

SEC AND DOL JOINTLY ISSUE SUGGESTED QUESTIONS FOR RETIREMENT PLAN SPONSORS TO ASK THEIR INVESTMENT CONSULTANTS

Last week we announced that the Staff of the U.S. Securities and Exchange Commission had released a report criticizing various practices of investment advisers who serve as “pension consultants.” This week the SEC and the U.S. Department of Labor have jointly published “tips to assist fiduciaries of employee benefit plans in reviewing conflicts of interest of pension consultants.”

The “tips” take the form primarily of ten questions that the SEC and DOL suggest that plan sponsors and other plan fiduciaries ask their pension consultants. We do not know how many plan fiduciaries will in fact raise these questions with their pension advisers, but we think that every investment advisory firm that provides pension consulting services should review the list and prepare their answers in case the questions are raised.

Where practical, a pension consultant may wish to prepare a “fact sheet” that sets out the answers to the questions so that the consultant can provide quick, consistent, and accurate answers if the questions are asked by a client or potential client. An even more proactive approach, assuming an adviser is well situated to address the questions, would be to prepare a letter to clients pointing out that the SEC and DOL have recommended that these questions be asked and providing the answers, without waiting for a client or potential client to ask. In any case, inaccurate or incomplete responses to the questions could jeopardize client relations and, possibly, result in enforcement proceedings by regulators.

We also think that plan sponsors and other plan fiduciaries should review the list and determine if any of the questions are appropriate to ask their pension consultants. The DOL may feel that, in providing the “tips”, it has guided fiduciaries toward what the DOL considers an appropriate level of inquiry by a plan fiduciary.

The ten questions and the SEC/DOL commentary on them are set out below. The full release is available on the SEC website at www.sec.gov.

1. *Are you registered with the SEC or a state securities regulator as an investment adviser? If so, have you provided me with all the disclosures required under those laws (including Part II of Form ADV)?*

SEC/DOL Comment: You can check yourself — and view Part I of the firm’s Form ADV — by searching the SEC’s Investment Adviser Public Disclosure website. Your investment adviser must furnish you with a copy of Part II of Form ADV. At present, the IAPD database contains Forms ADV only for investment adviser firms that register electronically using the Investment Adviser Registration Depository. In the future, the database will expand to encompass all registered investment advisers—individuals as well as firms—in every state. If you can’t locate an investment adviser in IAPD, be sure to contact your state securities regulator or the SEC’s Public Reference Branch.

2. *Do you or a related company have relationships with money managers that you recommend, consider for recommendation, or otherwise mention to the plan for our consideration? If so, describe those relationships?*

SEC/DOL Comment: When pension consultants have alliances or financial or other relationships with money managers or other service providers, the potential for material conflicts of interest increases, depending on the extent of the relationships. Knowing what relationships, if any, your pension consultant has with money managers may help you assess the objectivity of the advice the consultant provides.

3. *Do you or a related company receive any payments from money managers you recommend, consider for recommendation, or otherwise mention to the plan for our consideration? If so, what is the extent of these payments in relation to your other income (revenue)?*

SEC/DOL Comment: Payments from money managers to pension consultants could create material conflicts of interests. You may wish to assess the extent of potential conflicts.

4. *Do you have any policies or procedures to address conflicts of interest or to prevent these payments or relationships from being considered when you provide advice to your clients?*

SEC/DOL Comment: Probing how the consultant addresses these potential conflicts may help you determine whether the consultant is right for your plan.

5. *If you allow plans to pay your consulting fees using the plan's brokerage commissions, do you monitor the amount of commissions paid and alert plans when consulting fees have been paid in full? If not, how can a plan make sure it does not over-pay its consulting fees?*

SEC/DOL Comment: You may wish to avoid any payment arrangements that could cause the plan to pay more than it should in pension consultant fees.

6. *If you allow plans to pay your consulting fees using the plan's brokerage commissions, what steps do you take to ensure that the plan receives best execution for its securities trades?*

SEC Comment: Where and how brokerage orders are executed can impact the overall costs of the transaction, including the price the plan pays for the securities it purchases.

7. *Do you have any arrangements with broker-dealers under which you or a related company will benefit if money managers place trades for their clients with such broker-dealers?*

SEC/DOL Comment: As noted above, you may wish to explore the consultant's relationships with other service providers to weigh the extent of any potential conflicts of interest.

8. *If you are hired, will you acknowledge in writing that you have a fiduciary obligation as an investment adviser to the plan while providing the consulting services we are seeking?*

SEC/DOL Comment: All investment advisers (whether registered with the SEC or not) owe their advisory clients a fiduciary duty. Among other things, this means that advisers must disclose to their clients information about material conflicts of interest.

9. *Do you consider yourself a fiduciary under ERISA with respect to the recommendations you provide the plan?*

SEC/DOL Comment: If the consultant is a fiduciary under ERISA and receives fees from third parties as a result of their recommendations, a prohibited transaction under ERISA occurs unless the fees are used for the benefit of the plan (e.g., offset against the consulting fees charged the plan) or there is a relevant statutory or class exemption permitting the receipt of such fees.

10. *What percentage of your plan clients utilize money managers, investment funds, brokerage services or other service providers from whom you receive fees?*

SEC/DOL Comment: The answer may help in evaluating the objectivity of the recommendations or the fiduciary status of the consultant under ERISA.

If you have any questions concerning the "tips" or their possible application to your firm, please contact your regular Tucker Ellis & West LLP attorney or any of the following:

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