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From: Richard M. Todd
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To: Carol Van Gytenbeek
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BULLETIN

September 30, 2010

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First in a Series

SEC and DOL Convergence: Are You Ready?

By: Stephen Wilkes and Fred Reish

In addition to ERISA, our firm advises many clients on issues concerning federal and state securities laws. Employee benefits law and securities law have always run parallel on some issues, but we are now experiencing an unprecedented convergence of SEC and DOL regulation. These regulatory agencies have undertaken major initiatives with regard to fiduciary activity, plan investments, compensation, sales practices, and disclosure of services, compensation, and conflicts.¹ The complexities and interlocking relationship of both the regulations and regulators is increasing; it requires that service providers, especially those in the financial services industry, focus on the integration of these bodies of law.

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To understand the magnitude of this convergence, consider the scope of DOL activity in the last few years with regard to plan investments. Final or proposed regulations,

Reish & Reicher has been included in the *U.S. News & World Report's* 2010 Best Law Firms listing and was given the highest ranking of "Tier 1" for its work in the Employee Benefits (ERISA) Practice. According to U.S. News & World Report, "Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise." All first-tier firms, including Reish & Reicher, will be featured in the October issue of U.S. News & World Report.

Additionally, Fred Reish and Bruce Ashton were selected to be among the Best Lawyers in America for 2011. Both Fred and Bruce are part of a distinguished group of attorneys who have now been listed in Best Lawyers for ten years or longer. Their continuing recognition reflects their contribution to the benefits community.

Best Lawyers selects attorneys for that recognition based on an exhaustive and rigorous peer review process. In other words, inclusion on the list is the ultimate compliment for a lawyer, since it is based primarily on the opinion of other lawyers.

Interpretive Bulletins, Advisory Opinions, and PTE Class Exemption amendments have addressed Section 408(b)(2) disclosures, Form 5500 reporting, QPAM and cross trading exemptions from the prohibited transaction rules, participant investment advice, participant level disclosures, the definition of "plan assets" and "fiduciary," safe harbor annuity selection, and proxy voting.² The SEC has issued significant final and proposed rules about plan investments, including total revision of Rule 12b-1; a new model for Form ADV Part 2 "brochure disclosure;" custody of assets; the advertising of Target Date Retirement Funds; and the rules governing content and distribution of prospectuses, to name only a few.

Finally, on top of it all, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), enacted in July, will significantly impact the rules governing the sale and distribution of retirement plan investments. Dodd-Frank raises new questions under the securities laws (in addition to those under ERISA) such as: What are the registration implications of giving advice to varying clients? What is the fiduciary standard of conduct? When is an adviser a fiduciary? How are transaction fees, distribution fees, sales fees, administrative fees, and consulting fees assessed, and reported, and paid? What are the standards for disclosures by an investment adviser or broker-dealer, or by a mutual fund in a prospectus?

We have reached the point when regulatory compliance and fiduciary practices and procedures require financial service providers to simultaneously answer to different regimes, namely, ERISA and the securities laws.

¹ Other federal regulatory agencies, such as the Office of Comptroller of Currency with regard to collective investment funds or trust department services, are also involved in some jurisdictional fashion that affects, directly or indirectly, the retirement plan industry. Virtually every state has a regulatory agency that supervises banking, trust services, securities, brokerage, insurance, etc, and thus impacts the retirement plan world.

² These fiduciary and investment issues require serious consideration and review by registered investment advisers, broker-dealers, custodian and record keeping platform providers, banks, trust companies, insurance companies, and both mutual funds and private or pooled fund vehicles.

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