DrinkerBiddle&Reath LLP

Summer Conley
Counsel
310-203-4055 Direct
310-229-1285 Fax
summer.conley@dbr.com

Law Offices

1800 Century Park East
Ste. 1400
Los Angeles, CA
90067-1517

310-203-4000 phone
310-229-1285 fax
www.drinkerbiddle.com

CALIFORNIA
DELAWARE
ILLINOIS
NEW JERSEY
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John J. Canary, Division Chief
Office of Regulations and Interpretations
U.S. Dept. of Labor
Emp. Benefits Security Admin., Room N-5669
200 Constitution Ave., NW
Washington, DC 20210-0001

Re: 408b-2 and Brokerage Accounts

Dear Mr. Canary:

As I mentioned in our recent call, we would like to discuss the disclosure requirements under DOL Regulation §2550.408b-2(c) (the "Regulation") as they apply to self-directed brokerage accounts.

Paragraph (c)(1)(iv)(C)(2) of the Regulation requires that covered service providers give the responsible plan fiduciary a "description of all indirect compensation (as defined in paragraph (c)(1)(viii)(B)(2) of this section) that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described pursuant to paragraph (c)(1)(iv)(A) of this section."

When a broker-dealer provides a brokerage account for a plan, whether as the investment vehicle for the plan (that is, for a pooled trust) or for individual participants, the broker-dealer almost always receives indirect compensation from the investments. (For example, a brokerage account may permit a participant to invest in any marketable security or any registered mutual fund, thus making 5,000, 10,000 or more investments available for selection by the participant. While transactions in some securities may be on a general commission schedule offered by the broker-dealer, other investments have varying compensation structures which may include insurance commissions, 12b-1 fees, revenue sharing and so on. There may be hundreds of possible compensation arrangements.)

Under the Regulation, it would appear that the broker-dealer would need to disclose each of the possible compensation arrangements because it might receive compensation under any of them. Since the broker-dealer cannot possible know in advance the compensation arrangements under which it will actually be paid, from a risk management perspective, in order to comply with the regulation, it may need to "reasonably expect" to receive compensation from all of them. The sheer volume of such disclosures is costly and burdensome to the broker-dealer and confusing and overwhelming for the responsible plan fiduciary and participants. (In addition, because

the participant would be making the investment decisions regarding the specific investments to select, there is little the responsible plan fiduciary could do with the information after receiving it. Note, however, it is possible, but not clear, that a participant could be viewed as the responsible plan fiduciary when the participant selects the broker-dealer.)

In considering whether to impose a uniformity requirement for disclosures under the Regulation, the Department stated in the preamble that "the Department does not want to unnecessarily increase the cost and burden for service providers to furnish required information, especially to the extent such cost may be passed along to plan participants and beneficiaries, unless it is clear that the benefit to plan fiduciaries outweighs such cost and burden." (75 Fed. Reg. 41600, 41607.) In applying this same concept to disclosing all of the possible compensation arrangements under a brokerage account, the benefit does not outweigh the burden. It is unlikely that a responsible plan fiduciary would review and assess the reasonableness of hundreds or perhaps thousands of different compensation arrangements that might or might not apply to investments actually selected from the available investments and the cost and burden on the broker-dealer of developing and regularly updating the disclosures would be large.

In addressing the decision to eliminate conflict of interest disclosures, the Department noted in the preamble that commenters had stated "that service providers likely would over-disclose in order to avoid a prohibited transaction, thus inundating plan fiduciaries with excessive, potentially confusing, and ultimately meaningless information." (75 Fed. Reg. 41600, 41610.) Similarly, if broker-dealers feel the need to disclose every potential compensation arrangement for a brokerage account, plan fiduciaries will likely be overwhelmed by such information, rendering it virtually useless.

Under the participant disclosure requirements of DOL Regulation §2550.404a-5 (the "Participant Disclosure Regulation"), plan fiduciaries must disclose the fees and expenses for designated investment alternatives to participants. The definition of designated investment alternative excludes brokerage windows and self-directed brokerage accounts. In effect, the Department has determined that, for participants who use individual brokerage accounts, the disclosures required by the securities laws are adequate.

One possible way to avoid this burdensome disclosure is to limit the 408b-2 compensation disclosures for brokerage accounts to the disclosures required under applicable securities laws. This is essentially the requirement for brokerage accounts under the Participant Disclosure Regulation.

Please let us know a convenient time to discuss this important issue with you and any other appropriate individuals at the Department. We look forward to hearing from you.

Very truly yours,

Summer Conley

C. Frederick Reish

Bruce L. Ashton

SC:csk