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Retirement Plan Sponsor Compliance Reporting
DOL, IRS & Fiduciary Issues
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The Impact of New Required Reporting Requirements

401(k), 403(b) and 401(a) Plans Affected

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Introduction

On November 16, 2007, the Department of Labor ("DOL") published a new reporting format for the Schedule C retirement plan tax return, effective for the 2009 plan year, which requires significantly more disclosure of service provider fees and compensation. The new Schedule C disclosure requirements are intended to improve fee transparency of service providers, permit the DOL and plan sponsor the ability to monitor the compensation arrangements of service providers, understand the impact of fees on plan assets and evaluate the value of purchased services using plan assets. These objectives are met when a plan sponsor can obtain the information they need to assess the reasonableness of compensation paid for services rendered to the plan.

The new reporting requirements are akin to Sarbanes-Oxley impositions raising significant challenges for preparers and plan sponsors alike. Failure to comply with the new filing requirements is arguably a breach of Title 18 Part I Chapter 47 of the United States Code section 1027, which addresses false statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act ("ERISA") of 1974. The 9th Circuit Court of Appeals, in *U.S. v. Wiseman, 274 F.3d 1235 (2001)*, discussed how 18 U.S.C. 1027 applies to incorrect information filed in Form 5500. Also see, *See United States v. Martorano*, 767 F.2d 63, 66 (3d Cir. 1985) (finding a violation of § 1027 where the defendant filed a Form 5500 that failed to disclose a prohibited transaction, and the defendant failed to disclose to his attorney the relevant information needed to accurately complete the form); *United States v. Tolkow*, 532 F.2d 853, 857 (2d Cir. 1976) (finding a § 1027 violation where the defendant signed and filed a false Form 5500, and the defendant failed to disclose party-in-interest loans to the accountant preparing the attached financial reports).

Unfortunately, the Boards, Committees, Executives and Managers of most plan sponsors are unaware that the size and strength of their service provider does little to protect them. Much like Arthur Anderson who believed they prepared accurate and reliable reports, it was the executives at ENRON that went to jail. In a somewhat similar fashion to ENRON, it is usually "C" level executives who are fiduciaries and party to signing the Form 5500 under penalties of perjury. This is the case, even if their bundled vendors or subordinate staff are actually preparing, validating and presenting the required forms for execution by the CFO, CEO, CHRO or other designated signatory.

The liabilities alone are reason to reconsider serving in a fiduciary capacity especially when personal assets are accessible to participants, plaintiffs and the DOL to satisfy monetary damages. For these reasons it will be important to the Board, the Executives and the Fiduciaries that their service providers have a reliable solution to accurately capture fees by services rendered in as much detail as possible. Such a solution exists within the expanded deliverables offered by the PlanTools™ Risk Management System.

This analysis is provided to the retirement community – both "sell-side" professionals and "buy-side" plan sponsors to help inform, educate and equip you for successful compliance.

The PlanTools™ Risk Management System is the industry's first and foremost reporting solution platform for the management of fiduciary risk of investment-based retirement programs. Providing standards-based performance and expense reporting since 2001, this powerful system serves the regulatory and business needs of service platforms, advisors and consultants – in support of their retirement plan clients.

For more information, visit www.fraplantools.com or contact David J Witz, Managing Director at (704) 564-0482 or dwtiz@fraplantools.com. PlanTools™ is a wholly owned subsidiary of Fiduciary Risk Assessment LLC.

Background / History

Employers and administrators who comply with the instructions for Form 5500 generally will satisfy the annual reporting requirements for the IRS and DOL. Each Form 5500 must accurately reflect the characteristics and operations of the plan or arrangement being reported. ERISA and the Code provide for the assessment or imposition of penalties for not submitting the required information when due. Annual reports filed under Title I of ERISA must be made available by plan administrators to plan participants and beneficiaries and by the DOL to the public pursuant to ERISA sections 104 and 106.

ERISA and the Code provide for the DOL and the IRS, respectively, to assess or impose penalties for not giving complete and accurate information and for not filing complete and accurate statements on annual returns/reports. Certain penalties are administrative (i.e., they may be imposed or assessed by one of the governmental agencies delegated to administer the collection of the annual return/report data). Others require a legal conviction.

One or more of the following administrative penalties may be assessed or imposed in the event of incomplete filings or filings received after the due date unless it is determined that failure to file properly is for reasonable cause:

1. A penalty of up to $1,100 a day (or a higher amount if adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended) for each day a plan administrator fails or refuses to file a complete report. See ERISA section 502(c)(2) and 29 C.F.R. § 2560.502c-2.
2. A penalty of $25 a day (up to $15,000) for not filing returns for certain plans of deferred compensation, trusts and annuities, and bond purchase plans by the due date(s). See Code section 6652(e).
3. A penalty of $1,000 for not filing an actuarial statement (Schedule MB (Form 5500) or Schedule SB (Form 5500)) required by the applicable instructions. See Code section 6692.
4. Any individual who willfully violates any provision of Part 1 of Title I of ERISA shall on conviction be fined not more than $100,000 or imprisoned not more than 10 years, or both. See ERISA section 501.
5. A penalty up to $10,000, five (5) years imprisonment, or both, may be imposed for making any false statement or representation of fact, knowing it to be false, or for knowingly concealing or not disclosing any fact required by ERISA. See section 1027, Title 18, U.S. Code, as amended by section 111 of ERISA.

Perspective

According to the 2009 and 2010 Instructions for Form 5500, "A return/report must be filed every year for every pension benefit plan, welfare benefit plan, and for every entity that files as a DFE (“Direct Filing Entity”) as specified below (pursuant to Code section 6058 and ERISA sections 104 and 4065)." Beginning with the 2009 plan tax year, every retirement plan with 100 participants or more must complete and attach the Schedule C - Service Provider Information to Form 5500. For the 2009 filing year, the U.S. Department of Labor (DOL) has expanded the number of Schedule C codes from 23 to 55.

According to the DOL, the objectives of the expanded codes include:

1. Improve fee transparency of service providers
2. Monitor compensation arrangement of service providers
3. Understand impact of fees on plan assets
4. Evaluate the value of purchased services

The DOL has indicated that its staff will not hold anyone liable for incorrectly allocating plan expenses to the wrong C code, which begs the question given the objectives, "If there is no enforcement can the DOL rely upon information in the return to effectively monitor fiduciary responsibility related to fees paid from plan assets?"

This disconnect between what is **required** and what is **enforced** provides little incentive for service providers to give careful consideration to assigning accurate C codes to fees charged against plan assets, leaving millions of participants at risk. As one of our founding fathers, Alexander Hamilton, so eloquently stated:

> *"If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. (Federalist Papers, page 105 No. 15, Hamilton)*

The requirement to tie an appropriate code to the fees charged against plan assets is, at this time, nothing more than a recommendation. This does not provide the necessary incentive to produce reliable data to

improve fee transparency, monitor compensation arrangements of service providers and assess the impact of fees on plan assets. Furthermore, failure to enforce collection of accurate data inhibits data collection and reporting organizations use of Form 5500 data as a reliable and accurate source for benchmarking plan fees and services rendered.

Even if the DOL does force service providers to correctly complete Schedule C tax reports for client plans, the volume of service codes without clear definitions will likely result in confusion. This could lead to intentional manipulation or "gaming" of the system, allocating costs to inappropriate codes or in a manner that may vary from one preparer to another.

This dilemma leads one to conclude that the future reliability of Form 5500 and corresponding Schedule C data has not changed; it has just become more convoluted. It will be even more important for plan fiduciaries to have objective, well-equipped service providers and supporting professionals on their team.

