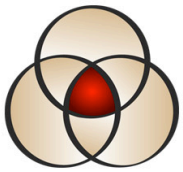

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Regulatory Update
Fall 2007

Introductory Comment: At long last the much anticipated release of the final rules to implement the broker exceptions under the Securities Exchange Act of 1934 have been issued (Reg R). Instead of restating the rule, I thought it would be appropriate to provide some commentary on this item. I have provided information on the SEC announcement and the comments provided by SEC staff on this topic. In addition, I have provided information on a proposed rule and a temporary interim rule impacting broker-dealers. Also discussed is the expanded examination cycle as outlined in the FFIEC pronouncement. Finally, I have included information on a proposed EBSA rule pertaining to multi-employer pension plans.

SEC: Agencies Adopt Final Rules to Implement the Bank 'Broker' Provisions of the Gramm-Leach-Bliley Act

On Monday, September 24, 2007 the Securities and Exchange Commission ("SEC") and Board of Governors of the Federal Reserve System ("Board") announced the adoption of final joint rules to implement the "broker" exceptions for banks under Section 3(a)(4) of the Securities Exchange Act of 1934. These exceptions were adopted as part of the Gramm-Leach-Bliley Act of 1999 (GLB Act). The SEC and the Board approved the final rules at separate open meetings held on September 19, 2007, and September 24, 2007, respectively.

The Board and SEC issued proposed rules for comment in December 2006. The final rules are similar to the proposed rules in overall scope and approach. In response to comments, the agencies also have modified the rules in several important respects to make the rules more workable and less burdensome.

The rules define the scope of securities activities that banks may conduct without registering with the SEC as a securities broker and implement the most important "broker" exceptions for banks adopted by the GLB Act. Specifically, the rules implement the statutory exceptions that allow a bank, subject to certain conditions, to continue to conduct securities transactions for its customers as part of the bank's trust and fiduciary, custodial and deposit "sweep" functions, and to refer customers to a securities broker-dealer pursuant to a networking arrangement with the broker-dealer.

The rules are designed to accommodate the business practices of banks and to protect investors. In developing these rules, the agencies consulted extensively with the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision. Banks do not have to start complying with the rules until the first day of their fiscal year commencing after September 30, 2008.

SEC - Opening Remarks at SEC Open Meeting: Adoption of Regulation R — The Bank Broker Provisions of the Securities Exchange Act

Background
Outlined below are comments and the speech provided by the SEC Staff as the opening remarks at the SEC Open Meeting held on September 19, 2007. These comments are specifically related to the adoption of Regulation R, and will provide additional insight into the development and adoption of the new Regulation.

Comments
Today we recommend that the Commission adopt Regulation R, which implements the bank broker provisions of the Exchange Act. Regulation R would be adopted jointly with the Board of Governors of the Federal Reserve System.

The Agencies received approximately 60 comments on proposed Regulation R. Staff from the Commission and the banking agencies have worked closely together to consider the comments and draft the final rules that we recommend today. This collaborative process has resulted in a set of rules that — while largely similar to those proposed — have been modified and clarified to address commenters' concerns. The revised rules are consistent with the language of the bank broker exceptions established by the GLBA and the underlying policies of functional regulation and investor protection. They also take into account banking industry implementation and compliance concerns.

The rules define terms used in the exceptions relating to networking, trust and fiduciary activities, safekeeping and custody, and sweep accounts. They also provide conditional exemptions from certain of the statutory requirements of these exceptions. In addition, they provide banks with the targeted exemptions for particular securities activities that were proposed as well as one new exemption pertaining to employee stock plans. Finally, these rules provide banks with additional time to come into compliance with the GLBA, and grant limited relief for banks from possible third-party rescission rights.

Networking: The networking exception permits banks to pay their unregistered employees — such as tellers, loan officers, and private bankers — incentive compensation to refer bank customers to their networking broker-dealer partners. The statute limits these payments to a "nominal one-time cash fee of a fixed dollar amount" when "the payment of the fee is not contingent on whether the referral results in a transaction." The rules define certain terms used in the networking exception, and provide an exemption to allow banks to pay higher fees for referrals of certain institutional and high net worth customers.

In particular, the rules define "incentive compensation" to better accommodate typical bank bonus programs while also clarifying the types of bonus plans that do not constitute "incentive compensation" and therefore can be freely used. A bank may generally pay bonuses that are based on the overall profitability *or* revenues of the bank, its affiliates or operating units — as long as the unit over time does not predominately engage in making referrals to broker-dealers. The bank regulators will examine bank bonus programs for compliance with these requirements.

The rules also include a high net worth/institutional referral exemption, which has been expanded from the proposal, to encompass referrals for a broader range of institutional customers, including certain institutions controlled by other institutions. Bank employees may orally provide a customer with information about the bank/broker relationship, if either the bank or the broker follows up with written disclosure. A key safeguard of this exemption is the requirement that the broker-dealer perform a suitability analysis when a referral fee is contingent on a transaction and a suitability or sophistication analysis for other referrals. Taken together, the conditions applicable to this exemption provide additional investor protections in those circumstances where the bank employee making the referral may receive a higher-than-nominal referral fee. A bank may rely on the exemption if it has a reasonable basis to believe the customer qualifies as high net worth or institutional.

Trust and Fiduciary: The trust and fiduciary exception permits a bank to effect securities transactions in a trustee or fiduciary capacity if, among other things, it is "chiefly compensated" for those transactions, consistent with fiduciary principles and standards, on the basis of specifically enumerated types of fees, which are referred to as "relationship compensation." These fees may be considered "relationship compensation" even if paid by a service provider rather than directly by an investment company. The rules establish a test to determine how a bank is "chiefly compensated," and permit a bank to choose either an account-by-account or bank-wide approach. Either alternative allows banks to exclude the compensation associated with a securities transaction conducted in accordance with any of the other exceptions or exemptions as long as the bank excludes that compensation from both relationship compensation (if applicable) and total compensation. The revenues of certain foreign branches of U.S. banks are excluded for purposes of the "chiefly compensated" test. Notably, a bank that does not have trust powers may rely on the trust and fiduciary exception if its appropriate federal regulator examines its fiduciary accounts for compliance with trust and fiduciary principles.

Custody and Safekeeping: The custody and safekeeping exception permits banks to perform certain securities-related services if they constitute "customary banking activities." The rules permit a bank to accept orders for securities transactions from employee benefit plan accounts and individual retirement accounts for which the bank acts as a custodian, recordkeeper or administrator, and to accept certain accommodation orders, as well.

