

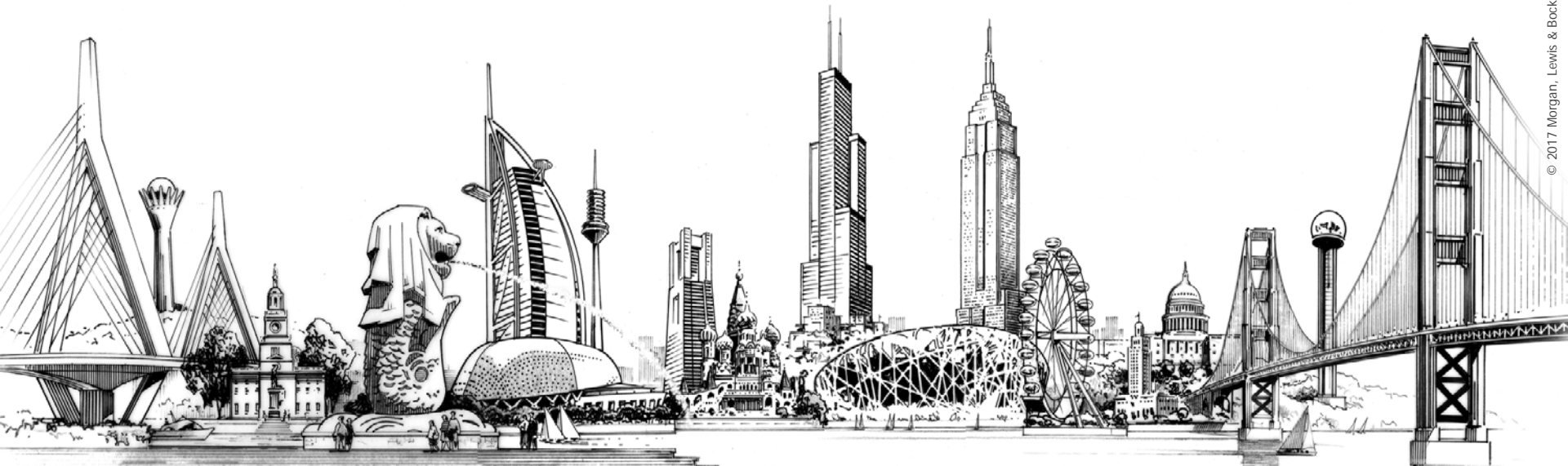
Morgan Lewis

LABOR DEPARTMENT AUDITS: SELECTED TOPICS— SERVICES PROVIDED BY PLAN SPONSOR

Rosina B. Barker

Rosina.Barker@morganlewis.com

202.739.5210



Documents Requested By Auditor

- Contracts with all service provider
- Fees paid to all service providers
- Fees paid to plan sponsor to pay or reimburse salary and benefits paid to plan sponsor's employees
- Any and all documentation relating to administrative expenses paid to sponsor for specified period

What The Auditors Are Looking For

- Simple case: excessive fees
- Statutory basis:
 - It is a prohibited transaction to transfer assets to a “party in interest” – which includes a service provider – other than for “reasonable” arrangements for services”

What The Auditors Are Looking For (Cont.)

- Less simple case: Does plan sponsor benefit from use of plan assets?
- Self-dealing prohibition of ERISA section 406(b) (and not cured by ERISA section 408) states that:
 - [A] fiduciary may not use the authority, control, or responsibility which makes such person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service
- Prohibition does not apply to:
 - reimbursement of expenses properly and actually incurred on behalf of plan

What The Auditors Are Looking For (Cont.)

- Inappropriate payments to 3d party service providers for services that are intrinsically settlor
- Inappropriate cross-subsidies: Payments to 3d party service providers who also provide services to plan sponsor under explicit arrangements for settlor expenses
- Cure: Be able to document all expenses flows and purposes

What The Auditors Are Looking For (Cont.)

- Inappropriate payments from plan assets to settlor (including settlor's employees)
- Inappropriate payments to affiliates of plan sponsor who provide services to plan
- Cure: Be able to document that all payments constitute reimbursement of salary and expenses: reimbursement of expenses properly and actually incurred by fiduciary on behalf of plan

What The Auditors Are Looking For (Cont.)

- Plan's reimbursement of employer's payment of expenses for plan administration
- Statutory basis of concern: Section 406 prohibits "extension of credit" between the plan and a party in interest (which includes the plan sponsor)
- PTE 80-26

Biography



Rosina B. Barker counsels clients on the Employee Retirement Income Security Act (ERISA), tax, and securities law aspects of their employee benefits and executive compensation plans. Her practice ranges from sophisticated defined benefit pension plan matters to complex executive compensation issues. She regularly advises on compliance with Code Sections 409(A), 83, 162(m), 457A, and 280G; and frequently counsels on the benefits and executive compensation issues arising from mergers, divestitures, and other business reorganizations.

Rosina B. Barker

Washington

T +1.202.739.5210

F +1.202.739.3001

Rosina.barker@morganlewis.com

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dallas	Los Angeles	Philadelphia	Silicon Valley
Astana	Dubai	Miami	Pittsburgh	Singapore
Beijing	Frankfurt	Moscow	Princeton	Tokyo
Boston	Hartford	New York	San Francisco	Washington, DC
Brussels	Houston	Orange County	Santa Monica	Wilmington
Chicago	London	Paris	Shanghai	



THANK YOU

© 2017 Morgan, Lewis & Bockius LLP

© 2017 Morgan Lewis Stamford LLC

© 2017 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Morgan Lewis