Instructions to Schedule C indicate that service providers must list all applicable codes to revenues received. This means that multiple codes could apply to the same dollars spent and thereby raises the question: "How to allocate the total dollars among the multitude of codes accurately?" With no clear direction from the DOL on this matter, it is reasonable to assume the Schedule C data will be unreliable to use in the formulation of valid benchmarking statistics.

Purpose

This report is designed to provide users of the PlanTools™ Expense Analysis and Benchmarking system with guidance necessary to prepare an accurate Schedule C report. PlanTools™ helps users to assimilate data for inclusion in Schedule C tax filings, while simultaneously assessing the reasonableness of fees for services rendered. PlanTools™ helps its users avoid the embarrassment and liability of being reported to the DOL as a service provider that has failed to provide the required information, accurately and completely.

The PlanTools™ Risk Management System has been enhanced and expanded in numerous ways as a result of the new reporting requirements. As a service to the industry – both buy-side plan sponsors and sell-side vendors and professionals, PlanTools™ has attempted to provide accurate definitions to each Schedule C code.

The authors of this document have ignored brevity for the sake of accuracy. We would ask the reader to keep in mind our firm's role in this analysis as an independent and objective source with no bias or incentive to mislead or misrepresent.

Our objective is to provide a factual report that can be relied upon in the preparation of the Schedule C so that accurate expense information can be captured and reported in a consistent and reliable manner. Assuming every Form 5500 preparer completes the Schedule C using the same protocols; it will be possible to use Schedule C data to create benchmarking statistics that can be relied upon by service providers and plan sponsors to effectively assess the reasonableness of fees charged for services rendered within the confines of a documented prudent process.

Ideally, this documented process can then be utilized to raise an impenetrable defense against the attack of a plaintiff attorney raising a claim of excessive fees. Unfortunately, based upon our analysis of the Schedule C and the fact that there are no universally accepted definitions or protocols to complete the Schedule C, it is unlikely that Schedule C information will provide reliable benchmarking data, at least in the near term. This likelihood supports the continued need for professionals engaged in the collection of client specific data to prepare meaningful benchmarking analysis.

As you review the PlanTools™ definitions, keep in mind that these definitions were derived from the combined experience and input of numerous professionals that prepare and consult with plan clients on Form 5500 issues. Please note, it is possible that a definition is incomplete or possibly even in error. Should you uncover a scenario that would affectively change or modify a definition please feel free to email us with the details of your findings to dwitz@fraplantools.com**.** Industry collaboration will only make this resource more valuable and reliable to every preparer and plan sponsor subject to Schedule C filing requirements.

Finally, this report should be used as a guide for informational purposes only. It should not be relied upon nor is it intended to convey legal or tax advice. The particular facts or circumstances applicable to your situation should be discussed with an attorney or accountant before making a final decision particularly in light of signing the Form 5500 under penalties of perjury.

Acknowledgment

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10 Accounting (including auditing)

Sample Services:

- Annual ERISA audit by Independent Qualified Public Accountant
- Payroll Audits
- Accounting/bookkeeping services
- Possibly services related to the Financial Accounting Standards Board (FASB) requirements
- 11-k; although this is an SEC requirement, some have raised this as a cost that could be justified paying from plan assets if it is a required attachment to the audit. Confirm this with your attorney or auditor.

Commentary *- While Code 10 will apply specifically to accountants providing audit services there are potentially other plan related services that can be provided by an accountant that could fall under this and other codes simultaneously. In other words, Code 10 is not limited to audit services. For example, an accounting firm could act as the plan Third Party Administrator (TPA) instead of the auditor. In this case there could be services rendered that could fall under both the recordkeeping codes such as Code 15 and/or 64 as well as Code 10 whereas those same services rendered by a TPA that is not an accounting firm may not think to bifurcate their recordkeeping fees between a recordkeeping code and this accounting code. Another key point to remember, the directions to Schedule C do not restrict the use of code 10 to the exclusive use of a certified public accountant.*

11 Actuarial

Sample Services:

- Actuarial valuation of total assets and liabilities
- Benefit Calculations
- QDRO calculations
- Preparation of the Schedule SB or MB actuarial certification
- Preparation of the PBGC filing and related computations
- Payment of PBGC premiums
- Asset liability study
- Termination of the Plan and corresponding PBGC filings

Commentary *- It seems fair to say this one is self-explanatory. If the actuary is doing actuarial work it is Code 11. However, actuaries do provide other services besides actuarial services. We anticipate that an actuary that provides consulting services, processes benefit distributions, charges for copying or duplicating documents or receives non-monetary fees from a third party could combine those services under their invoice as actuarial services and thus code the entire amount 11. Alternatively, an actuary can bifurcate fees among each applicable code or reflect multiple codes to one fee amount which is more likely to occur when amounts for each specific service amounts to less than $5,000. Because this flexibility in reporting existing it is easy to see how it will be difficult to use the data for reliable benchmarking. Finally, keep in mind that settlor functions would not be included. Thus, the cost for plan termination studies, mergers or acquisitions, or the evaluation of different benefit formulas should not be deducted from plan assets; therefore, should not be included under Code 11.*

12 Claims Processing

Sample Services:

- Cost to process the payment of benefit claims

Commentary *- Code 12 should be used to identify fees paid for claims processing services. This could apply to health and wealth plans if the plan does not meet the conditions of the limited exemption at 29 C.F.R. § 2520.104-44 or Technical Release 92-01. Health and welfare plans that meet these exemptions are not required to complete and file a Schedule C. Furthermore, this payment could apply to a separate third party*

pursuant to a contract with the insurer or other service provider that was directly retained by the plan sponsor. The fees for claims processing could be combined with other line items in an invoice creating challenges in identifying and allocating the cost. This is one example which will require the plan sponsor to question service providers about their practice of outsourcing services as well as require the plan sponsor to closely examine service provider billing practices to align costs with the appropriate codes. Finally, it is possible that Code 12 could apply to retirement plans where the service provider outsources paying agent services for benefit distributions. Although not typical, there are occasions where a third party administrator will outsource to a wholly owned subsidiary or independent third party that has the responsibility for processing benefit distributions. Furthermore, a Form 5500 preparer should inquire if float revenue is being earned on plan assets in transit and if those earnings are being used to subsidize the cost of claims processing. If so, the preparer should combine Code 12 with Code 62 Float Revenue.