The rules also permit a bank to rely on these provisions when it acts as a directed trustee without investment discretion, and extends the exemptions to subcustodians. Administrators, recordkeepers and subcustodians will be able to engage in cross-trades to the same extent that the custodian bank could — meaning they can cross or net orders between the accounts of a particular custodian bank, but not among the accounts of multiple banks. In response to comments, the release identifies the circumstances under which a bank might be considered an impermissible "carrying broker."

Sweep Accounts: The sweep account exception permits a bank to sweep funds from bank accounts into no-load money market funds without registering as a broker-dealer. The rules define terms used in the exception and conditionally allow sweeps into money market funds that charge more than no-load funds.

Other Provisions: Moving now to other provisions, in 2003, the Commission adopted an exemption for banks that engage in securities lending activities as a broker or as a dealer. Regulation R reproposed the broker portion of that exemption, which was negated by the Regulatory Relief Act. The rule will continue to allow a bank to engage in certain securities lending transactions as agent when it either does not have custody of the securities, or has custody of the securities for less than the entire period of the transaction. In response to comments, the release solicits additional comment on banks' transactions involving repurchase agreements.

Regulation R also includes an exemption to allow banks to effect certain agency transactions involving Regulation S securities. Banks may rely on the rule if they have a reasonable belief that securities were initially sold in compliance with Reg S when they effect resales of a security obtained from a broker-dealer for one of its non-U.S. customers who is not in the U.S.

The final rules also include an exemption that permits banks to effect mutual fund trades through a clearing agency system or transfer agent, rather than routing those trades to a broker-dealer. The exemption also includes transactions in registered variable insurance products. Moreover, the rules provide a new exemption permitting banks to effect certain "company stock" transactions for employee stock plans.

Banks will have until the first day of their first fiscal year commencing after September 30, 2008, to come into compliance with the Exchange Act bank broker provisions.

Conclusion

In conclusion, we recommend that the Commission with the Board adopt Regulation R jointly. In addition, we recommend that the Commission adopt the rules and rule amendments discussed in the companion release

SEC: Proposed Rule - Interpretive Rule Under the Advisers Act Affecting Broker-Dealers

Background

The Securities and Exchange Commission ("SEC") is publishing for comment an interpretive rule that would address the application of the Investment Advisers Act of 1940 to certain activities of broker-dealers. The proposal would reinstate three interpretive provisions of a rule that was vacated by a recent court opinion. The first provision would clarify that a broker-dealer that exercises investment discretion with respect to an account or charges a separate fee, or separately contracts, for advisory services provides investment advice that is not "solely incidental to" its business as a broker-dealer. The second provision would clarify that a broker-dealer does not receive special compensation within the meaning of section 202(a)(11)(C) of the Advisers Act solely because it charges a commission for discount brokerage services that is less than it charges for full-service brokerage. The third provision would clarify that a registered broker-dealer is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subjects it to the Advisers Act.

Information

The Investment Advisers Act of 1940 ("Advisers Act" or "Act")1 regulates the activities of certain "investment advisers," who are defined in section 202(a)(11) of the Act as persons who receive compensation for providing advice about securities as part of a regular business. Section 202(a)(11)(C) excepts from the definition of "investment adviser" a broker or dealer "whose performance of [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."

In 2005, the SEC adopted the original rule 202(a)(11)-1 under the Advisers Act, the principal purpose of which was to deem broker-dealers offering "fee-based brokerage accounts" as not subject to the Advisers Act. The rule also included several interpretations of section 202(a)(11)(C). On March 30, 2007, the Court of Appeals for the District of Columbia Circuit (the "Court"), in *Financial Planning Association v. SEC* (the "*FPA* decision"), vacated the original rule 202(a)(11)-1 on the grounds that the Commission did not have the authority to except broker-dealers offering fee-based brokerage accounts from the definition of "investment adviser." Though the Court did not question the validity of the SEC's interpretive positions, it vacated the entire rule, leaving the interpretations potentially in doubt.

The SEC has received requests from broker-dealers that the SEC clarify the status of the interpretive positions. Because of the significance of the interpretations, and in order to provide the public with an opportunity for meaningful comment on them in light of the *FPA* decision, the SEC is re-proposing the interpretive positions. Proposed rule 202(a)(11)-1 would clarify that (i) a broker-dealer provides investment advice that is not "solely incidental to" the conduct of its business as a broker-dealer if it exercises investment discretion (other than on a temporary or limited basis) with respect to an account or charges a separate fee, or separately contracts, for advisory services, (ii) a broker-dealer does not receive "special compensation" solely because it charges different rates for its full-service brokerage services and discount brokerage services, and (iii) a registered broker-dealer is an investment adviser solely with respect to accounts for which it provides services that subject it to the Advisers Act. The proposed interpretive positions are discussed below.

<u>"Solely Incidental"</u>

Section 202(a)(11)(C) of the Advisers Act, as discussed above, provides an exception from the Act for a broker-dealer "whose performance of [advisory services] is solely incidental to his business as a broker-dealer and who receives no special compensation therefor." This exception amounts to a recognition that broker-dealers commonly give a certain amount of advice to their customers in the course of their regular business as broker-dealers and that "it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business."

In the 2005 Proposing Release, the SEC explained its understanding that investment advice is "solely incidental to" the conduct of a broker-dealer's business within the meaning of section 202(a)(11)(C) when the advisory services rendered to an account are in connection with and

reasonably related to the brokerage services provided to that account. The SEC further explained their understanding is consistent with the legislative history of the Advisers Act, which indicates Congress' intent to exclude broker-dealers providing advice as part of traditional brokerage services. The SEC also explained that it is consistent with the Commission's contemporaneous construction of the Advisers Act as excepting broker-dealers whose investment advice is given "solely as an incident of their regular business."

Many commenters responding to the 2005 Proposing Release urged the SEC to clarify that certain practices are not solely incidental to brokerage services. Proposed rule 202(a)(11)-1(a) would re-codify two of the interpretations the SEC announced in 2005 regarding activity that is not "solely incidental" to brokerage services for purposes of section 202(a)(11)(C). The situations addressed by these interpretations are not the only ones in which a broker-dealer provides advice that is not solely incidental to its business as a broker-dealer. Commenters are invited to suggest other situations that should be addressed by the rule.

