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LEGAL ALERT

October 6, 2010

DOL OIG Recommends Further ERISA Regulation of Service Provider Conflicts of Interest

In a report dated September 30, 2010, the U.S. Department of Labor's (DOL) Office of Inspector General (OIG) recommended additional ERISA regulation of conflicts of interest on the part of service providers to retirement plans. The OIG recommendations were based primarily on the 2005 SEC "pension consultant" report, a review of DOL enforcement practices and policies, interviews with DOL and SEC officials, and a random sampling of DOL fiduciary audit files.

On the basis of that examination, OIG asserted that conflicts of interest on the part of service providers "are a concern in most ERISA covered pension plans," and recommended that:

- **DOL broaden the definition of "fiduciary" in its ERISA regulation, particularly as it applies to investment advisers.** OIG noted that, without fiduciary status, DOL cannot enforce conflict of interest issues against service providers, and contended that sophisticated investment advisers have been able to structure their relationships with retirement plans to avoid that status under the ERISA "fiduciary" regulation promulgated in 1974. OIG declared (without supporting detail) that changes in financial and business relationships justified a revision of that definition. Such a proposed regulation is now pending at the Office of Management and Budget; and

- **DOL require disclosure of all service provider conflicts of interest.** OIG noted with approval the recently issued interim final regulations requiring additional disclosures by pension service providers and the Form 5500 Schedule C revisions. OIG said, however, that those disclosures do not go far enough, because they do not clearly require service providers to disclose "business or personal relationships not involving compensation," e.g., a financial institution subsidizing a service provider's attendance at its client conference, or a service provider preferring to recommend to plans those money managers that purchase products or services from the service provider. DOL reportedly responded that the interim final regulations "might already provide the requirement for disclosure of all conflicts of interest and [DOL] is in the process of providing clarifying interpretations."

In a response appended to the report, the Assistant Secretary of Labor for DOL's Employee Benefit Security Administration agreed with both recommendations and committed to completing work on them at the earliest opportunity.

OIG also commented on the enforcement utility of more concrete requirements and standards for plan fiduciaries to consider conflicts of interest in selecting service providers, but did not reduce those comments to a formal recommendation.

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If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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