13 Contract Administrator

Sample Services:

- Applies to an independent person or entity retained to provide any combination of the following services:
    - Clerical operations (e.g., handling membership rosters, claims payments, maintaining books and records) of the plan on a contractual basis.
    - Adjudication of claims on behalf of the ERISA § 3(16) Plan Administrator
    - Experience and renewal analysis of insurance contracts
    - Benefit determinations
    - Claims administration
    - Utilization studies
    - COBRA administration
    - Experience and renewal analysis of insurance contracts

Commentary *- Code 13 Contract Administrator is referenced as a "key service provider" in the Frequently Asked Questions ("FAQ") DOL release and is a service that is required to be treated as separate reportable compensation for Schedule C purposes even if the fees are paid from mutual fund management fees and reflected in the net value of the investment. Contract administrator services are often tied to a fiduciary role if the contract administrator exercises discretionary management control over benefit claims paid from plan assets or other administrative responsibilities. According to the Form 5500 instructions, "a contract administrator is any individual, partnership, or corporation, responsible for managing the clerical operations (e.g., handling membership rosters, claims payments, maintaining books and records) of the plan on a contractual basis." Typically, individuals that occupy the role of "Plan Administrator" are employees of the plan sponsor. However, this responsibility may reflect the smallest portion of their daily activities even though it may be the one activity that carries the highest personal risk. For plan sponsors that outsource this responsibility to reduce personal liability of its employees a Contract Administrator is retained. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

14 Plan Administrator

Sample Services:

- According to the instructions for Form 5500, "Annual reports filed under Title I of ERISA must be made available by plan administrators to plan participants and beneficiaries and by the DOL to the public pursuant to ERISA sections 104 and 106. Even though the Form 5500 must be filed electronically, the administrator must keep a copy of the Form 5500, including schedules and attachments, with all required signatures on file as part of the plan's records and must make a paper copy available upon request to participants, beneficiaries, and the DOL as required by section 104 of ERISA and 29 C.F.R. § 2520.103-1." The plan administrator is also responsible for determining whether the $5,000 threshold is met for Schedule C purposes. Other statutory responsibilities of a ERISA § 3(16) Plan Administrator including:
    - Ensure all requisite filings are timely submitted

- Responsible for making disclosures to participants as required under ERISA §§ 103, 104 and 105
- Responsible for determining whether a document is a "contract" or "instrument" under ERISA § 104(b)(4) in response to a written request by a participant or beneficiary.
- Any duties specifically assigned within the Plan Document
- Determining plan eligibility
- Determining participant rights
- Determining when a Domestic Relations Order (DRO) is a Qualified Domestic Relations Order (QDRO)
- Notify participant and each alternate payee of the administrator's QDRO determination ERISA §§ 206(d)(3)(G)(i)(II), 206(d)(3)(I);IRC § 414(p)(6)(A)(ii)
- Rule on benefit claims
- Maintaining plan records
- Preparation and Distribution of Summary Plan Description ERISA §§ 104(b)(4) and 103
- Preparation and Distribution of Annual reports ERISA §§ 104(b)(4) and 103
- Preparation of Summary annual report DOL Reg § 2520.104b-10
- Preparation of Summaries of material modifications (SMMs) ERISA § 102
- Preparation of COBRA Notices ERISA § 606
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- Preparation of Women's Health and Cancer Rights Act notices ERISA § 713
- Preparation of Required Plan Amendments
- Preparation and Distribution of Plan and Trust Document ERISA § 104(b)(4)
- Preparation of Investment Policy
- Preparation of Funding Policy
- Preparation of the Section 204(h) notice
- Preparation of the Section 402(f) notice
- Post Summary of Family and Medical Leave Act (FMLA) rights and responsibilities [FMLA § 109(a); DOL Reg § 825.300(a)]
- Preparation of the FMLA notices to employee [DOL Reg § 825.301(c)(1)-(8)]
- Sign and date Form 5500 ERISA §§ 104 and 6058 and/or 4065.
- Distribution of any Terminal Report ERISA § 104(b)(4)
- Distribution of any Bargaining Agreements ERISA § 104(b)(4)
- Distribution of any Contract or Other Instruments by which the Plan is established or operated ERISA § 104(b)(4)

Commentary *- Normally, the named fiduciary is the responsible party that appoints the plan administrator. In some cases the named fiduciary is the plan administrator but in other cases it is a different person that works for the plan sponsor. In either case, the individual can be compensated by the plan if the exemption conditions of the ERISA § 408(c) are met. That exemption permits a fiduciary to receive reasonable compensation for services rendered and reimbursement of expenses properly and actually incurred in the performance of their duties with the plan if that person so serving does not receive full-time pay from the employer/plan sponsor. Although not customary, there is a growing trend to outsource this responsibility to an independent third party who accepts the fiduciary liability of a plan administrator under ERISA § 3(16). Regardless who is appointed as the plan administrator, that person is required to provide complete and accurate information and must comply fully with the filing requirements. ERISA and the Code provide for the DOL and the IRS to assess or impose penalties for not giving complete and accurate information and for not filing complete and accurate statements*

and returns/reports. Penalties for failure to comply with the administrative burdens can be assessed against the plan administrator by the DOL or IRS. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

15 Recordkeeping and Information Management (computing, tabulating, data processing, etc.)

Sample Services:

- Services of a contracted Third Party Administrator such as:
  - Allocating contributions, gains, and losses,
  - Processing transfers and distributions
  - Processing payroll feeds
  - Calculating vesting
  - Maintaining participant account balances e.g., such as daily valuation
  - Maintaining records of eligible COBRA recipients
  - Maintaining QDRO account balances
  - Compliance services
  - Preparing and mailing participant statements
  - Account maintenance services

Commentary *- A Form 5500 preparer has Code 15 and 64 to choose from for recordkeeping services which makes it a challenge to determine which code to list, if not both. There are no distinct definition differences other than the title and the number of the code. Since the instructions state, "Enter as many codes as apply" it would appear a preparer has no choice but to list both codes. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

16 Consulting (general)

Sample Services:

- Services can be provided by attorney, accountant, actuary, consultant, trustee, fiduciary, advisor etc.
- Services provided under this code apply specifically to any type of consulting

Commentary *- Code 16, 17 and 70 all include the term "consulting." There is no description provided in the instructions that defines when to use one code over another. If any individual or entity is paid for consulting from plan assets it is logical to assume the payment is a fee. Thus, it would appear that Code 70 Consulting fees would always be included in addition to either Code 16 or 17. The difference between 16 and 17 is in the name which leads me to conclude you use the code with the name that is most descriptive of the applicable consulting engagement or the recipient of the consulting engagement. For example, if the consulting is provided to a pension plan you use Code 17 and if it is not a pension related consulting fee then use Code 16. Recall that ERISA defines "pension" in section 3(2). The ERISA 3(2) definition provides a generic definition for "pension" that applies to any type of qualified plan; therefore, any consulting applicable to a pension would use Code 17. Using deductive reasoning that leaves Code 16 to apply to any consulting that is not pension related. For example, health and welfare consulting would utilize Code 16. The challenge without guidance is the determination of when Code 16 would apply to consulting rendered to a pension plan that would not fall under Code 17. Since fees deducted from plan assets must be reasonable, must be used for the establishment or operation of the plan (ERISA § 408(b)(2)) and must be appropriate and helpful for the plan to achieve its purpose (29 C.F.R. § 2550.408b-2(b)) then any general consulting could be construed to be pension consulting requiring the use of Code 17. Also, you will notice we referenced several types of professionals that have their own applicable codes. For example, attorneys that provide legal services should use Code 29, accountants*

should use Code 10, trustees might use some combination of Codes 20, 21, 24 and 25, an actuary should use Code 11, and an advisor could use some combination of Codes 26, 27, 53, or 71. So, why would you also cite Code 16, 17 or 70 in addition to any of the other applicable codes? Quite simply, the instructions state," Enter as many codes as apply." Of course, don't forget Code 50 which can be combined with any other Code when payment is made directly from plan assets. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

17 Consulting (pension)

Sample Services:

- Services can be provided by attorney, accountant, actuary, consultant, trustee, fiduciary, advisor etc.
- Services provided under this code apply specifically to pension consulting