1. Separate Contract or Fee for Advisory Services. Proposed rule 202(a)(11)-1(a)(1) would provide that a broker-dealer that separately contracts with a customer for, or separately charges a fee for, investment advisory services cannot be considered to be providing advice that is solely incidental to its brokerage. The SEC views a separate contract specifically providing for the provision of investment advisory services to reflect a recognition that the advisory services are provided independent of brokerage services and, therefore, cannot be considered solely incidental to the brokerage services. Similarly, the SEC has long held the view that when a broker-dealer charges its customers a separate fee for investment advice, it clearly is providing advisory services and is subject to the Advisers Act. In light of the *FPA* decision, brokerage firms and other interested parties may be unsure about whether the SEC continues to hold these views. In order to provide certainty to those parties, the proposed rule would codify the SEC's interpretations.

The SEC requests comment on their interpretation. In the 2005 Adopting Release, the SEC explained their understanding that many broker-dealers already use the payment of a separate fee as a bright line test to distinguish their brokerage activities from their advisory activities and the SEC has received no information since 2005 that would change our understanding. Do broker-dealers also already consider advisory services that are the subject of a separate contract not to be solely incidental to the brokerage services they provide? Commenters are invited to explain to the SEC any situation in which a broker-dealer could charge a separate fee for, or separately contract for, advisory services in a manner that, consistent with the intent of the Advisers Act, is "solely incidental" to the brokerage services provided. For example, could a broker-dealer separately contract for advisory services, but receive no "special compensation" therefore, for purposes of section 202(a)(11)(C) of the Act?

2. Discretionary Investment Advice. The SEC has long acknowledged that a broker-dealer's exercise of investment discretion over customer accounts raises serious questions about whether those accounts must be treated as subject to the Advisers Act – even where no special compensation is received. In 2005, the SEC adopted, and today they are re-proposing, a rule that would clarify that any account over which a broker-dealer exercises investment discretion is subject to the Advisers Act. Specifically, rule 202(a)(11)-1(a) would clarify that discretionary investment advice is not "solely incidental to" the business of a broker-dealer within the meaning of section 202(a)(11)(C) and, accordingly, brokers and dealers are not excepted from the Act for any accounts over which they exercise investment discretion as that term is defined in section 3(a)(35) of the Exchange Act (except that investment discretion granted by a customer on a temporary or limited basis is excluded).

The SEC believes that a broker-dealer's authority to effect a trade without first consulting a customer is qualitatively distinct from simply providing advice as part of a package of brokerage services. When a broker-dealer exercises investment discretion, it is not only the source of investment *advice*, it also has the authority to make the investment *decision* relating to the purchase or sale of securities on behalf of its client. This, in the SEC's view, warrants the protection of the Advisers Act because of the "special trust and confidence inherent" in such a relationship. Most commenters who addressed this aspect of the 2005 proposal, including those representing investors, advisers, and broker-dealers, generally agreed with the SEC.

Under the proposed rule, the exception provided by section 202(a)(11)(C) of the Act is unavailable for any account over which a broker-dealer exercises investment discretion, regardless of the form of compensation and without regard to how the broker-dealer handles other accounts. The SEC believes their interpretation is appropriate for several reasons. First, they believe it would apply the Advisers Act to the sort of relationship with a broker-dealer that the Act was intended to reach. Second, they believe the proposed rule is consistent with the interpretation that a broker-dealer is an investment adviser only with respect to those accounts for which the broker-dealer provides services or receives compensation that subject the broker-dealer to the Advisers Act. Finally, the SEC believes the proposed rule would provide a workable, bright-line test for the availability of the section 202(a)(11)(C) exception.

The SEC requests comment on their proposed interpretive provision. Do commenters agree with the SEC that it addresses the sort of relationship that the Advisers Act should reach? One commenter to the 2005 proposal asserted it does not. This commenter argued that Congress, when it adopted the Advisers Act, must have been aware that broker-dealers exercised discretionary authority and, by not expressly stating that brokers offering such accounts were subject to the Act, Congress indicated its intent to except such broker-dealers from the Act. The SEC disagrees. They explained in 2005, the Advisers Act does not address directly whether a broker-dealer exercising investment discretion over a commission-based account must comply with the Act. The Act applies unless the advisory services are "solely incidental to" the broker-dealer's business and no "special compensation" is received. The SEC remains unable to conclude that in 1940 Congress would have understood investment discretion to be part of the traditional package of services broker-dealers offered for commissions. The SEC is aware of nothing in the legislative history of section 202(a)(11)(C) (or of the Act as a whole) or in the brokerage practices in 1940 that would preclude our interpretation of that section as being unavailable for all accounts over which broker-dealers exercise investment discretion. Do commenters agree?

The SEC is also interested in understanding the impact on investors of these distinctions. They also request comment on our reference in the proposed rule to the definition of "investment discretion" in section 3(a)(35) of the Exchange Act. Is a different definition more appropriate? If so, what definition should be used? Is the SEC correct in excluding investment discretion given on a temporary or limited basis? Have they correctly identified the circumstances in which a broker-dealer exercises temporary or limited discretion?

3. Financial Planning. The rule the SEC adopted in 2005 also contained a provision stating that when a broker-dealer provides advice as part of a financial plan or in connection with providing financial planning services, a broker-dealer provides advice that is not solely incidental if it (i) holds itself out to the public as a financial planner or as providing financial planning services, (ii) delivers to its customer a financial plan, or (iii) represents to the customer that the advice is provided as part of a financial plan or financial planning services.

The SEC has decided not to propose this provision as part of this rule, which many financial services firms found difficult to apply. Instead, the SEC plans to consider issues relating to financial planning in light of the results of a study they commissioned by the RAND Corporation ("RAND Study") comparing the levels of protection afforded customers of broker-dealers and investment advisers under the federal securities laws. The RAND Study is expected to be delivered to us no later than December 2007, several months ahead of schedule.

<u>Full-Service and Discount Brokerage Programs</u>

As part of their 2005 rulemaking, the SEC adopted an interpretive provision which clarified that a broker-dealer will not be considered to have received "special compensation" for purposes of section 202(a)(11)(C) of the Advisers Act (and therefore will not be subject to the Act) *solely* because the broker-dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater or less than one it charges another customer. The SEC is re-proposing that interpretive position today as proposed rule 202(a)(11)-1(b).

This interpretive position reflects the longstanding view that, with respect to brokerage commissions or other transaction-based compensation, broker-dealers receive "special compensation" where there is a clearly definable charge for investment advice. But, if a firm negotiates different fees with its customers for similar transactions, the Commission would not conclude that the customer being

charged the higher fee is paying "special compensation" for investment advice based solely on differences in charges, because whether the pricing difference is based on the presence or absence of investment advice is "too hypothetical." Similarly, if, for example, a broker-dealer had a general fee schedule for full service brokerage that included access to brokerage personnel, and had a separate fee schedule for automated transactions using an Internet Web site, the SEC would not, absent other factors, view the difference as "special compensation." As one commenter to the 2005 proposal noted, electronic brokerage programs offer "lower expenses and less overhead, [and it is] entirely appropriate, and necessarily competitive, for firms to have reduced their fees for such services, and this reduction is obviously in clients' best interests."

