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DOL issues LM-10 Deadline Extension and Updated Guidance

 [19821] March 10, 2006 TO: COMPLIANCE ADVISORY COMMITTEE No. 8-06 INVESTMENT ADVISER MEMBERS No. 11-06 INVESTMENT ADVISER ASSOCIATE MEMBERS No. 5-06 PENSION MEMBERS No. 15-06 RE: DOL ISSUES LM-10 DEADLINE EXTENSION AND UPDATED GUIDANCE The Department of Labor has released updated guidance on the filing requirements of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) as it relates to service providers to unions and union-affiliated plans.1 First, DOL issued a release extending the deadline – to May 15 – for LM-10 filings due on March 30, 2006 (essentially, for firms with a December 31 fiscal year).2 Second, DOL posted new questions and answers on its website, which provide additional de minimis relief, address a number of factual situations and interpretive questions, and provide guidance on completing the LM-10.3 Deadline Extension Recognizing that its latest guidance was released just weeks before many employers and service providers were to file their the first LM-10, DOL states it will not take any enforcement action for filers whose report is due by March 31, 2006, so long as the LM-10 is filed by May 15, 2006.4 DOL previously stated that it would not seek enforcement action for fiscal years prior to 2005 if the fiscal 1 See Memorandum to Compliance Advisory Committee No. 55-05, Investment Adviser Members No. 22-05, Investment Adviser Associate Members No. 17-05, and Pension Members No. 53-05 [19361], dated November 11, 2005. 2 The deadline advisory is available at http://www.dol.gov/esa/regs/compliance/olms/filing_advisory_03_06.htm. 3 The updated guidance is available at http://www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm. The numbering of the Q&As has changed from the guidance issued in November 2005 but new Q&As can be identified because they are marked as such. 4 It is not clear from the advisory whether the May 15 extension applies to filers with a fiscal year ending January 31 whose LM-10 is, without extension, due on May 1. 2 year 2005 LM-10 is filed on time. DOL states that for this purpose a Form LM-10 filed on or before May 15 will be considered "on time." DOL provided no additional filing relief for fiscal year 2005. Additional Q&As DOL's new Q&As build on those issued in November 2005 and boosts the number of Q&As from 26 to 87. This memo describes new guidance likely to be of interest to members and their affiliates who provide services to Taft-Hartley plans. DOL's guidance addresses a number of situations and issues not summarized here. Below we use the term "covered entity" to refer to service providers subject to LM-10 reporting obligations. New Recordkeeping and Reporting De Minimis Exemptions Under the guidance DOL issued in November 2005, covered entities are not required to file an LM-10 if the aggregate value provided to a union or union official in a fiscal year does not exceed $250. As the Institute and others pointed out, the necessity to

track minor expenses like cups of coffee negates much of the benefit of this de minimis threshold.5 In its latest guidance, DOL adopts two new rules providing some relief, which DOL calls “recordkeeping and reporting exemptions” to avoid confusion with the $250 aggregate de minimis exemption.6 The new exemptions apply only to “widely attended gatherings” – defined as a gathering that will be attended by a large number of persons including both union officials and a substantial number of individuals with no relationship to a union. For a gathering to qualify as widely attended, union officials must be treated the same as individuals not affiliated with a union both at the gathering and in advertising or invitations. First, if a covered entity sponsors a widely attended gathering and spends $20 or less per attendee, it has no Form LM-10 obligations with regard to tracking or disclosing these costs. For example, if a union official attended a number of widely attended gatherings, all costing $20 or less, and the covered entity separately provided a gift worth $300, only the $300 gift would be required to be reported. Second, DOL states that a covered entity can sponsor up to two widely attended gatherings per fiscal year and spend up to $125 per attendee without reporting or tracking such expenses. However, if a union official attends three such events (i.e. for which the cost is $125 or less but more than $20), then the covered entity must report on Form LM-10 all three receptions. In other words, this 5 See Memorandum to Compliance Advisory Committee No. 4-06, Investment Adviser Members No. 7-06, Investment Adviser Associate Members No. 3-06, and Pension Members No. 7-06 [19649], dated January 26, 2006. 6 The aggregate $250 de minimis exemption is otherwise unchanged, but Q&As 51-54 address issues surrounding the exemption. For example, DOL clarifies that where meals, all of which are less than $250, are being provided to a number of officials of the same union, the cost of the meals need not be aggregated because they are payments to the officials and not the union. Also, DOL states that where a caterer provides non-itemized bills, reasonable good faith estimates may be used to determine the overall value of the meals each officer received. 