



***ERISA COMPLIANCE: AN ACTIONABLE
APPROACH TO ASSESSING NEW AND
CHANGING REGULATORY REQUIREMENTS***

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Sweeping and numerous regulatory initiatives, which have recently been introduced by the Department of Labor (DOL), are scheduled to become effective in 2012. It is imperative that affected firms begin preparing for the coming changes, as the penalties for non-compliance under the Employee Retirement Income Security Act of 1974, as amended (ERISA), are significant and could subject firms to penalties such as disgorgement, excise taxes and personal liability. The most impactful regulation for broker-dealers, RIAs, insurance providers, and investment manufacturers is the DOL's interim final regulation under ERISA 408(b)(2). By April 2012, this regulation will require all "covered" providers of services to ERISA plans to provide detailed written disclosures to their clients concerning all services to be provided and any direct and indirect compensation received in connection with such services, regardless of whether the contract or arrangement was entered into prior to such date. Consequently, compliance with the 408(b)(2) regulation requires affected firms to develop program-specific controls for new business and retrofit or migrate their existing business. The impact of this regulation alone is substantial, as many covered providers have not historically employed the necessary expertise to identify and remediate potential gaps in ERISA compliance.

Indeed, even firms that have already undertaken to develop compliant programs are reporting difficulties in identifying affected accounts or otherwise bringing their existing ERISA-covered services into compliance with the new requirements. To make matters worse, in October 2010, the DOL proposed a regulation that will significantly expand the nature and scope of services that will give rise to fiduciary status under ERISA. Given that ERISA places a number of additional restrictions on fiduciary service providers, firms must factor the potential impact of the broader definition into their existing ERISA compliance strategy. The remainder of this article sets forth some foundational questions and action items for firms to consider when seeking to identify and implement the necessary organizational and/or operational changes that may be required to comply with the new regulations.

- (1) **Are all "covered" accounts identified?** As discussed, many firms have reported difficulty in identifying all of the accounts potentially affected by the new regulations. For example, it is common for broker-dealers to receive aggregated data from recordkeepers for all compensation received on assets held away. Nevertheless, the 408(b)(2) regulation requires the disclosure of client-specific services and fees. Affected firms should determine whether and to what extent existing data feeds may be segregated to provide information for each covered client and begin developing an account "coding" mechanism so these accounts can be more easily identified in the future.
- (2) **Where and how to obtain disclosure data?** Firms should examine their books and records to identify relationships that may give rise to new or different reporting requirements. For held away business, it may be possible to obtain more detailed information, at more regular intervals, on compensation received in connection with ERISA-covered services. Because the ability to provide certain data will vary from provider-to-provider, affected firms should begin consulting with their approved providers to determine which firms are capable of supplying data in a manner that facilitates the identification and reporting of relevant information. It may be necessary to survey the firm's producers to determine whether or not the firm has identified all covered accounts and that the required information can be obtained, verified and reported in the disclosures.
- (3) **How will services be articulated?** The 408(b)(2) regulation requires covered service providers to specifically disclose the nature and scope of their services. While seemingly benign, this requirement can prove extremely difficult in cases where there is no service agreement in place between the firm and the ERISA client. For example, most broker-dealers do not have written agreements with their plan sponsor clients, as the compensation received in connection with

customary services provided by registered representatives is commonly paid by the plan's recordkeeper or custodian from fees built into the plan's investments. Many broker-dealers, consequently, will be faced with determining the services they will support based upon the needs of their clients, the sophistication of their producers and their compliance and supervisory resources.

Firms that elect to take a conservative approach by limiting the approved services may find their producers at a competitive disadvantage, as plan sponsors will evaluate the enumerated services against those offered by other service providers to determine the reasonableness of the arrangement. Firms that take a more expansive approach to articulating their services may find difficulty in supporting the proffered services, as compliance with ERISA requires an assessment of ERISA-specific concerns affecting the firm as a whole (due diligence, operations, compliance, supervision, etc.). A sustainable strategy will, therefore, largely depend upon the firm's ability to align objectives with current resources. Because most small and mid-sized firms do not employ internal ERISA expertise, their ability to support more complex or unique ERISA-covered services will likely be a function of their ability to leverage technology and third-party resources.

- (4) **What is the nature and scope of fiduciary liability under ERISA?** As discussed, ERISA places a number of additional limitations and obligations on those who provide fiduciary services. In addition to acting solely in the best interest of plan participants and beneficiaries, ERISA requires fiduciary service providers to be free from conflicts of interest or otherwise comply with specific safeguards set forth in various prohibited transaction exemptions. If these standards cannot be met, it is imperative for firms to ensure that any services they intend to offer do not give rise to fiduciary status under ERISA.

The most common way for financial service providers to become ERISA fiduciaries is to render investment advice for compensation. ERISA currently provides a five-part test to determine whether or not advice or recommendations are considered fiduciary investment advice. Additionally, as previously mentioned, the DOL has proposed a new definition of investment advice that would dispense with some of those factors and expand the types of activities that could give rise to fiduciary status. Firms should carefully examine both the current and proposed regulation to determine whether or not their approved services may subject them to a heightened standard of care or otherwise prohibit certain transactions.