The Commission would not look outside the fee structure of a given firm to determine whether special compensation exists. That is, just because a "discount" firm offered lower rates than a "full-service" firm, the SEC would not consider the "full-service" firm's charges "special compensation." The SEC requests comment on this interpretation. Do commenters support it? Should the SEC consider any modifications and, if so, which ones?

Dual Registrants

Finally, the SEC adopted in 2005, and are re-proposing today, a rule providing that a broker-dealer that is registered under both the Exchange Act and the Advisers Act is an investment adviser solely with respect to those accounts for which it provides advice or receives compensation that subject the broker-dealer to the Advisers Act. The SEC received few comments regarding this provision of the original rule, and they are proposing it as adopted. The provision would codify a long-standing interpretation of the Act that permits a broker-dealer also registered under the Act to distinguish its brokerage customers from its advisory clients.

SEC: Interim Rule - Temporary Rule Regarding Principal Trades with Certain Advisory Clients

Background

The Commission is adopting a temporary rule under the Investment Advisers Act of 1940 that establishes an alternative means for investment advisers who are registered with the Commission as broker-dealers to meet the requirements of section 206(3) of the Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients. The Commission is adopting the temporary rule on an interim final basis as part of its response to a recent court decision invalidating a rule under the Advisers Act, which provided that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act. As a result of the Court's decision, which takes effect on October 1, fee-based brokerage customers must decide whether they will convert their accounts to fee-based accounts that are subject to the Advisers Act or to commission-based brokerage accounts. The SEC is adopting the temporary rule to enable investors to make an informed choice between those accounts and to continue to have access to certain securities held in the principal accounts of certain advisory firms while remaining protected from certain conflicts of interest. The temporary rule will expire and no longer be effective on December 31, 2009.

On March 30, 2007, the Court of Appeals for the District of Columbia Circuit (the "Court"), in *Financial Planning Association v. SEC* ("*FPA* decision"), vacated rule 202(a)(11)-1 under the Investment Advisers Act of 1940 ("Advisers Act" or "Act"). Rule 202(a)(11)-1 provided, among other things, that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act. As a consequence of the *FPA* decision, broker-dealers offering fee-based brokerage accounts became subject to the Advisers Act with respect to those accounts, and the client relationship became fully subject to the Advisers Act. Broker-dealers would need to register as investment advisers, if they had not done so already, act as fiduciaries with respect to those clients, disclose all potential material conflicts of interest, and otherwise fully comply with the Advisers Act, including the Act's restrictions on principal trading.

The SEC filed a motion with the Court on May 17, 2007 requesting that the Court temporarily withhold the issuance of its mandate and thereby stay the effectiveness of the *FPA* decision. The SEC estimated at the time that customers of broker-dealers held $300 billion in one million fee-based brokerage accounts. The SEC sought the stay to protect the interests of those customers and

to provide sufficient time for them and their brokers to discuss, make, and implement informed decisions about the assets in the affected accounts. The SEC also informed the Court that they would use the period of the stay to consider whether further rulemaking or interpretations were necessary regarding the application of the Act to fee-based brokerage accounts and other issues arising from the Court's decision. On June 27, 2007, the Court granted our motion and stayed the issuance of its mandate until October 1, 2007.

The effective date of the interim rule is September 30, 2007, except for 17 CFR 275.206(3)-3T will be effective from September 30, 2007 until December 31, 2009. Comments on the interim final rule should be received on or before November 30, 2007.

Information

Congress intended section 206(3) of the Advisers Act to address concerns that an adviser might engage in principal transactions to benefit itself or its affiliates, rather than the client. In particular, Congress appears to have been concerned that advisers might use advisory accounts to "dump" unmarketable securities or those the advisers fear may decline in value. Congress chose not to prohibit advisers from engaging in principal and agency transactions, but rather to prescribe a means by which an adviser must disclose and obtain the consent of its client to the conflicts of interest involved.

In light of these concerns and the important protections provided by section 206(3) of the Advisers Act, rule 206(3)-3T provides advisers an alternative means to comply with the requirements of that section that is consistent with the purposes, and our prior interpretations, of the section. The temporary rule continues to provide the protection of transaction-by-transaction disclosure and consent, subject to several conditions. Specifically, temporary rule 206(3)-3T permits an adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) of the Advisers Act by, among other things: (i) providing written prospective disclosure regarding the conflicts arising from principal trades; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal transactions; (iii) making certain disclosures, either orally or in writing, and obtaining the client's consent before each principal transaction; (iv) sending to the client confirmation statements disclosing the capacity in which the adviser has acted and disclosing that the adviser informed the client that it may act in a principal capacity and that the client authorized the transaction; and (v) delivering to the client an annual report itemizing the principal transactions. The rule also requires that the investment adviser be registered as a broker-dealer under section 15 of the Exchange Act and that each account for which the adviser relies on this rule be a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which it is a member.

These conditions, discussed below, are designed to prevent overreaching by advisers by requiring an adviser to disclose to the client the conflicts of interest involved in these transactions, inform the client of the circumstances in which the adviser may effect a trade on a principal basis, and provide the client with meaningful opportunities to refuse to consent to a particular transaction or revoke the prospective general consent to these transactions. The SEC notes that they have previously stated that "Section 206(3) should be read together with Sections 206(1) and (2) to require the adviser to disclose facts necessary to alert the client to the adviser's potential conflicts of interest in a principal or agency transaction." The SEC requests comment generally on the need for the rule and its potential impact on clients of the advisers. Will the advantages described above that accompany rule 206(3)-3T be beneficial to investors? Have they struck an appropriate balance between investor choice and investor protection? Does the alternative means of compliance contained in rule 206(3)-3T provide all the necessary investor protections?

Section-by-Section Description of Rule 206(3)-3T

Rule 206(3)-3T deems an investment adviser to be in compliance with the provisions of section 206(3) of the Advisers Act when the adviser, or a person controlling, controlled by, or under common control with the investment adviser, acting as principal for its own account, sells to or purchases from an advisory client any security, provided that certain conditions discussed below are met. The scope and structure of the rule are similar to our rule 206(3)-2 under the Advisers Act, which, as noted above, provides an alternative means of complying with the limitations on "agency cross transactions," also contained in section 206(3).