3 exemption allows a covered entity to avoid recordkeeping only if it is sure that no single union official will attend more than two gatherings costing between $20 and $125. In determining the cost of the gathering to the covered entity, the covered entity must include the costs of the food, beverage, service, and entertainment, but not the cost of the hall in which the reception is held, security for the event, or the time spent by its employees in planning or running the reception. The cost per attendee may be derived by summing the covered costs and dividing by the number of attendees, but DOL states that any reasonable, good faith method of making this determination will be acceptable. DOL states that these new exemptions also apply to the LM-30 that union officials are required to file. Factual Scenarios A number of the new Q&As address factual scenarios and interpretive questions that the Institute and others have raised with DOL since its original LM-10 guidance was issued in November. Employer with Affiliates. A common question arising from the original LM-10 guidance was how the definition of “employer,” and the aggregate $250 de minimis rule, applied to firms with numerous subsidiaries and affiliates performing a wide range of services to Taft-Hartley plans (who may or may not have centralized recordkeeping). DOL states that the entity required to file the Form LM- 10 is the “employer” who made the payment, and only the “employer” may file the Form LM-10. DOL further states that in determining what entity is the “employer,” reasonable judgments may be made based on the structure, corporate or otherwise, of the businesses in question, and non-LMRDA law governing when two entities are considered separate, and when they are considered to be one. DOL did not specifically address whether these same principles applied for purposes of the $250 de minimis rule and the new $125 recordkeeping and reporting exemption described above. Mergers and Acquisitions. DOL states that where a covered entity with reportable payments is acquired by another firm but does not continue in existence (such as through merger), it must file a terminal LM-10 report within 30 days of the loss of existence as an entity. If the covered entity continues in existence, for example as a subsidiary of its new owner, the LM-10 would be filed as usual 90 days after the end of the covered entity's fiscal year. Finally, if a firm acquires only the assets of a covered entity, the purchasing firm would not acquire the obligation to file for the covered entity, and the covered entity would retain the obligation to file Form LM-10. Partnerships. Generally, a partnership would not be considered an "employer" if it did not have employees other than the partners. DOL states that if the partnership includes many partners but control of the enterprise is concentrated in only a few managing partners, then the non-managing 4 partners may qualify as employees, and the partnership could be considered an employer under the LMRDA.7 Use of Office Space. DOL states that where a covered entity permits a union to reserve office or conference space on a temporary and episodic basis, where permission, timing, and location are within the covered entity's discretion, the value would not be reportable because it has no reasonably quantifiable market value. On the other hand, dedicated office space provided cost-free would be reportable. Miscellaneous Examples. The guidance states that the following payments are reportable: • A vendor of legal or accounting services to a union takes the union's officers on a golf excursion.8 • A vendor whose business consists in substantial part of selling restaurant equipment to the employer of the union members makes loans to the union's officers. • A vendor of financial services to a union affiliated pension plan provides a gift worth more than $250 to a union trustee. • A covered entity makes a contribution to a union officer who is a candidate for public office, even if the payments are made to a separate campaign fund. The guidance states that the following payments are not reportable: • An employer pays regular wages to a bona fide employee who is also an officer of a union. • A covered entity makes a payment, such as an interest or dividend payment, or a loan in the regular course of business as a national or state bank, credit union, insurance company, or other credit institution. • A firm seeking to sell financial services to a union affiliated pension plan provides gifts to a wide variety of potential clients, including a union trustee of the plan, and the gift received by each recipient is worth less than $250. • Payments in satisfaction of a judgment or arbitration award. • Payments in settlement of a bona fide claim, in the absence of fraud or duress. • Payments of dividends to unions that are shareholders of a corporation. • Payments to a spouse of a union officer, unless under the circumstances the payment is an "indirect" payment to the union officer.9 7 DOL also notes that while partnerships, sole proprietorships, individuals and other entities with no employees are generally not considered "employers" for LMRDA purposes, they could be required to file an LM-10 if they were acting directly or indirectly as an employer or as an agent of an employer in relation to an employee. 