

Morgan Lewis

seminar

Form 5500 Schedule C Webcast

Presenters

Thomas M. Hogan
Daniel R. Kleinman
Marianne R. Yudes

November 17, 2009

Agenda

- Background of Final Rule and Related Guidance
- Coverage of specific topics under the Supplemental FAQs about the 2009 Form 5500 Schedule C
 - Good Faith Reporting
 - Bundled Services Arrangements
 - Eligible Indirect Compensation
 - Master Trust Investment Accounts
 - Investment Funds
 - Gifts, Meals & Entertainment
 - Health and Welfare Plans

Background

Background

- For 2009 Form 5500 filings, plan administrators required to file New Schedule C
- The purpose is to aid plan fiduciaries and participants in assessing reasonableness of compensation paid to service providers and potential conflicts of interest

Background

- DOL issued guidance:
 - Final Rule & Instructions to Schedule C in November 2007 (Final Rule)
 - FAQs in July 2008 (2008 FAQs)
 - Supplemental FAQs in October 2009 (2009 FAQs)

Background: What is Reportable Compensation?

- Includes money and any other thing of value that a service provider receives directly or indirectly from the plan
- Direct Compensation (*i.e.*, payments made directly by the plan for services rendered to the plan)
- Indirect Compensation such as:
 - *Gifts, awards, trips*
 - *Investment Management Fees*
 - *Brokerage Commissions*
 - *Soft Dollars*
- Payments by plan sponsor excluded (2008 FAQ 37)

Background: What is Reportable Compensation?

- Specific Examples:
 - Fees, expenses, and charges of the plan or the plan's investments constitute reportable compensation only to the extent such charge or fee is received and retained by plan service provider (2008 FAQ 4 / 2009 FAQs 11-12)
 - *Contingent deferred sales charges*
 - *Surrender/termination charges*
 - *Redemption fees*

Background: What is Reportable Compensation?

- Specific Examples (Continued):
 - Includes insurance company fees for plan services charged against a plan's investment or where the insurance company pays commissions and other compensation to agents, brokers and other persons for the plan's purchase of or investment in a contract (2008 FAQ 22 / 2009 FAQ 9)
 - Schedule A reporting is also required in certain circumstances

Background: Before & After

- **BEFORE:** Direct Compensation reporting; Not Indirect Compensation
- **AFTER:** Both Direct & Indirect Compensation Reporting

- **BEFORE:** Disclose fees concerning plan's 40 highest paid service providers
- **AFTER:** Persons receiving \$5,000 or more in reportable compensation for a particular transaction or service

- **BEFORE:** Discretionary brokerage commissions
- **AFTER:** Both discretionary and non-discretionary brokerage commissions

- **AFTER:** Identify service providers who fail to provide necessary information subject to service provider good faith effort transitional relief

Background: What This All Means

- Obligation on plan administrators to collect information from service providers
- Greater burden on plan administrators and plan service providers
- Potential follow-up by DOL for service providers listed as not providing necessary information

Background: Final Guidance

- 2009 FAQs likely the last formal guidance from DOL on Schedule C before 2009 Form 5500s are due
- Plan administrators and plan service providers need to adjust their reporting systems to collect the necessary information, or comply with the safe harbor for 2009 only

Good Faith Reporting

Morgan Lewis

Good Faith Reporting

- 2009 *good faith* reporting safe harbor (2008 FAQ 40) only available where the service provider:
 - Makes a good faith effort to collect and provide the required information to the plan administrator,
 - Fails to collect all such information despite its efforts, and
 - Reports any and all such information it collects for such reporting period, irrespective of it being incomplete
- Per 2009 FAQ 10, DOL expects plan administrators to:
 - Reach out to plan service providers who rely on the 2009 safe harbor regarding the *good faith* statement, and
 - Assess steps that the service provider is taking to meet reporting requirements for subsequent years

Bundled Services Arrangements

Bundled Services Arrangements

- Includes any arrangements where the plan hires one company to provide a range of services (either directly, through affiliates or subcontractors, or a combination), which are priced as a single package (2008 FAQ 13)
- Fees to each bundled service provider do not need to be separately reported, subject to exceptions (2008 FAQ 14):
 - Fees charged against the plan's investment (e.g., investment management fees, float revenue, 12b-1 fees, etc.)
 - Compensation received by the plan fiduciary or these service providers:
 - Contract administrator
 - Consultant
 - Custodian
 - Investment advisor/manager
 - Insurance brokerage/agent
 - Recordkeeper

