melanie Nussdorf: Service providers – most service providers are – have really ramped up what they're trying to collect. So let's pretend you're a record keeper and you receive X dollars from the plan, but you also receive a million dollars from various mutual funds for record keeping services in the trailer sort of fashion service fee. Most record keepers are already putting in systems that would compile that information on a plan basis so that they can take their direct and indirect compensation, combine it and code it in the way that the Labor Department's going to require it to be coded, and put on the form for a plan sponsor. Brokers are doing the same things, though theirs is a little more complicated because you're needing to find all the individual brokers who may have arrangements with plans and get them somehow into your system so that you can then report that compensation. Because of course all of that is indirect compensation and a broker dealer might not know about it.

With respect to other service providers, usually they are paid by the plan. To the extent they're paid by a third party, sometimes in a directed brokerage arrangement, the directed brokerage is used to pay, for example, the trustee fee or the record keeping fee. In that case, that also is quite indirect and a service provider like a record keeper or the trustee or the custodian will be compiling on a plan by plan basis the amount it receives from the plan and otherwise from other possible parties, third parties, so that it can be reported on the 5500.

So we have seen many broker dealers and banks already setting up systems to try to capture this information. Others who are working really hard to come within the alternative reporting rule for

most of their compensation are already sketching out the kind of disclosures they need to make. And I expect that that will take the better part of the rest of the year to come up with something that is significantly comprehensive enough to satisfy the requirements of the rule.

Ed Mervine: And I take it from your earlier comments that the consequences for the service provider of not supplying the information in the 5500 is just simply getting on a bad boy list –

Melanie Nussdorf: Right. But if you're a bank or a broker dealer, the idea that you've been reported in a public filing that absolutely anybody can get by walking over to the Labor Department or signing onto free ERISA is reputationally not ideal. And so I think one of the biggest issues that service providers had when we were asking the department for clarification on the 5500 was you need to do something, it's already August, we've got so many questions, we don't have this information ready to go yet, and we don't want our name on the list of non-compliers.

So I do think that that has been helpful. I doubt whether the department will extend that particular piece of relief beyond 2010. And so sometime in the next 18 months the department expects everybody to get their act together.

Eric Serron: Yes, and ultimately, Ed, when – something is going to be adopted in terms of a proposed regulation under 408B2. There may be you know significant changes from the existing proposal, they may not be. But one thing that I'm pretty sure you can bet is going to be in there is the provision that says that you have to provide the information – the service providers has to provide the information required for the plan administrator to complete the 5500, which will have the effect of making a failure to provide that information a prohibited transaction and results in excise taxes to the service provider.

Ed Mervine: And that – is that – what are the consequences to the service provider then?

Eric Serron: It's the excise tax and the threat of having to undo the entire transaction.

Melanie Nussdorf: That's where my worry comes in that I mentioned earlier. What if I just have a foot fault, I just leave out one little piece of disclosure but significantly complete the rest of the disclosure. Is someone going to say just that little foot fault does you in and has you violating the prohibited transaction provisions for all of your comp. And that we expect the labor department to clarify in the final rule.

Ed Mervine: Then there was one question on the annual disclosure requirement to participants. I think it was …

Melanie Nussdorf: What does annual mean?

Ed Mervine: Yes, what's annual mean. That's the question.

Melanie Nussdorf: One of the things that we think is the greatest about this participant disclosure regulation is that it really is plan sponsor friendly. It's required annually, but at no particular time. So you know I suppose rolling 12 months is probably what the answer is. But if it's the most convenient for you to do it in March after you've received all the disclosure from the funds that you have, March would do the trick. I think the department is trying not to set out in this proposed rule very detailed instructions that are not going to fit everybody. So they're saying you know use your head once a year, you pick the time, and you make sure you do it once a year. They're also allowing electronic disclosure, and the department has specific electronic disclosure rules which are cited in the preamble to the proposed regulation. But that should make the disclosure easier as well and save the environment, too.

Eric Serron: And with that let me just you know add a – some concluding comments. I think that plays off of what Melanie just said. When we started this out, I mentioned that service provider fees have been under scrutiny at all government levels, in the courts and in the Congress and the

Department of Labor. The proposed disclosures to the participants are a good example of why the department is maybe the best situated to answer some of these questions and make the law going forward. The problem with the courts having to do this is that we can already see in the decisions that are coming out in the district courts that there's a fair amount of conflict among the courts at the district court level on with has to be disclosed or whether there's any disclosure obligation at all. And that of course leads people, you know plan sponsors and service providers completely on the lurch.

And then from the standpoint of the legislation that's in congress, if you take one look at the Miller bill you'll see some very onerous disclosure requirements that make you wonder you know what – how the participants are going to possibly be able to adjust to all this information. So of the three institutional resolutions of this problem, you know my sense is that we're probably better off dealing with the department than we are with the other two institutions.

Melanie?

Melanie Nussdorf: I agree with that. I think the department wants to be helpful. And certainly in asking for clarification on the 5500 they could not have been more willing to listen and more responsive.

Ed Mervine: Great. Well, thank you very much, Melanie and Eric. I think this has been very good information. And I want to thank everybody that's participated in our webcast this afternoon. Just a couple wind-up types of things. And we've gotten all the questions that were submitted. But I suspect that both Eric and Melanie would be available if somebody has a question that they want to e-mail them directly. Is that OK with you guys if there's a question that comes out that they can e-mail you folks directly?

Melanie Nussdorf: Absolutely. We'd be delighted.

Ed Mervine: And I think if they click on your bios in the links, I think your e-mail addresses come up there.

Melanie Nussdorf: Right. I'm told our Web site's very friendly.

Ed Mervine: OK. Well, so if anybody on the – on the webcast wants to check with these fine presenters, that's the availability. The other thing, the final thing that I need to do is to advise folks one of the links that is in the link box is a webcast evaluation. We certainly would appreciate it if you'd click on that and fill out that evaluation. And then also I am aware that this particular webcast will be available for a year on the ACC Web site. So if you happen to you know call in half way through or had a particular question, that's another way to go back through it, is to get on ACC and review it again.

So thank you all for attending and we hope to see you participate in the financial services committee event in the future. Thank you.

END