8 In addition, DOL states that if a union sponsored a golf outing in which each golfer paid his or her own greens fees, but the covered entity contributed golf bags and clubs to the union to be awarded as prizes, the gift would be reportable as a payment to the union. 5 Covered Unions and Union Officials Trustees of Union Plans. DOL states that a trustee of a Taft Hartley plan who is appointed by the union is considered a union official. In other words, the trustee does not need to have any other special status within the union to be covered, so long as the trustee was appointed by the union to the board of trustees of the plan. Payments to Pension Plans. DOL states that a gift of a fruit basket to a pension or welfare plan that is shared among the plan's employees is not reportable because it is not a payment to the union or to a union official (even if the plan subsequently gives the gift to an official of the affiliated union). Unions Covering Government Employees. Under the LMRDA, unions representing exclusively public sector workers are not LMRDA-covered labor organizations. However, DOL states that if any union members are employed by a private sector employer, then payments to any official of the union are reportable.10 The DOL notes that a court case has cast into doubt whether "intermediate" unions – those interposed between a national union and a local union – may be covered by the LMRDA even if they represent no private sector employees. DOL states that, pending final resolution of the court decision, DOL will not seek to enforce LM-10 or LM-30 obligations on any intermediate union.11 Subsidiaries of Unions. An organization owned by a labor organization is not a labor organization unless it meets the definition of labor organization under the LMRDA. DOL states that under unusual circumstances, payments to a subsidiary corporation could be considered indirect payments to a labor union. For example, a payment to a corporation that markets merchandise with union themes and logos that is wholly owned, wholly financed, and wholly controlled by a labor union would be reportable. On the other hand, a payment to a corporation, 60% of which is owned by a union but which is under independent management, and that designs and builds low-income housing, would not be reportable. Confidentiality Clauses DOL states that there is no exemption in the LMDRA for reporting transactions that would violate a confidentiality clause. DOL states that if a covered entity believes that completing an LM-10 will result in the disclosure of sensitive, confidential or proprietary information that could cause 9 However, the LM-30 reporting requirements mandate reporting of payments to spouses. 10 The guidance indicates resources on how to determine whether a labor union is covered by the LMRDA. 11 The court case is Alabama Education Ass’n v. Chao, Nos. 03-0253 & 03-0682, 2005 WL 736525 (D.D.C. March 31, 2005) (appeal pending), which challenges a DOL final rule on the issue. 68 Fed. Reg. 58374 (Oct. 9, 2003). 6 substantial harm to the covered entity’s business interests, the issue should be discussed with the Office of Labor-Management Standards prior to filing the LM-10. Relief for 2005 and Prior Years DOL’s prior guidance provided that no LM-10 will be required for fiscal years beginning on or before December 31, 2004 provided that the 2005 fiscal year LM-10 is filed on time. DOL clarified that if a covered entity does not have a reportable transaction for 2005 but wishes to take advantage of the relief for prior years, it must maintain or create records sufficient to verify that it identified no reportable payments for this fiscal year despite established internal procedures or reasonable, good faith efforts. These records must be maintained for five years. The covered entity should not submit a blank form. DOL states that a covered entity is treated as acting diligently and in good faith in reconstructing records for fiscal year 2005 if the covered entity makes reasonable attempts to locate or reconstruct missing records, completes the Form LM-10 as accurately as possible based on the located or reconstructed records, and does not knowingly or negligently withhold information. Filing Form LM-10 Section N of the guidance provides Q&As on completing the LM-10. DOL states that, while the treasurer and president (beginning next year) are ordinarily required to sign the Form LM-10, the covered entity may allow other officers to sign instead if they perform the functions normally performed by a company’s president and/or treasurer. The company’s compliance officer may not generally sign the LM-10. DOL notes that all reports required to be filed under the LMRDA are public and reports for year 2000 and later can be viewed on the DOL’s website www.union-reports.dol.gov. Michael L. 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