If a firm is unable to eliminate prohibited conflicts of interest or support the provision of fiduciary investment advice to ERISA clients, it is crucial to understand the implications of implementing policies that seek to limit the services they intend to offer. Because most plan fiduciaries do not possess the necessary investment-related expertise to prudently manage plan investments, they rely on advisers for support. The new disclosures, however, will put plan fiduciaries on notice of any limitations imposed on their adviser by their supervising firm, and they may be surprised to learn that they will no longer be receiving ongoing "investment advice." Moreover, if the plan fiduciaries fulfilled their duty to prudently select their adviser, they would have evaluated his/her compensation in light of the services he/she actually provided. To the extent those services included investment advice (either at the plan or participant level), plan fiduciaries may seek to have their adviser lower his/her compensation to reflect the fact that the service is no longer available.

Affected firms should, therefore, be prepared to offer up solutions to plan fiduciaries who seek specific guidance on plan investments and to demonstrate the value of their non-fiduciary

services. Fortunately, the industry has begun to respond, and many providers now offer access to investment advice through unaffiliated, “remote” advisers. There are also a number of advisers that have the ability to provide advice remotely through arrangements that are independent and not tied to a particular platform or provider. By evaluating the availability and appropriateness of these options, advisers can assist plan fiduciaries in implementing and overseeing third-party advisory services. If the adviser has a well thought out solution in hand where he/she will play an active role, it is less likely that the plan will look to hire another adviser.

The foregoing questions are meant to serve as a foundation for firms that are seeking to reassess their ERISA strategies. There are a number of additional questions that will naturally arise out of the firm’s preliminary analysis. The following action items present a generic “roadmap” and additional details for firms to consider when developing and deploying successful ERISA-related programs:

- Identify all advisers and accounts that are subject to the regulations;
- Determine the scope of services to be offered (i.e., commission vs. fee-based, fiduciary vs. non-fiduciary, investment advice vs. education);
- Determine whether any services will be offered pursuant to an exemption;
- Reconcile approved services with errors and omissions coverage;
- Amend service agreements, disclosure documents and procedures to conform to the new standards with respect to content, format, delivery, etc.;
- Conduct additional due diligence on approved service providers (recordkeepers, TPAs, etc.) and determine whether responsibilities are properly allocated and that required data is capable of being provided;
- Examine third-party agreements, including solicitor arrangements and referral programs, and, develop procedures to eliminate or manage conflicts of interest;
- Consider outsourcing fiduciary services (e.g., plan and participant level investment advice; and
- Establish procedures for communicating any changes to procedures, disclosures, etc. and implement firm-specific training for affected advisers and their supervisors.

By acting now and taking proactive and preventive steps to reevaluate and retool ERISA compliance strategies, it is possible for the new regulations to serve as an opportunity for affected firms to not only increase revenues, but also to attract and retain advisers that specialize in providing retirement-related services. For more information about developing a firm-specific approach to ERISA compliance, please contact Jason C. Roberts, Founder and CEO of the Pension Resource Institute, LLC (PRI), at jroberts@pension-resources.com.

ABOUT PRI

Bringing together 75 years of proven expertise, ranging from executive, legal and compliance to sales and distribution, the PRI team works with clients to engineer profitable, sustainable and responsible retirement-related services. The broad experience of the PRI team allows us to collaborate with our clients and partners to develop competitive platforms and value added resources by aligning opportunities with available resources and evolving opportunities. By incorporating into our analysis all affected business units (i.e., due diligence, operations, supervision, etc.), we are able to provide clients with workable and sustainable strategies. The PRI team also assists in the implementation, training and monitoring of programs and provides individualized guidance to help clients deploy client-centric services and achieve economies of scale. By elevating value and utilization over cost and availability, the PRI team incorporates participant experiences and success indicators into all of the programs we develop and support.

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Jason C. Roberts is the Founder and CEO of the Pension Resource Institute (PRI) providing strategic consulting and training to retirement plan service providers (broker-dealers, RIAs, investment managers, recordkeepers, TPAs, etc.) and fiduciary education to plan sponsors. He is primarily responsible for tactical planning and business development at PRI, and he actively leads many of PRI's consulting projects.



Prior to founding PRI, Jason was a partner and co-chair of the Financial Services Group at Reish & Reicher – a leading ERISA law firm – where his practice focused on employee benefits and securities regulation. He counseled broker-dealers, RIAs, hedge funds, private equity funds, retirement plan sponsors and plan providers in ERISA and investment-related matters. Jason was frequently retained as an expert witness on fiduciary claims and represented clients in federal and state court at the trial and appellate level (including the U.S. Supreme Court) and in arbitrations before FINRA. He also counseled clients involved in government enforcement proceedings.