The SEC has applied section 206(3) not only to principal transactions engaged in or effected by an adviser, but also to certain situations in which an adviser causes a client to enter into a principal transaction that is effected by a broker-dealer that controls, is controlled by, or is under common control with the adviser.30 Accordingly, rule 206(3)-3T would be available if the adviser acts as principal by causing the client to engage in a transaction with a broker-dealer that is an affiliate of the adviser – that is, a broker-dealer that controls, is controlled by, or is under common control with the investment adviser.

Non-Discretionary Accounts: Rule 206(3)-3T applies to principal trades with respect to accounts over which the client has not granted "investment discretion, except investment discretion granted by the advisory client on a temporary or limited basis." Availability of the rule to discretionary accounts would be inconsistent with the requirement of the rule, discussed below, that the adviser obtains consent (which may be oral consent) from the client for each principal transaction. In addition, the SEC is of the view that the risk of relaxing the procedural requirements of section 206(3) of the Advisers Act when a client has ceded substantial, if not complete, control over the account raises significant risks that the client will not be, or is not in a position to be, sufficiently involved in the management of the account to protect himself or herself from overreaching by the adviser.

The rule would apply to all non-discretionary advisory accounts, not only those that were originally established as fee-based brokerage accounts. As noted above, some portion of the customers converting fee-based brokerage accounts into advisory accounts will be converting those accounts into non-discretionary accounts offered by the same firm. The SEC understands from their discussions with broker-dealers that maintaining principal trading distinctions between advisory accounts that were once fee-based brokerage accounts and those that were not would be very difficult. Trade execution routing for investment advisory programs often is derived through unified programs or electronic codes allowing or prohibiting certain kinds of trades uniformly for all accounts that are of the same type. As such, limiting relief to accounts that were formerly in fee-based brokerage programs would make the requested relief impractical for firms and would neither serve the best interests of clients (because the effect would be to limit their ability to continue to access the inventory of securities held by their brokerage firm) nor be administratively feasible to firms affected by the Court's ruling with respect to the transition and ongoing servicing of these and other accounts subject to the Advisers Act. The SEC accordingly determined not to limit the availability of the temporary rule only to those non-discretionary advisory accounts that were fee-based brokerage accounts.

Issuer and Underwriter Limitations: Rule 206(3)-3T is not available for principal trades of securities if the investment adviser or a person who controls, is controlled by, or is under common control with the adviser ("control person") is the issuer or is an underwriter of the security. The rule includes one exception – an adviser may rely on the rule for trades in which the adviser or a control person is an underwriter of non-convertible investment-grade debt securities.

One benefit an investor may gain by establishing a brokerage account with a large broker-dealer is the ability to obtain access to potentially profitable public offerings of securities. These securities are typically purchased by the broker-dealer participating in the underwriting as part of its allotment of the offering and then sold to customers in principal transactions. As noted above, many broker-dealers have not made such offerings available to advisory clients because of the requirements of section 206(3).

A broker-dealer participating in an underwriting typically has a substantial economic interest in the success of the underwriting, which might be different from the interests of investors. When a broker-dealer acts as an underwriter with respect to a security, it is compensated precisely for the service of distributing that security.35 A successful distribution not only offers the possibility of a concession on the securities (the spread between the underwriter's purchase price from the issuer and the public offering price), but also often an over-allotment option, and potentially future business (whether as an underwriter, lender, adviser or otherwise) with the issuer. The incentives may bias the advice being provided or lead the adviser to exert undue influence on its client's decision to invest in the offering or the terms of that investment. As such, the broker-dealer's incentives to "dump" securities it is underwriting are greater for sales by a broker-dealer acting as

an underwriter than for sales by a broker-dealer not acting as an underwriter of other securities from its inventory.

A broker-dealer acting as an issuer has similar, if not greater, proprietary interests that are likely to adversely affect the objectivity of its advice. The SEC therefore is of the view that an investment adviser who (or whose affiliate) is the issuer or underwriter of a security has such a significant conflict of interest as to make such a transaction, with one exception, an inappropriate subject of the relief they are providing today.

Written Prospective Consent Following Written Disclosure: An adviser may rely on rule 206(3)-3T only after having secured its client's written, revocable consent prospectively authorizing the adviser directly or indirectly acting as principal for its own account, to sell any security to or purchase any security from such client. The consent must be obtained only after the adviser provides the client with written disclosure about: (i) the circumstances under which the investment adviser may engage in principal transactions with the client; (ii) the nature and significance of the conflicts the investment adviser has with its clients' interests as a result of those transactions; and (iii) how the investment adviser addresses those conflicts. The SEC anticipates that this consent normally would be obtained by the adviser when the client establishes the advisory account.

Rule 206(3)-3T is not exclusive. An adviser would still be able to effect principal trades with a client who either never grants the prospective consent required under paragraph (a)(3) of the rule 206(3)-3T, or subsequently revokes that consent after having granted it, so long as the adviser complies with the terms of section 206(3) of the Act.

With each written disclosure, confirmation, and request for written prospective consent, the investment adviser must include a conspicuous, plain English statement clarifying that the prospective general consent may be revoked at any time. Thus, the client must be able to revoke his or her prospective consent at any time, thereby preventing an adviser from relying on rule 206(3)-3T with respect to that account going forward.

Trade-by-Trade Consent Following Disclosure: The temporary rule requires an investment adviser, before the execution of *each* principal transaction, to: (i) inform the client of the capacity in which the adviser may act with respect to the transaction; and (ii) obtain consent from the client for the investment adviser to act as principal for its own account with respect to each such transaction. The trade-by-trade disclosure and consent may be written or oral. Although representatives of the brokerage industry have requested that the SEC eliminate the requirement for transaction-by-transaction disclosure and consent, the SEC has determined that such disclosure and consent continues to be important to alert clients to the potential for conflicted advice they may be receiving on individual transactions. In light of the conflicts inherent in these transactions, generally notifying the client that a transaction may be effected on a principal basis close in time to the carrying out of such a trade is appropriate.

Given the frequency and speed of trading in some advisory accounts as well as the increasing complexity of securities products available in the marketplace, trade-by-trade disclosure and consent, even if oral, might be a more effective protection against misunderstanding by advisory clients of the nature of a transaction and the conflicts inherent in it as well as a meaningful safeguard for investment advisers seeking to comply with their fiduciary obligations. The SEC understands, however, that in many instances the adviser may not know whether a particular transaction will be effected on a principal basis. Accordingly, the rule permits advisers to disclose to clients that they "may" act in a principal capacity with respect to the transaction.

