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NEW LM-10 FILING REQUIREMENTS APPLICABLE TO SERVICE PROVIDERS TO UNIONS AND UNION-AFFILIATED PLANS

 IMMEDIATE ATTENTION [19361] November 11, 2005 TO: COMPLIANCE ADVISORY COMMITTEE No. 55-05 INVESTMENT ADVISER MEMBERS No. 22-05 INVESTMENT ADVISER ASSOCIATE MEMBERS No. 17-05 PENSION MEMBERS No. 53-05 RE: NEW LM-10 FILING REQUIREMENTS APPLICABLE TO SERVICE PROVIDERS TO UNIONS AND UNION-AFFILIATED PLANS The Department of Labor released yesterday 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. The guidance is in the form of 26 lengthy Q&A's posted on DOL's website,1 and as explained more fully below, is effective for fiscal years beginning on or after January 1, 2005. Below we summarize the guidance with respect to who must file, what must be reported, a new de minimis exemption, and the effective date (including rules for reporting the current fiscal year). The guidance was issued on a retroactive basis and without opportunity for notice and comment despite requests by the Institute and other financial services associations that any filing obligations for service providers to employee benefit plans be imposed only prospectively after opportunity to address industry concerns.2 DOL has attempted to address some industry concerns through an expanded de minimis exemption and allowing reports to be filed for 2005 without penalty of perjury under certain circumstances. Who Must File DOL's starting point is that every private sector business or organization that employs at least one employee, or is a group or association of employers or an agent of such business, organization, or association, is an "employer" for purposes of the LM-10 reporting obligation 1 The guidance is available at http://www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm. 2 See Memorandum to Compliance Advisory Committee No. 48-05, Investment Adviser Members No. 14-05, Investment Adviser Associate Members No. 12-05 and Pension Members No. 33-05 [19051], dated August 1, 2005; and Memorandum to Compliance Advisory Committee No. 54-05, Pension Committee No. 36-05 and Investment Adviser Committee No. 12-05, [19309], dated October 31, 2005. 2 under the LMRDA. The guidance provides that generally only payments from the following employers are reportable: 1. An employer whose employees the recipient's labor organization represents or is actively seeking to represent; 2. An employer a substantial part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with an employer whose employees the recipient's labor organization represents or is actively seeking to represent; 3. An employer that buys from,

or sells or leases directly or indirectly to, or otherwise deals with the recipient's labor organization; 4. An employer that buys from, or sells or leases directly or indirectly to, or otherwise deals with a trust in which the recipient's labor organization is interested ("union-affiliated plans"); or 5. An employer in active and direct competition with an employer described in categories 1 though 4. Financial institutions that provide services to union-affiliated plans, including Taft-Hartley plans, will likely be covered by category 4 but, depending on the circumstances, could be covered by other categories as well. For example, category 5 covers payments to a union official from a financial service provider that does not provide services to the official's union or union- affiliated plan but is in "active or direct competition" with a service provider that does. Below we use the term "covered entity" to refer to service providers subject to LM-10 reporting obligations. DOL states that where a covered entity makes a reportable payment that is reimbursed by another covered entity, the entity that makes the final payment without reimbursement should report the transaction. Covered entities that share the cost of a reportable payment must each report their allocable share. The LMRDA contains an exemption for payments and loans made by banks, credit unions, insurance companies, savings and loan associations and "other credit institutions." The guidance states that this exception only covers payments made "in the ordinary course of business" and that meals and entertainment, even if routinely offered to favored clients, are only incidental to the regular course of business, and therefore are not exempt from reporting. Categories of Reportable Payments Generally Reportable payments include any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses) or any promise or agreement to make a payment or loan to a labor organization or officer, employee, agent, shop steward, or other representative of a labor organization. The LMRDA exempts payments "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of 3 business." DOL's guidance takes the position that payments for the purpose of cultivating or maintaining a business relationship are ancillary to the regular course of business. Fees paid to union officers for service as a member of a corporate board are not exempt.3 However, compensation paid to an employee for services as an employee are exempt. Unrelated Services to Union Officials as Individuals The guidance provides an exemption for payments made in the ordinary course of business to a class of persons that (a) is determined without regard to whether they are, or are identified with, labor organizations and (b) whose relationship to labor organizations is not ordinarily known to or readily ascertainable by the payer. For example, payments made to a union officer who is an individual brokerage client of a financial services company (that happens to provide services to the officer's union-affiliated plan) are exempt if the payments are made without regard to the individual's position at the union and the union status is not relevant to the company's provision of individual brokerage services to the union official. Personal Payments by Employees of Covered Entities Under the guidance, a covered entity must report payments made by its employee from the employee's personal funds if the employee: • Holds a key position with the covered entity, such as a manager; • Has within his job responsibilities to generate or maintain business relationships with unions or affiliated trusts; • Has within his job responsibilities to engage in labor relations activity for the covered entity; or • Is acting, directly or indirectly, for the covered entity when giving the gift (for example is entitled to reimbursement from the covered entity but simply chooses to forgo reimbursement). Charitable Contributions Charitable contributions, including to union relief funds, are not reportable even if the contribution was made at the request of an officer or a labor union and even if a union official sits on the board of the charity. DOL states in its guidance that under "highly unusual circumstances" payments to tax-exempt organizations could be considered an indirect payment to a union official, such as in the case of a charity set up solely to provide educational scholarships to the children