Jason was recently included in 401kWire's 2011 list of the 100 Most Influential People in Defined Contribution, and he currently serves on the steering committee for the American Society of Pension Professionals and Actuaries (ASPPA) 2011 and 2012 401(k) Summits. Jason also serves on the Investment Fiduciary Leadership Council's (IFLC) Task Force on Fiduciary Standards for Endowments & Foundations and is a co-director of IFLC's Southern California Fiduciary Roundtable.

Jason has published numerous articles on fiduciary best practices, ERISA compliance and securities regulation. He is a nationally-recognized speaker on issues such as fiduciary compliance, the efficacy of retirement savings programs and service provider due diligence and disclosure requirements. Jason is frequently quoted and interviewed by both professional and public publications, including *The Wall Street Journal*, *InvestmentNews*, *Dow Jones News*, *Registered Rep. Magazine*, *Ignites*, *PLANSPONSOR Magazine*, *PlanAdviser Magazine*, *Institutional Investor*, *Fund Action*, and *FSI Voice*.

Jason received his B.S.B.A. in Finance & Banking from the University of Missouri and his J.D. from the University of California, Los Angeles (UCLA) School of Law. He is a graduate of FINRA's Compliance Boot Camp and has obtained the designation of Accredited Investment Fiduciary Analyst™ from the Center for Fiduciary Studies.

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Amy Glynn is President and Founder of the Pension Resource Institute, a nationwide consulting firm founded to assist organizations in establishing efficient, compliant and profitable strategies in the qualified marketplace. Amy leads the firm's initiatives as they relate to developing and deploying sustainable sales and distribution. In addition, Amy leads the development and implementation of adviser-based sales and distribution strategies.

Amy has been in the 401(k) and pension marketplace for over 20 years, and in 2010, Amy was ranked #39 on 401kwire.com's list of the top 100 most influential people.

From 2008 until 2010, Amy served as Director of Retirements for indie hybrid firm, Commonwealth Financial Network (CFN), leading the firm's efforts to support advisers in all aspects of the marketplace, both individual and workplace. At CFN she: re-architected and developed the firm's strategic direction in the qualified marketplace and its integration with the nonqualified marketplace for both broker-dealer and RIA business lines; built the industry's first universal fee-based Retirement Plan Consulting Program contractually supporting co-fiduciary investment advisory services at both plan sponsor and participant levels; developed and implemented compliance protocols across the organization; led the oversight and development of adviser training, sales and business development; built a web-based resource center; implemented diligence on 30-plus providers; rebuilt a team with a staff of 7, averaging 11 years industry experience and doubled the firm's qualified fee-based business.

Prior to joining CFN, Amy ran a successful consulting organization integrating ERISA practices into existing businesses. She has also served as vice president of institutional retirement plan sales at New York Life; founded a web-based job placement and career resource center for women; was named Start-Up of the Year in Women's Business Journal in 2000; and she led the #1-producing retirement plan division in the country at Smith Barney for five consecutive years.

Amy is frequently a keynote speaker and panelist in the industry and has been published and quoted in the following publications: *WorkingWoman*, *Women's Business Journal*, *Boomer Magazine*, *Registered Rep. Magazine*, *PlanAdviser Magazine*, *PLANSPONSOR Magazine* and *InvestmentNews*.

Amy is a graduate of Colgate University with a B.A. in English and Women's Studies, a member of the American Society of Pension Professionals and Actuaries and on the Board of the Women in Pensions Network.

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John Simmers is a Founder of the Pension Resource Institute, bringing over 30 years of experience ranging from executive, sales and operations to compliance and supervision. John is a recognized expert and thought leader on industry regulations, and he leads all aspects of the development and implementation of client strategy.

John was formerly the Chairman and CEO of the ING Advisors Network (n.k.a. Cetera Financial Group) from 2000 until 2009, where he worked closely with ING U.S. Retail Financial Services leadership and the executive members of the broker-dealer firms to lead the network and its 10,000 independent financial professionals.

John's experiences include both the regulatory and industry sides of financial services. He began his career in 1974 as an NASD (n.k.a. FINRA) examiner and rose to supervisor. In 1983, John co-founded and was Executive VP, COO and CCO of Financial Network Investment Corporation, now a member of the ING broker-dealer network.

John has served as an executive leader for numerous industry-related associations, including FINRA, where he served on the Board of Governors, as well as the following national committees: Membership; Independent Firms; Direct Participation Program; Insurance Affiliated Firms; and Joint FINRA/NYSE Continuing Education. He was also a board member of NASDR, which was the subsidiary responsible for all rule making before the NASD became FINRA. John was a former chairman of the Financial Services Institute (FSI) and a member of its board of directors. He was also a past president and director of the California Association of Independent Broker-Dealers and a former member of the Investment Adviser Committee and Independent Firms Committee for the Securities Industry and Financial Markets Association (SIFMA). He served on the Compliance Council, Due Diligence Steering Committee, and Broker-Dealer Advisory Council for the Financial Planning Association (FPA).

John is a frequent speaker at industry conferences and is regularly quoted in industry publications and articles. In 2007 and 2008, John was named in Investment Adviser Magazine as one of the top 25 most influential people in the industry.

John earned his bachelor's degree in Business from Ohio State University.