Written Confirmation: The investment adviser must send to each client with which it effects a principal trade pursuant to rule 206(3)-3T a written confirmation, at or before the completion of the transaction. In addition to the other information required to be in a confirmation by Exchange Act rule 10b-10, the confirmation must include a conspicuous, plain English statement informing the advisory client that the adviser disclosed to the client prior to the execution of the transaction that the adviser may act in a principal capacity in connection with the transaction, that the client authorized the transaction, and that the adviser sold the security to or bought the security from the client for its own account.

Annual Summary Statement: The investment adviser must deliver to each client, no less frequently than once a year, written disclosure containing a list of all transactions that were executed in the account in reliance on rule 206(3)-3T, including the date and price of such transactions. The annual summary statement is designed to ensure that clients receive a periodic record of the principal trading activity in their accounts and are afforded an opportunity to assess the frequency with which their adviser engages in such trades. As with each other disclosure required pursuant to rule 206(3)-3T, to be able to rely on the rule the investment adviser must include a conspicuous, plain English statement that its client's written prospective consent may be revoked at any time.

Advisory Account Must be a Brokerage Account: Rule 206(3)-3T is only available to an investment adviser that also is registered with us as a broker-dealer. Each account for which the investment adviser relies on this section must be a brokerage account subject to the Exchange Act, the rules thereunder, and the rules of applicable self-regulatory organizations (*e.g.*, FINRA). The rule therefore requires that the protections of both the Advisers Act and the Exchange Act apply when advisers enter into principal transactions with clients in reliance on the rule.

The temporary rule permits, subject to compliance with the rule's conditions, an adviser that also is registered as a broker-dealer to execute a principal trade directly (out of its own account) or indirectly (out of an account of another person who is a control person of the adviser). Because the SEC has decided to apply the rule only to advisers who also are registered as broker-dealers, an adviser who is not also a registered broker-dealer would be unable to rely on rule 206(3)-3T if it causes a client to enter into a principal trade with a control person, even if that control person is a registered broker-dealer.

Other Obligations Unaffected: Rule 206(3)-3T(b) clarifies that the temporary rule does not relieve in any way an investment adviser from its obligation to act in the best interests of each of its advisory clients, including fulfilling the duty with respect to the best price and execution for a particular transaction. Compliance with rule 206(3)-3T also does not relieve an investment adviser from its fiduciary obligation imposed by sections 206(1) or (2) of the Advisers Act or by other applicable provisions of federal law.

Transition Guidance

The SEC is providing guidance to assist broker-dealers who have offered fee-based brokerage accounts and are seeking the consent of their clients to convert those accounts to advisory accounts and meet the requirements of this rule by October 1, 2007.

Client Consent: Broker-dealers have asked whether they must, before October 1, 2007, obtain written consent from each of their fee-based brokerage customers to enter into an advisory agreement that meets the requirements of the Advisers Act, in particular section 205 of the Act. Broker-dealers have informed us that, as a practical matter, it is not feasible for them to do so and, if written consent is required, many fee-based brokerage customers will experience interrupted service or will be placed in traditional commission-based brokerage accounts, which may not be best for them.

Interim final rule 206(3)-3T(a)(3) requires an adviser wishing to rely on the rule's alternative means for complying with section 206(3) of the Act to obtain a written prospective consent from each client authorizing the investment adviser to engage in principal transactions with the client. The SEC understands that it likely will be impossible for advisers to obtain these written consents from fee-based brokerage customers who convert their accounts to non-discretionary advisory accounts prior to October 1, 2007. To make the alternative means provided in the interim final rule useful immediately upon its effective date to those customers, the SEC will not object if an adviser obtains the required written consent no later than January 1, 2008 from each fee-based customer who converts his or her account to a non-discretionary advisory account. During this transitional period, investment advisers must comply with the other conditions of rule 206(3)-3T, including the condition in paragraph (a)(4) of the rule, which requires that the adviser make certain disclosures and obtain client consent before effecting a principal trade with the client. They also must provide a client with the written disclosure required by paragraph (a)(3) of the temporary rule prior to effecting the first trade with that client in reliance on this rule.

Client Brochures: Advisers Act rule 204-3 requires an investment adviser to furnish its advisory clients with a disclosure statement, or brochure, containing at least the information required to be in Part II of Form ADV at the time of, or prior to, entering into an advisory contract. In light of the time constraints firms face in complying with the October 1st deadline, the SEC will not object if, with respect to the fee-based brokerage customers that convert to non-discretionary advisory accounts, advisers deliver this statement no later than January 1, 2008.

FFIEC: Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks

Background

The OCC, Board, FDIC, and OTS (collectively, the Agencies) are jointly adopting as final the interim rules issued on April 10, 2007, that implemented section 605 of the Financial Services Regulatory Relief Act of 2006 (FSRRA) and related legislation (collectively the Examination Amendments). The Examination Amendments permit insured depository institutions (institutions) that have up to $500 million in total assets, and that meet certain other criteria, to qualify for an 18-month (rather than 12-month) onsite examination cycle. Prior to enactment of FSRRA, only institutions with less than $250 million in total assets were eligible for an 18-month onsite examination cycle. The interim rules made parallel changes to the Agencies' regulations governing the onsite examination cycle for U.S. branches and agencies of foreign banks (foreign bank offices), consistent with the International Banking Act of 1978 (IBA).

In addition to implementing the changes in the Examination Amendments, the interim rules clarified when a small insured depository institution is considered ''well managed'' for purposes of qualifying for an 18-month examination cycle. Effective on September 25, 2007, the Interim Rules published on April 10, 2007 (72 FR 17798) are adopted as final without change.

Information

Section 10(d) of the Federal Deposit Insurance Act (the FDI Act) generally requires that the appropriate Federal banking agency for an insured depository institution conduct a fullscope, on-site examination of the institution at least once during each 12-month period. Prior to enactment of FSRRA, section 10(d) also authorized the appropriate Federal banking agency to lengthen the on-site examination cycle for an institution to 18 months if the institution (1) Had total assets of less than $250 million; (2) was well capitalized (as defined for purposes of the prompt corrective action statute at 12 U.S.C. 1831o); (3) was found, at its most recent examination, to be well managed and to have a composite condition of outstanding or good; (4) had not undergone a change in control during the previous 12-month period in which a full-scope, on-site examination otherwise would have been required; and (5) was not subject to a formal enforcement proceeding or order by its appropriate Federal banking agency or the FDIC. The Board, the FDIC and the OTS, as the appropriate Federal banking agencies for state-chartered insured banks and savings associations, are permitted to conduct on-site examinations of such institutions on alternating 12-month or 18-month schedules with the institution's State supervisor, if the Board, FDIC, or OTS, as appropriate, determines that the alternating examination conducted by the State carries out the purposes of section 10(d) of the FDI Act and, if relevant, the Home Owners' Loan Act.

