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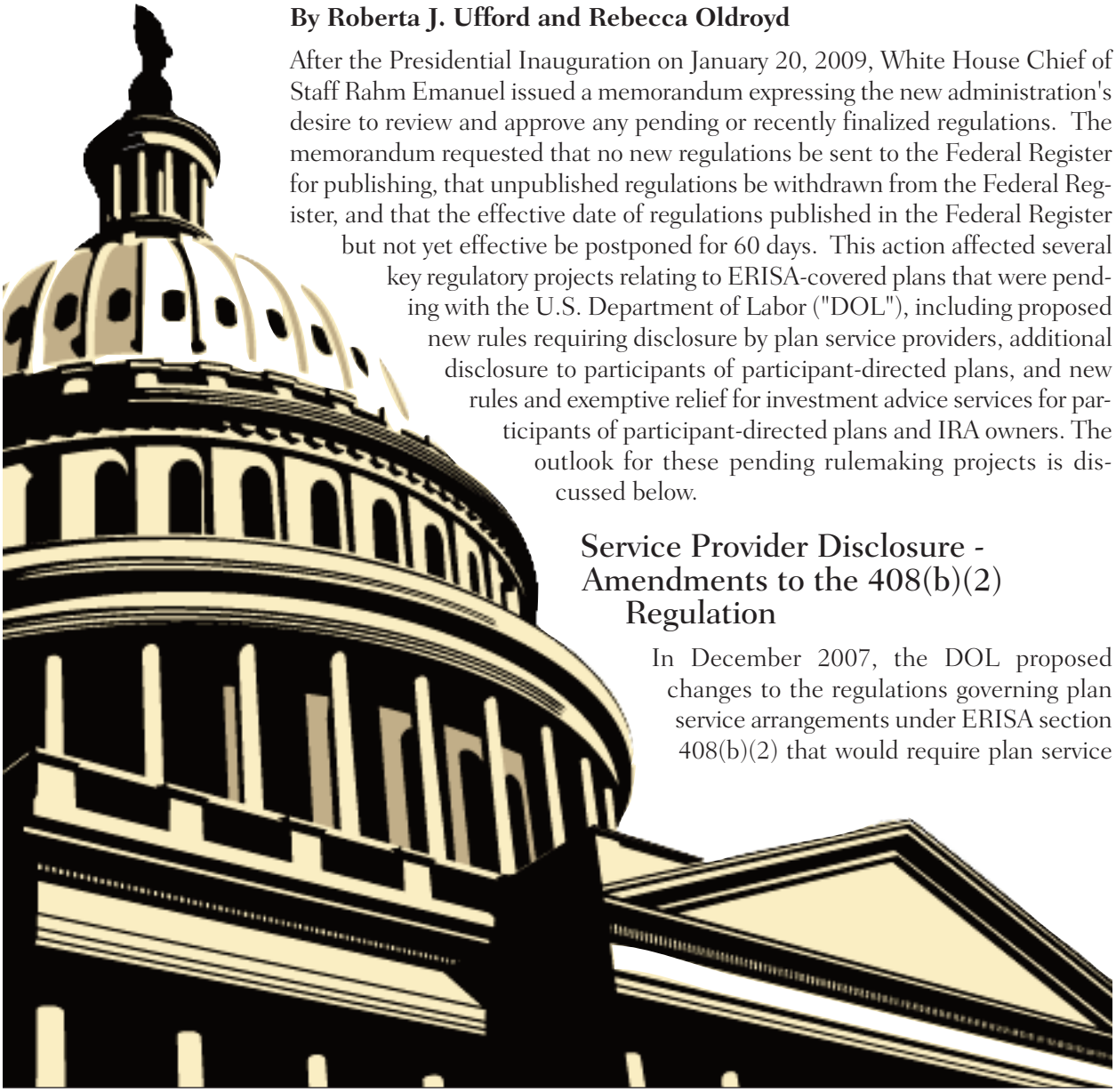
Update on Pending Department of Labor Regulations



By Roberta J. Ufford and Rebecca Oldroyd

After the Presidential Inauguration on January 20, 2009, White House Chief of Staff Rahm Emanuel issued a memorandum expressing the new administration's desire to review and approve any pending or recently finalized regulations. The memorandum requested that no new regulations be sent to the Federal Register for publishing, that unpublished regulations be withdrawn from the Federal Register, and that the effective date of regulations published in the Federal Register but not yet effective be postponed for 60 days. This action affected several key regulatory projects relating to ERISA-covered plans that were pending with the U.S. Department of Labor ("DOL"), including proposed new rules requiring disclosure by plan service providers, additional disclosure to participants of participant-directed plans, and new rules and exemptive relief for investment advice services for participants of participant-directed plans and IRA owners. The outlook for these pending rulemaking projects is discussed below.

Service Provider Disclosure - Amendments to the 408(b)(2) Regulation

In December 2007, the DOL proposed changes to the regulations governing plan service arrangements under ERISA section 408(b)(2) that would require plan service

providers to disclose in writing all services to be provided, all compensation or fees received in connection with the services to be provided, and detailed information about potential conflicts of interests, to a benefit plan before the parties enter into, extend or renew a service contract or arrangement. Failure to comply with the disclosure requirements would result in a contract or arrangement being deemed "unreasonable" and in violation of the ERISA prohibited transaction rules.

It was expected that these rules would be final in time to take effect at the same time as the new requirements for reporting service provider compensation on Schedule C of the Form 5500, which became effective January 1, 2009. However, even though DOL reportedly completed its review of the proposed rules and forwarded a final version to the Office of Management and Budget ("OMB") for approval in September of 2008, the regulation was not published before the change in administration. Now, it is possible that the regulation will be revised and resubmitted to OMB by the new administration or, alternatively, that Congress will address 408(b)(2) disclosure issues legislatively. Also, given the new administration's interest in transparency, the final version could possibly include even more stringent service provider disclosure requirements than initially proposed.

Although the service provider disclosure regulation is still pending, a recent DOL enforcement action suggests that plan service providers should not delay in reviewing and updating their fee disclosures to ERISA-covered plans, especially with respect to so-called "indirect" compensation arrangements in which the service provider receives fees from a third party in connection with plan services. (An example of indirect compensation is a shareholder service fee received by a custodian or recordkeeper from mutual funds in which plan clients invest.) On March 6, 2009, DOL issued a press release describing a settlement with a pension consultant in connection with allegations that the consultant received undisclosed and unauthorized compensation in connection with its ERISA plan clients. As part of the settlement, the consultant agreed that it would fully disclose all compensation and potential conflicts of interest in contracts with ERISA covered plans under terms that reflect the same requirements that would be imposed by the proposed 408(b)(2) regulations, including:

- specific information describing all compensation received by the consultant and its affiliates from any source;
- a description of how the compensation is determined; and
- disclosure of any financial interests the consultant or its affiliates acquired in any transaction with an ERISA plan.

It is difficult to predict when the new administration will indicate how it will approach the pending service provider disclosure regulation, particularly because the Assistant Secretary of the Employee Benefits Security Administration ("EBSA") has not yet been appointed. On February 24, 2009, Hilda Solis was confirmed as the Secretary of Labor for the Obama Administration, and it is likely that the office of Assistant Secretary of EBSA could be filled in the near future.

Participant Disclosure Regulation

In July 2008, the DOL proposed regulations that would require that all participants in participant-directed plans receive certain information about the plan and the plan's investment options, including specific information about fees and expenses, to enable participants to make informed investment decisions. The proposed regulation applied to all participant-directed individual account plans – 401(k) plans, other participant-directed 401(a) defined contribution plans, and 403(b) plans (if subject to ERISA). DOL proposed to make these regulations effective beginning January 1, 2009.

However, like the 408(b)(2) regulation, the participant disclosure regulation did not receive final approval from OMB before the administration transition. Although it is unclear whether and how the new administration may alter the disclosure requirements under the proposed regulation, it is clear that disclosure of fee information to plan participants is an on-going concern for both DOL and Congress. In fact, legislation was in-

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troduced in February 2009 in the Senate that would require special reporting and disclosure rules for individual account plans (S. 401, introduced in the Senate Committee on Health, Education, Labor and Pension). This suggests that participant disclosure standards could be established legislatively rather than by DOL regulation.

Investment Advice Regulation and Exemption

The Pension Protection Act of 2006 included a new statutory exemption from ERISA's prohibited transaction rules for investment advice services provided under an "eligible investment advice arrangement" to participants of participant-directed plans and IRA owners. On August 22, 2008, DOL published a proposed regulation and a new administrative prohibited transaction class exemption intended to implement the statutory investment advice exemption and the definition of "eligible investment advice arrangement" described in the statutory exemption. The proposed rule and administrative exemption, which was designed to expand relief for investment advice services provided to participants in plans and IRAs outside the scope of the statutory exemption, were generally welcomed by financial institutions but were not favored by other groups concerned about investment advisor conflicts of interest. A final version of the investment advice rule was approved by OMB and published in the Federal Register on January 21, 2009, the day after President Obama's inauguration.

In February 2009, DOL requested public comment on whether the regulation should be revised or withdrawn and received numerous comments that question whether the regulations are appropriate as well as comments in support of the regulation. The comment period closed on March 6, 2009. On March 20, 2009, DOL published a Federal Register notice delaying the effective date of the investment advice regulation for an additional 60 days until May 22, 2009 to "allow additional time for the Department to evaluate questions of law and policy concerning the rules." DOL's decision with respect to the future of the investment advice

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