Commentary *- Codes 16, 17 and 70 all include the term "consulting." There is no description provided in the instructions that defines when to use one code over another. If any individual or entity is paid for consulting from plan assets it is logical to assume the payment is a fee. Thus, it would appear that Code 70 Consulting fees would always be included in addition to either Code 16 or 17. The difference between 16 and 17 is in the name which leads me to conclude you use the code with the name that is most descriptive of the applicable consulting engagement or the recipient of the consulting engagement. For example, if the consulting is provided to a pension plan you use Code 17 and if it is not a pension related consulting fee then use Code 16. Recall that ERISA defines "pension" in section 3(2). The ERISA 3(2) definition provides a generic definition for "pension" that applies to any type of qualified plan; therefore, any consulting applicable to a pension would use Code 17. Using deductive reasoning that leaves Code 16 to apply to any consulting that is not pension related. For example, health and welfare consulting would utilize Code 16. The challenge without guidance is the determination of when Code 16 would apply to consulting rendered to a pension plan that would not fall under Code 17. Since fees deducted from plan assets must be reasonable, must be used for the establishment or operation of the plan (ERISA § 408(b)(2)) and must be appropriate and helpful for the plan to achieve its purpose (29 C.F.R. § 2550.408b-2(b)) then any general consulting could be construed to be pension consulting requiring the use of Code 17. Also, you will notice we referenced several types of professionals that have their own applicable codes. For example, attorneys that provide legal services should use Code 29, accountants should use Code 10, trustees might use some combination of Codes 20, 21, 24 and 25, an actuary should use Code 11, and an advisor could use some combination of 26, 27, 53, or 71. So, why would you also cite Code 16, 17 or 70 in addition to any of the other applicable codes? Quite simply, the instructions state," Enter as many codes as apply." Of course, don't forget Code 50 which can be combined with any other Code when payment is made directly from plan assets. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

18 Custodial (other than securities)

Sample Services:

- Applies to fees associated with securities classified as Tier 3 according to FAS 157
- Assume this applies to assets that are not subject to SEC oversight. Examples include:
  - Real estate,
  - Bank Accounts,
  - Certificates of Deposit,
  - Bank Collective Investment Funds, and/or
  - Group Annuity Separate Accounts.

Commentary *- The term "custodian" refers to persons having lawful custody of plan assets and who track and hold the securities for a plan for safe keeping. Typically, a custodian is a financial institution, like a trust company, bank, insurance company, mutual fund company, transfer agent or brokerage firm. Generally, the*

custodian must be within the United States. A custodian does not have discretion to direct the investment of custodial funds unless they have been appointed as either the investment manager or trustee. Because the Schedule C form does provide an alternative custodian code that specifically addresses securities (See Code 19) it would appear that if the investment is not a recognized security then the cost to custody the asset falls under this code. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

19 Custodial (securities)

Sample Services:

- A party that merely acts as a servicing agent to hold assets for safe keeping
- Assume this applies to assets that are subject to SEC oversight such as
    - Stocks
    - Bonds, Debentures, Notes, or Certificates
    - Mutual Funds
    - Separate Accounts for a plan sponsor that holds securities
    - Qualifying Employer Securities - ERISA § 407
    - Qualifying Employer Real Property - ERISA § 407
    - Securities issued by foreign governments
- Processing and settling of participant/plan trades
- Fees charged for performing unitized accounting of the plan's assets
- Cashiering fees

Commentary *- The term "custodian" refers to persons having lawful custody of plan assets who track and hold the securities for a plan for safe keeping. Typically, a custodian is a financial institution, like a trust company, bank, insurance company, mutual fund company, transfer agent or brokerage firm. Generally, the custodian must be within the United States. A custodian does not have discretion to direct the investment of custodial funds unless they have been appointed as either the investment manager or discretionary trustee. Because the Schedule C form does provide an alternative custodian code that does not specifically address securities (See Code 18) it would appear that if the investment is a recognized security then the cost to custody the asset falls under this code. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

20 Trustee (individual)

Sample Services:

- A person retained to provide independent trustee services, excludes a bank, trust company or similar financial institution.
- May or may not have discretionary investment powers
- May or may not have responsibility for company stock

Commentary *- There are five related codes. Code 20 should be used to identify an individual trustee that is not a financial institution. The person that accepts this role may be retained specifically as an independent trustee to safeguard the confidentiality of information and protect the rights of participants when company stock is held in a plan. This person may also be appointed discretionary authority thus requiring the use of Code 24 or alternatively the trustee may be appointed with limited authority as a directed trustee under Code 25. Finally, the person appointed trustee may also be appointed as the named fiduciary requiring the use of Code 31 and/or Code 14 as Plan Administrator. The trustee codes provide an interesting challenge for a preparer to*

ascertain the specific authority appointed the individual to ensure all the proper codes are reflected. Although in some cases the multitude of options creates confusion, the use of multiple trustee codes is logical. The only alternative would have been to design the codes with longer descriptions. For example, Individual Discretionary Trustee, Individual Directed Trustee, Institutional Discretionary Trustee and Institutional Directed Trustee could be alternatives to limit the code identification to one code instead of two. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

21 Trustee (bank, trust company or similar financial institution)

Sample Services:

- An entity retained to provide independent trustee services, excludes an individual.
- May or may not have discretionary investment powers
- May or may not have responsibility for company stock

Commentary *- There are five related codes. Code 21 should be used to identify an institutional trustee that is a financial institution. The institution that accepts this role may be retained specifically as an independent trustee to safeguard the confidentiality of information and protect the rights of participants when company stock is held in a plan. This institution may also be appointed discretionary authority thus requiring the use of Code 24 or alternatively the trustee may be appointed with limited authority as a directed trustee under Code 25. The trustee codes provide an interesting challenge for a preparer to ascertain the specific authority appointed the institution to ensure all the proper codes are reflected. Although in some cases the multitude of options creates confusion, the use of multiple trustee codes is logical. The only alternative would have been to design the codes with longer descriptions. For example, Individual Discretionary Trustee, Individual Directed Trustee, Institutional Discretionary Trustee and Institutional Directed Trustee could be alternative names to codes to limit the code identification to one code instead of two. Also, an institutional trustee may also serve in the dual role of custodian where the institution holds custody of plan assets. In this case, either or both Code 18 Custodial (other than securities) or Code 19 Custodial (securities) should be used. Finally, it is not unusual for institutional trustees with custody of plan assets to provide paying agent services or benefit distributions in which case code 62 Float Revenue may be appropriate to use in conjunction with the other codes. Of course as you can see, the combination of trustee, custodian, and float on a single line for a single service provider hinder the ability to compare this information to a trustee that does not custody plan assets and/or does not negotiate to collect float income. Note: If the institution is collecting float revenue please review AO 93-24A, Information Letter to Judith McCormick dated August 11, 1994 and FAB 2002-3 to confirm that the retention of float income complies with the fiduciary processes outlined. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

22 Insurance Agents and Brokers

Sample Services:

- Applies to revenues received for the sale of insurance company products and services by agents and brokers

Commentary *- Code 22 applies to a party that is properly licensed by a State Insurance Department. Products sold create commission dollars that could also be reported under:*

1. *23 Insurance services*
2. *53 Insurance brokerage commission and fees*

Insurance commission cannot be paid to an unlicensed agent and may not be shared with the plan i.e., rebating is illegal. This is a good example of the potential for confusion and, as a result, the collection of unreliable data. Due to the overlap of codes, it is doubtful that information captured under Codes 22, 23, 53 will remit meaningful and useful information. In addition, because some insurance agents do charge fees for services rendered it is possible their failure to properly allocate their revenue could hinder the effectiveness of the data

collected under Codes 16 Consulting (general), 17 Consulting (pension), 49 Other Services and 50 Direct Payments from the Plan. Note: Commissions and fees listed on Schedule A are not required to be reported again on Schedule C.