In addition, section 7(c)(1)(C) of the IBA provides that a U.S. branch or agency of a foreign bank shall be subject to on-site examination by its appropriate Federal banking agency as frequently as a national or State bank would be subject to such an examination by the agency. The Agencies have adopted regulations to implement the examination cycle requirements of section 10(d) of the FDI Act and section 7(c)(1)(C) of the IBA, including the extended 18-month examination cycle available to qualifying small institutions and foreign bank offices.

Section 605 of FSRRA, which became effective on October 13, 2006, amended section 10(d) of the FDI Act to raise, from $250 million to $500 million, the total asset threshold below which an insured depository institution may qualify for an 18-month (rather than a 12-month) on-site examination cycle. Public Law 109–473, which became effective on January 11, 2007, also amended section 10(d)(10) of the FDI Act to authorize the appropriate agency, if it determines the action would be consistent with principles of safety and soundness, to allow an insured depository institution that falls within this expanded total asset threshold to qualify for an 18-month examination cycle if the institution received a composite rating of outstanding *or* good at its most recent examination.

The Examination Amendments will allow the Agencies to better focus their supervisory resources on those institutions that may present capital, managerial, or other issues of supervisory concern, while concomitantly reducing the regulatory burden on small, well capitalized and well managed institutions. The Agencies will continue to use off-site monitoring tools to identify potential problems in smaller, well capitalized and well managed institutions that present low levels of risk.

Moreover, neither the statute nor the Agencies' regulations limit, and the Agencies therefore retain, the authority to examine an insured depository institution or foreign bank office more frequently than would be required by the FDI Act or IBA.

Rule and Comments
On April 10, 2007, the Agencies published and requested comment on interim rules to implement the Examination Amendments. In particular, the Agencies amended their respective rules to raise, from $250 million to $500 million, the total asset threshold below which an insured depository institution that meets the qualifying criteria in section 10(d) and the Agencies' rules may qualify for an 18-month on-site examination cycle. In addition, as authorized by the Examination Amendments, the Agencies determined that it is consistent with safety and soundness to permit institutions with between $250 million and $500 million in total assets that received a composite rating of 1 or 2, which corresponds to ''outstanding'' and ''good'' respectively, under the Uniform Financial Institutions Rating System (commonly referred to as CAMELS), and that meet the other qualifying criteria set forth in section 10(d) and the Agencies' rules, to qualify for an 18-month examination cycle.

Consistent with section 7(c)(1)(C) of the IBA, the OCC, Board and FDIC also made conforming changes to their regulations governing the on-site examination cycle for the U.S. branches and agencies of foreign banks. These changes permit a foreign bank office with total assets of less than $500 million to qualify for an 18-month examination cycle if the office received a composite ROCA rating of 1 or 2 at its most recent examination.

In connection with these changes, the Agencies also modified their rules to specify that a small institution meets the statutory ''well managed'' criteria for an 18-month cycle if the institution, besides having a CAMELS composite rating of 1 or 2, also received a rating of 1 or 2 for the management component of the CAMELS rating at its most recent examination.

The Agencies received comments on the interim rules from 11 commenters, although many commenters submitted identical letters to each Agency. Comments were submitted by six banking trade associations, four insured depository institutions, and one law firm. All commenters supported the interim rules. Commenters generally agreed that the rules would appropriately reduce regulatory burden for qualifying small institutions and foreign offices without creating undue risk to the institutions, officers or the deposit insurance fund. After carefully reviewing the comments and for the reasons set forth above and in the Supplementary Information to the interim rules, the Agencies have determined to make final the interim rules as published in April 2007.

The Agencies estimate that the final rules, like the interim rules, will increase the number of insured depository institutions that may qualify for an extended 18-month examination cycle by approximately 1,089 institutions, for a total of 6,670 insured depository institutions. Approximately 126 foreign branches and agencies would be eligible for the extended examination cycle based on the interim rules, for an increase of 31 offices. The FDI Act and the IBA set the outside limits within which an on-site safety and soundness examination of an institution or foreign bank office must commence, and permit the appropriate Agency for an institution or foreign bank to conduct an on-site examination more frequently than required. The Agencies' rules continue to expressly recognize that the appropriate Agency may examine an institution or foreign bank office as frequently as the Agency deems necessary.

EBSA: Proposed Rule - Multi-Employer Pension Plan Information Made Available on Request

Background
On September 13, 2007 the U.S. Department of Labor announced proposed rules giving participants in multiemployer pension plans, their union representatives and contributing employers the right to request and receive copies of certain actuarial, financial and other funding-related documents from their plans. The new disclosure rules implement provisions of the Pension Protection Act of 2006 (PPA).

"These rules will ensure that workers, employee representatives and employers receive important information about the financial operation of their multiemployer plans," said Bradford P. Campbell, assistant secretary of the Labor Department's Employee Benefits Security Administration.

Under the PPA, plan administrators of multiemployer plans must furnish upon the written request of participants, beneficiaries, employee representatives and contributing employers copies of actuarial, financial and funding-related documents. The plan has 30 days after a request to furnish the documents, which are limited to one copy per report within a 12-month period.

The proposed rule, upon adoption, would implement amendments to the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), requiring the administrator of a multiemployer plan to provide copies of certain actuarial and financial information about the plan to participants and others upon request. The amendments, enacted by the Pension Protection Act of 2006, added subsection (k) to section 101 of ERISA. The proposed regulation would affect plan administrators, participants and beneficiaries of multi-employer plans, as well as employee representatives of such participants and employers that have an obligation to contribute to such plans.

Information

Section 502(a)(1) of the Pension Protection Act of 2006, Public Law 109– 280, 120 Stat. 780 (PPA), which was enacted on August 17, 2006, amended the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), by adding section 101(k). Section 101(k)(1) of ERISA requires the administrator of a multiemployer pension plan, upon written request, to furnish certain documents to any plan participant, beneficiary, employee representative, or any employer that has an obligation to contribute to the plan. The documents that are required to be furnished are: (A) A copy of any periodic actuarial report (including sensitivity testing) received by the plan for any plan year which has been in the plan's possession for at least 30 days; (B) a copy of any quarterly, semi-annual, or annual financial report prepared for the plan by any plan investment manager or advisor or other fiduciary which has been in the plan's possession for at least 30 days; and (C) a copy of any application filed with the Secretary of the Treasury requesting an extension under section 304 of the Act (or section 431(d) of the Internal Revenue Code of 1986) and the determination of such Secretary pursuant to such application.

