
From: sanmitchell@REISH.com **On Behalf Of** fredreish@REISH.com
Sent: Thursday, January 03, 2008 2:28 PM
To: Campagna, Lou - EBSA
Subject: Proposed 408(b)(2) Regulation

Lou:

Here are a couple of quick questions/comments about the proposed regulation:

1. Several of the provisions require that the providers state "whether" they have a certain status. For example, a provider must state whether it is a fiduciary. I assume that means, if a provider is a fiduciary, it must say so. Alternatively, it could mean that every covered service provider must state "whether or not" it is a fiduciary. It would be helpful to have that clarified.

Also, it appears that failure of a fiduciary (either acknowledged or functional) to state whether it is a fiduciary would fail to satisfy one of the conditions for the relief. Assuming that is the case, the "contract or arrangement" would not be reasonable and, therefore, the transaction would be prohibited. It will be helpful to have an explanation of that conclusion (assuming it is correct) in the preamble, as well as an explanation of the "amount involved" – which I assume to be the entire amount of the fees and expenses. Is that the case?

2. The proposed regulatory exemption applies to "contracts or arrangements". While the word "contract" has a meaning that is commonly understood – at least by lawyers, the same can not be said of the word "arrangement." That is particularly true since the arrangement must be in writing. I assume that "arrangement" means something along the lines of "mutual understanding". However, once the requirement for a writing is applied to the arrangement, it seems to me that it becomes more similar to an unsigned contract under which the parties are agreeing to act. For example, "arrangement" between a mutual fund and a 401(k) plan might become a "written arrangement" in the form of a prospectus (and perhaps any applications and other materials that the mutual fund complex delivers to a plan or requires the 401(k) plan to sign). It would be helpful to have a definition of "arrangement" and an elaboration of the writing requirement in that context.

Lou, I hope these comments are helpful. I will be following up with more.

Fred

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