23 Insurance services

Sample Services:

- Applies to a party that is properly licensed by a State Insurance Department.
- Revenues received by an organization that provides insurance services such as
    - developing rates
    - support services

Commentary *- The instructions for the Schedule C and the FAQ provide no description for Code 22 or Code 23. However, Code 22 references agents and brokers whereas as Code 23 purposely excludes agents and brokers. It seems logical to assume that Code 23 applies to insurance services that would not involve an agent or broker. However, without clear directions on the appropriate use of Code 23 it will be likely that preparers with combine both Code 22 and 23 and possibly 53 due to the encouragement in the instructions to "Enter as many codes as apply." Note: Commissions and fees listed on Schedule A are not required to be reported again on Schedule C.*

24 Trustee (discretionary)

Sample Services:

- Represents a person or entity having exclusive authority and discretion over the management and control of plan assets as described in ERISA § 3(38), 403(a), (b); DOL Reg 2509.75-8, D-2
- May retain authority as an investment manager or the ability to delegate investment management responsibilities to a third party as the term investment manager is defined under ERISA § 3(38)
- May appoint an individual as provided for in Code 20 Trustee (individual) or may appoint an Institution as provided for in Code 21 Trustee (bank, trust company or similar financial institution)

Commentary *- You cannot use this code without using Code 20 Trustee (individual) or Code 21 Trustee (bank, trust company or similar financial institution). As the instruction to Schedule C indicate, "Enter as many codes as apply." By selecting Code 24 you must identify whether the trustee is an individual or entity using Code 20 or 21. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

25 Trustee (directed)

Sample Services:

- A person who has custody of plan assets but is not charged with discretionary authority over the disposition or management of plan assets
- This person is subject to the instructions of a fiduciary that does have discretion
- Limited liability due to lack of requisite authority over the plan or its assets
- May appoint an individual as provided for in Code 20 Trustee (individual) or may appoint an Institution as provided for in Code 21 Trustee (bank, trust company or similar financial institution)

Commentary *- You cannot use this code without using Code 20 Trustee (individual) or Code 21 Trustee (bank, trust company or similar financial institution). As the instruction to Schedule C indicate, "Enter as many codes as apply." By selecting Code 25 you must identify whether the trustee is an individual or entity using Code 20 or 21. Furthermore, directed trustees do carry more liability then had been understood in the past since the issuance of FAB 2004-03. Specifically, Directed trustee responsibilities as articulated in Field Assistance Bulletin 2004-03 (December 17, 2004) include:*

- *When a directed trustee knows or should know that a direction from a named fiduciary would be a prohibited transaction, the directed trustee may not follow the direction.*
- *A directed trustee must request and review all documents governing the plan to determine whether the directions it receives are consistent with the plan.*
- *The directed trustee's fiduciary responsibility does not change merely because the directed trustee, in carrying out its duties, raises questions concerning whether a direction is "proper" or declines to follow a direction that the directed trustee does not believe is a proper direction.*
- *A directed trustee must follow processes that are designed to avoid prohibited transactions. A directed trustee could satisfy this obligation by obtaining appropriate written representations from the directing fiduciary that the plan maintains and follows procedures for identifying prohibited transactions. If the plan documents are ambiguous, a directed trustee must obtain a clarification of the plan's terms from the fiduciary responsible for interpreting the plan.*
- *A directed trustee does not have an independent obligation to determine the prudence of every transaction. The directed trustee does not have an obligation to duplicate or second-guess the work of the plan fiduciaries that have discretionary authority over the management of plan assets and does not have a "direct obligation" to determine the prudence of a transaction. There are, however, certain exceptions.*
- *If a directed trustee knows a named fiduciary is failing to discharge its obligations in accordance with ERISA's requirements, the directed trustee may not simply follow directions from the breaching fiduciary.*
- *The directed trustee's obligation to question market transactions involving publicly traded stock on prudence grounds is quite limited. The primary circumstance in which such an obligation could arise is when the directed trustee possesses material non-public information regarding a security.*
- *If a directed trustee is in possession of material non-public information (for example, regarding a particular employer security), the directed trustee has a duty to ask the named fiduciary whether the named fiduciary also knows about the information and whether the named fiduciary has considered such information in giving the direction.*
- *A directed trustee is required to question the prudence of a transaction based upon publicly available information in "limited, extraordinary circumstances." According to DOL, when public information "call[s] into serious question a company's viability as a going concern," a directed trustee may have a duty not to follow the named fiduciary's instruction to purchase or hold the company's stock without further inquiry.*

Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

26 Investment Advisory (participants)

Sample Services:

- Fees associated with rendering investment advice to individual participants not the plan.

Commentary *- The Pension Protection Act of 2006 codified the provision of investment advisory services directed to participants via an Eligible Advice Arrangement under section 408(g). This important addition to ERISA clarifies the basis for providing participant advice and establishes the cost for such services can be deducted from plan assets. Cost allocated to Code 26 should include either the cost for a computer based model or an individual professional advisor who meets the exemption criteria. It is interesting to note that participant level advice was acknowledged with the regulatory release of 29 C.F.R. § 2550.404c-1. Under these regulations, the DOL made it clear that advice was not required; yet, gave examples of participants receiving advice. This was followed with an Interpretive Bulletin relating to participant investment education in 1996 under 29 C.F.R. § 2509.96-1 which appropriately tied participant level advice back to the regulations under 29 C.F.R. § 2510.3-21(c) which address functional investment advisory fiduciary activities. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the*

identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

27 Investment Advisory (plan)

Sample Services:

- Advisory services are delivered to the plan not the participants as an ERISA § 3(21) functional fiduciary.
- Evaluating a plan's investment menu and performance may or may not qualify under the advisor code. Much depends on the service provider's role that provides the advisory services.

Commentary - The regulations under *29 C.F.R. § 2510.3-21(c) clearly define the activities that cause a person to become a fiduciary under ERISA § 3(21) whether they acknowledge their role in writing or not. In fact, it is not by mistake that the requirement to be an ERISA § 3(38) investment manager requires written acknowledgement whereas that requirement does not exist for a functional fiduciary under ERISA § 3(21). This will cause the preparer and the plan administrator who signs the Form 5500 under penalties of perjury to evaluate whether their insurance agent, stock broker, registered representative, or registered investment advisor is a fiduciary regardless of what their contract states or denies. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

28 Investment Management

Sample Services:

- Applies to a fiduciary other than a trustee or named fiduciary that acknowledges in writing that he is a fiduciary with respect to the plan
- Must have power to manage, acquire or dispose of any asset of the plan [Securities Exchange Act § 3(a)(35), 15 USC § 78c(a)(35)]
- Applies to
    - SEC registered investment advisor under IAA 1940
    - State registered investment advisor
    - Bank
    - Insurance company
- Investments subject to a reportable investment manager fee includes:
    - Bank collective investment fund or trust,
    - Insurance company separate account, and
    - Separately managed account.

Commentary *- A named fiduciary appoints investment discretion to a trustee unless he withholds that responsibility and either allocates investment discretion to the participants or an independent investment manager under ERISA § 3(38). An investment manager is different than an investment advisor fiduciary. The investment manager actively manages all or some portion of plan assets whereas an investment advisor provides advice but does not hold any discretionary powers over plan assets. Some argue that outsourcing discretionary investment management to an ERISA § 3(38) investment manager eliminates all fiduciary risk for the named fiduciary but that is just not true. A named fiduciary continues to remain liability for monitoring the investment manager and approving the continued use of the investment manager as well as co-fiduciary liability under ERISA § 405. However, if the investment manager was prudently selected and monitored the named fiduciary will not be liable for the acts or omissions of the investment manager. Every fiduciary regardless of their discretionary or nondiscretionary powers must be continuously monitored to ensure they remain a prudent choice. This standard is clearly articulated within the examples provided in the regulations of ERISA § 404(c) issued in 1992. Code 28 fees must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than*

eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

29 Legal

Sample Services:

- Legal is tied specifically to fees paid by the plan to an attorney for
  - preparation, review and approval of a QDRO,
  - interpretation of plan provisions,
  - any other legal services rendered to the plan or responsible parties, or
  - any other consulting services except settlor services rendered to the plan or responsible party by an attorney.