Section 502(a)(2) of the PPA amended section 502(c)(4) of ERISA to provide that the Secretary of Labor may assess a civil penalty of not more than $1,000 a day for each violation of section 101(k). Section 502(a)(3) of the PPA provides that the Secretary of Labor shall prescribe regulations under section 101(k)(2) not later than one year after the date of enactment of the PPA.

Section 502(d) of the PPA provides that section 101(k) shall apply to plan years beginning after December 31, 2007.

Overview of Proposed Regulation

Included in this notice is a proposed regulation that, upon adoption, would implement the new disclosure requirement under section 101(k) of the Act. Interested parties are invited to comment on all aspects of the regulation. The Department intends to publish a separate regulation implementing the Secretary's authority to assess civil penalties under section 502(c)(4) of ERISA at a later date.

Paragraph (a) of the proposed regulation provides that the administrator of a multi-employer pension plan shall furnish copies of actuarial, financial and funding-related documents to certain persons who make written requests to the plan.

For purposes of paragraph (a), a person entitled to request and receive documents is any participant within the meaning of section 3(7) of the Act; any beneficiary receiving benefits under the plan; any labor organization representing participants under the plan; or any employer that is a party to the collective bargaining agreement(s) pursuant to which the plan is maintained or who otherwise may be subject to withdrawal liability pursuant to section 4203 of the Act. See § 2520.101–6(d). In this regard, the phrase ''any employer that has an obligation to contribute to the plan'' under section 101(k) of the Act has been construed under paragraph (d)(4) of the proposed regulation in a manner that is consistent with the construction given to similar language

under section 101(f) of ERISA, which relates to annual funding notices of multi-employer defined benefit pension plans.

Paragraph (b)(1) of the proposed regulation provides that the plan administrator must furnish the requested document or documents to the requester not later than 30 days after the date the written request is received by the plan, subject to the limitations in paragraphs (b)(3) and (b)(4).

Paragraph (b)(3) of the proposed regulation provides that a plan administrator is not required to furnish to any requester more than one copy of a document described in paragraph (c) during any 12-month period. Thus, an eligible requester would not be entitled to receive more than one copy of the same financial report within a 12-month period. This limitation, however, does not mean that an eligible requester would not be entitled to request and receive copies of two different reports (e.g., one financial report and one actuarial report) during any 12-month period. For purposes of the application of this 12-month limitation, the Department is of the view that the 12-month period commences from the earlier of the date the plan actually responds to a request or the 30th day referenced in paragraph (b)(1) of the regulation.

Paragraph (b)(4) of the proposed regulation permits the plan administrator to charge the requester for the reasonable costs of furnishing documents. The PPA specifically authorizes the Department to prescribe in regulations the maximum amount that would be considered a reasonable charge for furnishing documents under this section. For this purpose, the Department proposes that a reasonable charge may not exceed the lesser of the actual cost to the plan for the least expensive means of acceptable reproduction of the document, or 25 cents per page, plus the cost of mailing or otherwise delivering the requested document. This standard adopts the existing reasonable charge standard under 29 CFR 2520.104b–30, but also permits the plan administrator to charge the requester the actual cost to the plan of mailing or delivering the document or information.

Paragraph (b)(2) provides that such documents must be furnished in a manner consistent with the general furnishing requirements set forth in 29 CFR 2520.104b–1 including the use of electronic media. See § 2520.104b–1(c). In this regard, wherever possible, the Department encourages plan administrators to use electronic media to furnish requested information in order to reduce compliance costs under the regulation.

Paragraph (c) of the proposed regulation delineates the documents that must be disclosed pursuant to section 101(k). Paragraph (c)(1) provides that information subject to the disclosure requirement in paragraph (a) consists of a copy of any periodic actuarial report (including any sensitivity testing) received by the plan that has been in the plan's possession for at least 30 days before the plan receives the written request; a copy of any quarterly, semi-annual, or annual financial report prepared for the plan by any plan investment manager or advisor (without regard to whether such advisor is a fiduciary within the meaning of section 3(21) of the Act) or other fiduciary which has been in the plan's possession for at least 30 days before the plan receives the written request; and a copy of any application filed by the plan sponsor with the Secretary of the Treasury requesting an amortization extension under section 304 of the Act
or section 431(d) of the Internal Revenue Code of 1986 and the determination of such Secretary pursuant to such application.

To provide plan administrators with clarity regarding their disclosure obligations under section 101(k), the proposed regulation clarifies that financial reports prepared by advisors are subject to disclosure without regard to whether the advisor or advisors are fiduciaries within the meaning of section 3(21) of ERISA. See § 2520.101– 6(c)(1)(ii). The Department specifically requests comments on whether this clarification alone provides sufficient certainty as to what financial reports are required to be disclosed, or, whether, in addition, the term ''financial report'' should also be clarified in regulation and, if so, how.

Paragraph (c)(2) provides that documents required to be disclosed under the regulation shall not include certain information. In this regard, paragraph (c)(2)(i) provides that required disclosures do not include the information or data which served as the basis for such report or application, e.g., the data behind or underlying a report or application. In addition, paragraph (c)(2)(ii) of the proposed regulation provides that disclosed reports or applications shall not include any information that the plan administrator reasonably determines to be either individually identifiable information regarding

any plan participant, beneficiary, employee, fiduciary, or contributing employer, or proprietary information regarding the plan, any contributing employer, or entity providing services to the plan. The Department specifically invites comment on whether clarification is needed with respect to determinations regarding what information should be considered ''proprietary'' or ''individually identifiable'' in this context and, if so, what standards should govern such determinations. In this regard, paragraph (c)(2)(ii) of the proposed rule clarifies that, in responding to a request under the regulation, a plan administrator is required to inform the requester if the plan administrator withholds any information determined to be ''proprietary'' or ''individually identifiable'' within the meaning of the restrictions in paragraph (c)(2) of the proposed regulation.

Along with the proposed regulation under section 101(k), discussed above, this notice also includes amendments to 29 CFR 2520.104b–30, which provides guidelines for assessing a reasonable charge for furnishing plan documents pursuant to section 104(b)(4) of the Act (e.g., latest updated summary plan description, latest annual report, any terminal report, etc.). Language in § 2520.104b–30 could be construed as contrary to specific language in section 101(k) of ERISA, § 2520.101–6, and other PPA provisions amending title I of ERISA that expressly permit plan administrators to impose reasonable charges on requesters for the cost of furnishing the requested information, including handling and postage charges. Accordingly, minor conforming amendments are being proposed to paragraph (a) of § 2520.104b–30 to eliminate any ambiguity that may be caused by current § 2520.104b–30.