of union officials. De Minimis Exception In administering the LMRDA, DOL historically has excluded from reporting sporadic or occasional gifts, gratuities, or favors of insubstantial value, given under circumstances and 3 The guidance provides that directors' fees are not required to be reported until the fiscal year that begins on or after January 1, 2006. 4 terms unrelated to the recipients' status in a labor organization, such as traditional Christmas gifts. The new guidance provides that gifts and gratuities with an aggregate value of $250 or less provided by an employer will be considered insubstantial for purposes of Form LM-10 reporting. If the aggregate value of multiple gifts or loans from a single employer to a single union or union official exceeds $250 in a fiscal year, the transaction will no longer be treated as de minimis, and the aggregate value of the transactions will be reportable. Gifts or loans from multiple employees of one employer are treated as originating from a single employer for purposes of the $250 threshold. In order to be treated as de minimis, the gift or gratuity must be unrelated to the recipient's status in a labor organization. The guidance provides that a gift or gratuity is unrelated to the recipient's status in a labor union if the covered entity ordinarily provides this consideration to individuals in similar circumstances who are not union officials. For example, if a covered entity routinely provides meals to all its clients (union affiliated or not) during the course of day-long meetings, meals would be unrelated to union status. Similarly, if a service provider to a pension and welfare plan provides a meal to both union and management trustees, and these types of meals are ordinarily offered to its clients under like circumstances, the meal would be deemed unrelated to the union official's status for the purpose of meeting that part of the de minimis test. Where an covered entity hosts a conference for employee benefit professionals, including union officials who are trustees, the covered entity must calculate the value of the conference to each union official in attendance to determine whether the de minimis exemption applies, and, if not, how much to report on Form LM-10. The cost to the covered entity of the refreshments, meals, travel, and lodging must be included in this calculation but the cost of the conference rooms and audio-visual equipment need not be included. The guidance states that it would be reasonable to divide the total cost of refreshments, meals, travel, and lodging for the conference by the number of attendees to determine the value received by each attendee. Effective Date Generally the guidance is effective for fiscal years of the covered entity beginning on or after January 1, 2005. The LM-10 is required to be filed within 90 days after the end of a fiscal year, which means that covered entities with a calendar fiscal year will be required to file, by March 31, 2006, an LM-10 covering payments made during the fiscal year that began on January 1, 2005. Although certain relief (described below) is provided as to the substance of the filing to be made in 2006 for the 2005 fiscal year, no relief is provided as to the filing deadline. DOL takes the position that this guidance clarifies filing requirements that have always existed. The guidance states that under a special enforcement policy, new filers will not be required to submit reports or maintain records for fiscal years beginning prior to January 1, 2005 except in "extraordinary circumstances" such as evidence of egregious conflicts of interest or outright attempts to purchase official favors. Generally, the LM-10 is required to be signed under penalty of perjury by the president and treasurer (or corresponding principal officers) of the filer. The guidance waives this requirement for the LM-10 for fiscal year 2005, if the following requirements are met: 5 • The employer did not institute procedures for tracking and reporting the payments based on a good faith belief that the LMRDA did not require reporting of them; • The employer has acted diligently and in good faith to reconstruct the records and identify all covered transactions; and • The employer prepares a report that discloses all the transactions revealed by its good faith inquiry. Effectively, this means that a covered entity must institute a diligent and good faith process to reconstruct its records for the current fiscal year and prepare a report detailing what was found. If the three conditions above apply, the employer may file the current

year’s LM-10 by striking out the penalty of perjury statement and inserting a statement declaring that a good faith investigation and diligent inquiry was performed.4 Key officials in the organization who supervised or conducted the good faith search, instead of the president and treasurer, may sign this declaration. Because the president and treasurer will be required to sign the LM-10 under penalty of perjury starting with the fiscal year that begins on or after January 1, 2006, a covered entity, before the beginning of its 2006 fiscal year, will have to establish any systems to capture the information required to be reported (including multiple payments with a value of under $250 to determine if the de minimis aggregate threshold is met). Filers are required to maintain applicable records for a period of at least five years after the LM-10 is filed. Michael L. Hadley Assistant Counsel 4 The guidance contains the full text of the statement that must be used.