Commentary *- The only party that can provide legal services is a properly licensed attorney. However, reputable experienced ERISA counsel offer much more than just legal services of a personal and confidential nature. It is not unusual to retain ERISA counsel to provide consulting and educational services that extend beyond the legal realm. When this occurs, the preparer may find it necessary to include other codes beside Code 29 in keeping with the Schedule C instructions to "Enter as many codes as apply."*

30 Employee (plan)

Sample Services:

- Fees paid to employees who receive a Form W-2 as a plan employee.

Commentary *- An employee of the plan must meet the conditions of the exemption under ERISA § 408(c) which means the employee is not serving as a full-time employee paid by the plan sponsor.*

31 Named Fiduciary

Sample Services:

As defined under ERISA § 402 and includes responsibilities such as:

- Authority to control and manage the operation and administration of the plan
- Ability to appoint a Plan Administrator under ERISA § 3(16)
- Ability to appoint a Fiduciary under ERISA § 3(21)
- Ability to appoint a Trustee under ERISA § 403
- Ability to appoint an Investment Manager under ERISA § 3(38)

Commentary *- A named fiduciary must be named in the plan document and may be a single individual, committee, position, or entity. Because a named fiduciary is specifically named in the plan document consideration should be given to the person named to avoid the requirement to amend the plan should that person be removed. For example, instead of including the name of the Chief Financial Officer in the plan document use his/her title to avoid amending the plan document at a later date if the CFO leaves the company. However, avoiding amending the plan may not be an option if "named fiduciary" services were retained from an independent firm. Typically, the named fiduciary is the plan sponsor unless an individual(s) or committee is appointed by name or title. In the majority of the cases it will be rare that any fees are attributable to this code since few plan sponsors presently outsource all "named fiduciary" responsibilities.*

32 Real Estate Brokerage

Sample Services:

- Fees or commissions paid to a real estate agent or broker responsible for contracting the sale or acquisition of real estate or qualifying real employer property as that term is defined under ERISA § 407

Commentary *- It would appear there is limited use for this code, which would be restricted to a plan that holds real estate as the term implies. Although the directions specifically state it does not apply to broker fees related*

to mutual funds, its silence could be assumed that it does apply to limited partnerships. Therefore, if a plan holds a real estate limited partnership in a brokerage account that is subject to a commission it is likely that the commission for that transaction should be reported under Code 32. If this is the case and the plan is participant directed with a self-directed brokerage option and a real estate limited partnership is held by numerous participants, it appears the plan sponsor would need to aggregate and report all commissions paid for the acquisition or sale of that security under Code 32. If the brokerage account provider is unable to provide a detailed plan report that summarizes this information annually the collection of this data could be time and cost prohibitive. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

33 Securities Brokerage

Sample Services:

- The annual cost associated with maintaining a brokerage account
- Wire Transfers, reporting, copies of statements etc.
- Commission recapture, Soft Dollars, Bid/Ask spreads, Price concessions, and Securities Lending.
- The acquisition and sales cost for Company Stock or Company Stock fund

Commentary *- It is assumed that Code 33 applies to the cost associated with securities brokerage versus specific commissions or fees associated with the acquisition or sale of a security. This assumption is based on the existence of Code 71 i.e. Securities brokerage commissions and fees which appears to be the place to list specific costs associated with commissions and fees paid for securities brokerage that would be incurred in the course of buying and selling securities. However, if Code 71 includes both commissions and fees then what costs are relevant for reporting purposes under Code 33? Our best guess is the list above; however, each item above that generates a fee assessed against plan assets could fail under Code 71. It appears the only securities brokerage cost that is exclusive to Code 71 is "commissions." Although fees are not mentioned in the Code 33 title "Securities Brokerage" it is reasonable to assume it exists to capture fees. We suspect this will create discrepancies among prepares as they struggle to determine if they should use Code 33, 71 or both for securities brokerage fees. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

34 Valuation (appraisals, etc.)

Sample Services:

- Associated with establishing the market value of an asset that is not publicly traded.
- Appraisals could apply to non-publicly traded securities, real estate, limited partnerships and collectibles.

Commentary *- Appraisal services are required annually for plan assets where the fair market value is not readily determinable on established markets such as the NYSE, AMEX or over the counter. An appraiser is responsible for determining the cost, quality or value of the asset for reporting purposes. It is important to note that an appraiser retained by the plan to assess the value of an asset must be independent. In fact, the appraiser should not have any other ongoing relationship with the plan outside of the appraisal work to avoid a conflict or a claim of conflict.*

35 Employee (plan sponsor)

Sample Services:

- Employee compensation or expense reimbursement payments made by the plan sponsor that are eventually reimbursed from the plan assets.

Commentary *- Code 35 is used for allocating employee overhead to the plan where the cost is initially paid by the plan sponsor. To reimburse the plan sponsor for employee compensation stringent requirements must be*

meet to legitimately charge employee salaries or business overhead to a plan. General only very large plans that devote one or more full-time employee to plan management will use this code. The term "plan sponsor" is defined by ERISA § 3(16)(B).

36 Copying and Duplicating

Sample Services:

- Printing and copying cost could apply to
    - Summary Plan Descriptions
    - Enrollment Booklets
    - Customization

Commentary *- Charges to the plan to cover the cost of copying and printing of materials would use Code 36 to reflect those expenses charged against plan assets. This code could be used in conjunction with many other codes.*

37 Participant Loan Processing

Sample Services:

- Cost to process a loan between the plan and participant

Commentary *- Assuming the cost to process the participant loan is deducted from plan assets or amortized in the loan, Code 37 applies. However, Code 37 only applies to loan processing not loan maintenance. Loan maintenance fees paid from plan assets would most likely be assigned Code 65 "account maintenance fees." However, due to the requirement that a preparer reflect all codes that apply, a service provider could attach Code 37 and 65 to a plethora of other codes that apply to their total fee. This conglomeration of Codes to a single fee hinders the ability of plan sponsors and service providers that intend to use Form 5500 data for benchmarking from producing reliable data to assess the reasonableness of fees for services rendered.*

38 Participant Communication

Sample Services:

- Could apply to communication, education, enrollment materials and meetings.

Commentary *- Communication costs could easily be combined with Code 36 Copying and duplicating.*

40 Foreign Entity

(e.g., an agent or broker, bank, insurance company, etc. not operating within jurisdictional boundaries of the United States)

Sample Services:

- Fee paid to a provider not operating within the jurisdictional boundaries of the United States.

Commentary *- ERISA § 404(b) states, "Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States." We believe that Code 40 is provided for reporting fees paid to a foreign entity in compliance with the regulation as set forth in 29 C.F.R. §* 2550.404b-1.

49 Other Services

Sample Services:

- Any service not specifically listed

Commentary *- If it doesn't fit under any other code put the cost for the service under this code instead of Code 99 which is only "Other." Payments from plan assets for something other than a services rendered should be assigned Code 99.*

50 Direct Payments from the Plan

Sample Services:

- Fees paid directly from the plan whether or not specifically allocated to the participants account and reflected on their statement.

Commentary *– It appears that "Direction" as stated in the Schedule C instructions was intended to say "Direct." Code 50 can be added to all other codes if the cost of the service is paid directly from plan assets. Indirect payments would not be assigned Code 50.*

51 Investment Management Fees Paid Directly by the Plan

Sample Services:

- Direct payment made from plan assets to an investment manager for investment management services.

Commentary *- Code 51 does not apply to a mutual fund even though a mutual fund does pay an investment management fee to an investment manager. The reason it does not apply is because mutual funds assets are not consider plan assets. Instead, only the mutual fund shares held by the plan are plan assets. See ERISA § 3(21)(B); § 401(b)(1) and 29 C.F.R. § 2509.75-2 and 75-3. However, if the plan holds a common or collective fund, separately managed account or separate account the assets of those pooled accounts are considered plan assets under 29 C.F.R. § 2510.3-101 and deduction of investment management fees from these pooled investment accounts would be reportable on the Schedule C using Code 51. Also, without any clarity on the definition for Code 28 i.e., investment management, it seems reasonable to assign Code 28 to any reported fees under Code 51. Keep in mind that investment management services are subject to a reporting threshold of $1,000 or more and Code 51 fees must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14.*

52 Investment Management Fees Paid Indirectly by the Plan
(e.g., mutual fund investment adviser management fees)

Sample Services:

- Could include the investment management component of mutual funds, insurance company separate accounts, collective trusts and other investment vehicles held by a plan.

Commentary *- Code 52 does not apply to a mutual fund that qualifies as an "eligible indirect fee" and, thus, is subject to the alternative reporting option. However, if Code 52 does apply it must be reported on the Schedule C even for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14. Also, without any clarity on the definition for Code 28 i.e., investment management, it seems reasonable to assign Code 28 to any reported fees under Code 52. Keep in mind that investment management services are subject to a reporting threshold of $1,000 or more and Code 52 fees must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14.*

53 Insurance Brokerage Commissions and Fees

Sample Services:

- Applies to a party that is properly licensed by a State Insurance Department
- Revenues received by a licensed insurance agent are tied to products approved by the state and sold to the plan

Commentary *- Insurance commissions must be paid to a properly licensed insurance agent. Insurance commissions cannot be paid to an unlicensed agent and may not be shared with the plan i.e., rebating is illegal. Insurance commissions reported on Schedule A are not required to be reported on the Schedule C; however, the amount reported in the Schedule A must be considered in meeting the $5000 minimum threshold for the Schedule C. In other words, if an agent receives $4000 in commissions that is reported in Schedule A and that same agent receives another $2000 that is not reported in Schedule A the $2000 must be reported in the Schedule C even though it is less than the $5000 threshold amount. There are three Schedule C codes with the term "insurance" in their title.*

1. *Code 22 is "Insurance Agents and Brokers,"*
2. *Code 23 is "Insurance Services," and*
3. *Code 53 is "Insurance Brokerage Commissions and Fees."*

The Schedule C instructions and the Frequently Asked Questions (FAQ) released by the DOL do not provide any direction on when or how these similar codes would be utilized. However, it seems reasonable to assume

that all insurance related commissions and fees should be assigned Code 53. The challenge is determining when to assign Code 22 or 23. Logic leads me to conclude that an insurance company commission or fee should be assigned two codes. The first is Code 53 which identifies the compensation as either a commission or fee that is tied to an insurance product. The second code is either 22 or 23 which identifies who received the commission or fee, an agent/broker i.e., Code 22 or someone other than the agent/broker i.e., Code 23. For example, Code 23 might be used in conjunction with Code 53 when the recipient is an organization that develops insurance rates or provides support to the insurance company for a fee that is passed through to the plan. It is also worth noting that Code 23 is more likely to be used with Health and Welfare plans; although, the directions make it clear that Health and welfare plans that meet the conditions of the limited exemption at 29 C.F.R. § 2520.104-44 or Technical Release 92-01 are not required to complete and file a Schedule C. Furthermore, a Schedule C preparer may need to consider adding Code 50 "Direct Payments from the Plan" to the combination of codes listed above in a bundled or unbundled arrangement. Commissions and fees listed on Schedule A are not required to be reported again on Schedule C. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

54 Sales Loads (front end and deferred)

Sample Services:

- Front end sales loads associated with buying and selling shares of an investment, typically mutual funds.
- Deferred sales charges apply to mutual funds and insurance products that pay an upfront commission that is amortized over a period of years. Should the contract be liquidated before the time the commission has been earned, the plan withdrawal suffers a sales load on the back end to cover the commission paid up front.

Commentary *- A Code 54 front end sales load reduces the amount of the deposit so a net amount is actually invested. The load is typically a commission that is split between the broker/dealer and the registered representative based upon a percent that was previously memorialized contractually. Front end sales charges are normally waived when total assets exceed $1 million whereas back end loads or deferred loads can apply to any amount of assets if the arrangement upon inception included an advance payment of commissions that are subject to an amortization period. Should the investment be liquidated prior to a specified date the amount liquidated is subject to a deferred sales load. A deferred sales load could also be referred to as a surrender charge under Code 58. Paying an up front commission on deposits is rarely appropriate. If the service provided by a service provider is the execution of a transaction the fiduciary has the obligation to seek best execution at the lowest possible price considering any ancillary research services provided.*

55 Other Commissions

Sample Services:

- A commission paid to a third party not directly retained by the plan sponsor that received a solicitor commission/fee for the referral that turned into a sale.

Commentary *- It would appear that Code 55 "Other commissions" applies to commission payments made from plan assets that are not captured by any other code that is more specific. The preparer should use this code with a commission payment that cannot be tied to any other commission related code. For example, if Code 53 insurance brokerage commissions and fees, 54 Sales loads (front end and deferred), 61 Finders fees/placement fees, 63 Distribution (12b-1), 68 "Soft Dollar" commissions, and 71 Securities brokerage commissions and fees do not apply, then use Code 55.*

56 Non-Monetary Compensation

Sample Services:

- Includes compensation such as gifts and meals that exceed $100 aggregate limit. Value less than $10 do not need to be counted toward the $100 limit. Examples Include:
    - Airfare
    - Meals

- Lodging
- Awards
- Entertainment
- Gifts
- Subsidized Benefits
- Subsidized tax payments i.e., W-2 versus 1099 income
- Subsidized Office expenses
- Subsidized miscellaneous expenses
- Contributes toward contractual obligations

Commentary *- This represents a huge challenge for the industry. As an example, insurance company career agents and registered representatives of broker/dealers are provided many services and various perks by placing business with proprietary and non-proprietary products. At the same time there are additional perks for volume of business from within the organization as well as externally through providers that do business with the organization. The list of perks is long and secretive. It is unlikely we will ever have accurate information under this code. There just is not sufficient incentive to comply or the necessary directions to enforce compliance. However, assuming this information is available the challenge the service provider will have will be to allocate the value of the non-monetary compensation among multiple clients on a reasonable basis.*

57 Redemption Fees

Sample Services:

- Cost associated with selling an investment or transferring money from an investment before it has been seasoned to avoid a redemption fee.
- Participant marketing timing activities are subject to redemption fees.
- It could apply to the liquidation of a Stable Value fund beyond its contractual limits or before a minimum holding time.
- It could apply to the liquidation of a front loaded mutual fund that paid a finder's fee.