Eligible Indirect Compensation

Eligible Indirect Compensation

- May include the following:
 - Distribution fees
 - Investment management fees
 - Recordkeeping or shareholder service fees
 - Finder's fees
 - Float income
 - Brokerage commissions
 - Soft dollars
- Under the alternative reporting method, plans are permitted (but not required) to report far less information for “eligible indirect compensation”

Eligible Indirect Compensation

- Certain disclosure requirements apply in meeting the alternative reporting option
- Disclosures can be provided in multiple documents and by a number of different parties
- Date by which service providers must provide disclosure materials varies

Eligible Indirect Compensation

- Mutual fund revenues paid through an agent of the mutual fund or other intermediary can still qualify as *eligible indirect compensation* reportable under the alternative reporting option under the Schedule (2009 FAQ 7), including:
 - 12b-1 fees
 - Sub-transfer fees
 - Shareholder services fees

Master Trust Investment Accounts

Master Trust Investment Accounts

- Fees for plans invested in MTIAs may be reported on the Form 5500 filing for the MTIA
- For a master trust for which more than one Form 5500 is required, compensation must be allocated to the proper MTIA(s) (2009 FAQ 19)
- Fees and expenses reported on MTIA level are not to be reported on plan level

Investment Funds

Investment Funds

- Main issue is how far down the chain of investments do you look for service providers?
- Fees received by third parties from “operating companies” in connection with managing or operating the company are generally not reportable (2008 FAQ 7 / 2009 FAQ 6)
- A Hedge fund that is not subject to ERISA because less than 25% of its limited partners are benefit plan investors is an investment fund for Schedule C purposes (2009 FAQ 6)

Gifts, Meals & Entertainment

Morgan Lewis

Gifts, Meals & Entertainment

- Gifts, meals, and entertainment are indirect compensation subject to:
 - \$50/\$100 *de minimis* threshold (2008 FAQ 34)
 - Non-monetary gifts of less than \$10 are not counted toward \$100 threshold
- Promotional items of insubstantial value are not reportable (2009 FAQ 2) including:
 - Logo'd coffee mugs
 - Calendars
 - Greeting cards
 - Plaques

Gifts, Meals & Entertainment

- Employees of the plan sponsor are service providers
- Reportable compensation must be allocated between ERISA/non-ERISA accounts (2008 FAQ 35)
- Reporting of a person's compensation is dependent on the person's position or relationship with plan

Gifts, Meals & Entertainment

- Waivers of Educational Conference Fees and reimbursement for related travel costs are reportable (2008 FAQ 33 / 2009 FAQ 4) unless plan fiduciary determines in writing that:
 - *Plan's payment would be prudent,*
 - *Payment/reimbursement of expenses consistent with written plan/policy,*
 - *Conference topic reasonably related to duties of attending representative, and*
 - *Expenses reasonable in light of benefits afforded to plan*

Gifts, Meals & Entertainment: DOL Enforcement Guidelines

- DOL is concerned about appropriate disclosure of gifts & entertainment
- Form 5500 instructions state: “CAUTION: These thresholds are for purposes of Schedule C reporting only. Filers are ***strongly cautioned that gifts and gratuities of any amount paid to or received by plan fiduciaries may violate ERISA*** and give rise to civil liabilities and criminal penalties.” (Emphasis added)
- Amounts that violate ERISA may give rise to:
 - Civil liabilities under ERISA § 406(b)(3) – prohibited transaction for fiduciary to receive “any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan” (penalties include payment of amount received to plan and excise tax of 15% per year)
 - Criminal Penalties under 18 USC § 1954 – giving anything of value to an ERISA fiduciary because of or with an intent to influence plan decision (and fiduciary’s receipt of any thing of value because of or with an intent to be influenced) is punishable by fine and/or imprisonment up to 3 years

Gifts, Meals & Entertainment: DOL Enforcement Guidelines

- ERISA Prohibited Transactions do not have a *de minimis* factor
- DOL has provided baseline rules in its Enforcement Guidelines in this area
- Fiduciaries should be concerned about gifts/gratuities that give rise to an ERISA prohibited transaction and should use prudence in reviewing

Health and Welfare Plans

Morgan Lewis

Health and Welfare Plans

- Schedule C reporting rules also apply to group health plans and other welfare plans (2009 FAQ 23)
- Certain health plan fees will be treated as transactional charges and need to be reported as such (2009 FAQ 24)

Questions?

Morgan Lewis

Contact Information

- Thomas M. Hogan
 - 212.309.6778; thogan@morganlewis.com
- Daniel R. Kleinman
 - 202.739.5143; dkleinman@morganlewis.com
- Marianne R. Yudes
 - 215.963.5490; myudes@morganlewis.com

Disclaimer

- This communication is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship