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## DOL Settlement Regarding Trading Error Correction Gains

The Department of Labor (DOL) announced on February 4, 2013 that it had reached a settlement agreement touching upon, among other issues, the disclosure of compensation earned under an investment transaction processing error correction policy. The \$5.2 million settlement with ING Life Insurance and Annuity Co. (ILIAC) resulted from an investigation conducted by the Employee Benefit Security Administration's Boston Regional Office. The DOL alleged that ILIAC's failure to disclose its policy on reconciling transaction processing errors to retirement plan clients was a violation of the Employee Retirement Income Security Act (ERISA).

Recordkeepers and other administrative service providers to plans typically experience occasional errors in processing investment transactions on behalf of client plans. These errors may occur when purchase or sale orders are placed for an erroneous amount or investment or when such orders are not completed at the correct time. Most service providers undertake to make their clients whole by placing corrective orders. The price of the investments will likely have changed during the interim between the erroneous trade and the corrective trade. As a result, a gain or a loss may be generated due to the correction. Some service providers will agree in their service contracts to fund losses resulting from such errors.

DOL's news release describes that it has been ILIAC's practice to keep the gains resulting from the correction of an error in two instances; first, when processing transactions that failed to process as of the contract date and second, when re-processing erroneous transactions. The DOL alleged that ILIAC's failure to disclose its transaction error correction policy resulted in it receiving compensation in violation of ERISA.

As part of the settlement, ILIAC must make full disclosure of its investment transaction policy to both current and prospective clients who are subject to ERISA. The disclosure must be in writing; either through a separate notice for current clients, or by incorporation into the service contract for prospective clients. ILIAC is further obligated to inform clients that it will track, on an annual basis, the effect that corrections have on each plan and will make such information available to the client. Finally, in its disclosure, ILIAC must acknowledge that any gains that are kept under the correction policy constitute additional compensation for services ILIAC provides. ILIAC will report this additional compensation in accordance with ERISA section 408(b)(2).

We have worked with a number of clients on issues relating to error correction. This settlement agreement lends support to a position we have often considered, which is that an error correction policy under which a recordkeeper retains inadvertent gains can be a part of a reasonable service arrangement, so long as proper disclosures have been made. Please contact your regular Groom attorney or one of the attorneys in the fiduciary practice group to determine how this information may apply to your business.