Commentary *- The difference between Code 57 Redemption and Code 58 Product termination is the finality of the arrangement. For example, a redemption fee can apply to a partial liquidation of an investment or contract. However, Code 58 appears to apply to a complete termination of the relationship. Redemption fees, on the other hand, are described in SEC Rule 22c-2 and represent a fee that some funds charge their shareholders when the shareholders redeem their shares. Although a redemption fee is deducted from redemption proceeds just like a deferred sales load, it is not considered to be a sales load. Unlike a sales load, a redemption fee is used to defray fund costs associated with a shareholder's redemption and is paid directly to the investment fund. A deferred sales charge or back-end load is not a redemption fee. See FAQ 12. If the redemption of the investment or contract imposes a cost that exceeds what is reasonable the arrangement would fail to meet the exemption under ERISA § 408(b)(2) and the regulations.*

58 Product Termination Fees (surrender charges, etc.)

Sample Services:

- Surrender charges are also referred to as Contingent Deferred Sales Charges.
- Typically applicable to investment products that have paid an upfront commission to a sales representative.
- May also apply to an arrangement that paid a previous vendor's surrender charge.
- Applies to assets removed from the investment product before the money becomes seasoned and the cost of the commission paid in advance has been amortized.
- Most likely applies to Insurance Company Group Annuity that pay finder's fees, and to A, B or C Share Class mutual funds.

- When the plan is the recipient of the finder fee, the plan could become the party liable for the reimbursement creating a questionable allocation of costs the plan may have to bear if termination fees apply.
- This code could apply to a Stable Value fund that is subject to an early surrender charges or market value adjust.
- This code may also apply to an early withdrawal penalty on a bank certificate of deposit.

Commentary *- The difference between Code 57 Redemption and Code 58 Product termination is the finality of the arrangement. For example, a redemption fee can apply to a partial liquidation of an investment or contract. However, Code 58 appears to apply to a complete termination of the relationship. If the termination of the investment or contract imposes a cost that exceeds what is reasonable the arrangement would fail to meet the exemption under ERISA § 408(b)(2) and the regulations.*

59 Shareholder Servicing Fees (SSF)

Sample Services:

- Mutual funds include fees within their operating expense ratio to cover expenses such as
  - produce statements,
  - produce confirmation statements,
  - provide toll-free phone access to account balance,
  - provider web access to account balance,
  - track shares held,
  - transfers between shares,
  - printing and mailing,
  - redemptions and
  - 1099 preparation

Commentary *- Mutual funds are typically held in an omnibus account where the shareholder is the Trustee(s) of the plan and the recordkeeping responsibilities become the liability of the Third Party Administrator retained. This fee is often combined with Sub-transfer agency fees and represents reasonable cost sharing between the investment manager, who priced the service into their operating expense with the third party responsible for delivering the services they reported they would provide but are not providing. In fact, some within the industry have claimed that a mutual fund retaining Shareholder servicing fees could be legally challenged for misrepresentation when the fund is held in an omnibus account. However, there is no case law to support this argument. Historically, mutual funds will allocate these dollars to the recordkeeping firm to cover their cost to provide the recordkeeping services the mutual fund would have otherwise provided. Shareholder service fees could be paid as*

1. *a percent of assets*
2. *per participant*
3. *per fund held*

It is important to note that, at the time this is written, only one company has actually created an audit process to confirm the accuracy of the Shareholder servicing fees to the penny. Many firms that engage in this practice do not have an audited system in place to provide an accurate audit trail of the dollars collected and their proper allocation. A plan sponsor utilizing a firm that provides this service should request an annual report and a description of the methodology for calculating and tracking SSF for their records. Code 59 fees must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14; however, a prospectus properly provided according to the disclosure requirements to meet the eligible indirect compensation definition will permit the preparer to utilize the alternative reporting option if the prospectus discloses sub-transfer agent fees.

60 Sub-Transfer Agency Fees (Sub-TA)

Sample Services:

- Transfer agent fees are paid for coordinating the allocation of participant and plan sponsor contributions to the designated investment alternatives selected by each participant.
- In general terms, this coordination is outlined as follows:
    - Contributions (deferrals) are withheld from a participant's paycheck.
    - Deferrals are forwarded (typically electronically via ACH) to the custodian.
    - Custodian receives deferrals and reconciliation (typically performed by the recordkeeping firm) of the deferrals.
    - Custodian processes the investment purchases according to the reconciliation submitted.
    - Purchases may occur in any number of the following ways:
        - Direct purchase of the investment alternative where the investment alternative is held in title by the Trustees of the plan. The plan is subject to the prospectus requirements for minimum purchases and net asset value acquisition of shares.
        - Mutual fund companies use transfer agents to keep track of the individuals and entities that own shares of their funds.
        - A fund company may be its own transfer agent, but this service is typically handled by an outside company, such as a bank or a trust company.
    - A transfer agent maintains shareholder records; pays out distributions; handles purchases, exchanges, and redemptions; and mails account statements and other shareholder literature.
    - A sub-transfer agent in a 401(k) context is typically a TPA recordkeeper who maintains each participant's ownership, number of shares owned, participant's buy/sell transactions, and provides periodic statements to participants.
    - Transfer Agents, not sub-transfer agents, are required to register with the SEC under Section 17A of the Securities Exchange Act of 1934.

Commentary *- This fee is often combined with Shareholder Service fees and represents a reasonable cost sharing between the investment manager, who priced the service into their operating expense, with the third party responsible for delivering the services they reported they would provide but are not providing. Code 60 fees must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14; however, a prospectus properly provided according to the disclosure requirements to meet the eligible indirect compensation definition will permit the preparer to utilize the alternative reporting option if the prospectus discloses sub-transfer agent fees.*

61 Finders Fees / Placement Fees

Sample Services:

- The payment of an upfront commission or fee for placing business with a particular entity regardless of whether ongoing services are provided. For example,
    - Some mutual funds provide 1% finder's fee on deposits.
    - Some insurance company group annuity contracts can be structured with a finder's fee.
    - A solicitor arrangement could be structured with an investment, product or service.

Commentary *- The Schedule C instructions reference Finders fees in relation to insurance contracts; although, the FAQ references the same term in relation to an investment, product or service (See FAQ 6). It is also important to note that Finders fees must be reported separately in the Schedule C even if it is part of a bundled service arrangement unless that Finder's fee is reported on the Schedule A. Finder's fees are rarely paid in today's market but they do still exist on grand-fathered plans that use some class A mutual fund shares or insurance company group annuity contracts. Also, it is worth noting the danger in having finder's fees paid to an ERISA Account to reimburse the plan for expenses. Normally finder's fees have stipulations that must be met to retain the upfront payment. For example, the money must stay invested in the investment for at least twelve months. If the money is removed from the investment before twelve months the typical contractual obligation requires the recipient to repay a portion of the finder's fee leaving participants vulnerable to paying expenses that have never been disclosed.*

62 Float Revenue

Sample Services:

- Collection and retention by an institution of interest paid on assets in transit.
- Can apply to deposits and/or withdrawals.

Commentary *- This area is one that truly requires the plan sponsor and named fiduciary to be proactive. A fiduciary must document its negotiations with the institution for their receipt and retention of float revenue. To understand the steps a fiduciary must take to avoid engaging in a prohibited transaction under ERISA § 406(a) and (b) and engaging in a fiduciary breach under ERISA §§ 404 and 405, a fiduciary must be familiar with AO 93-24A, Information Letter to Judith A. McCormick (August 1994) and FAB 2002-3 which all deal with float revenue. In fact, if a fiduciary adheres to the guidance outlined in FAB 2002-3, float revenue will qualify for the alternative reporting option which minimizes the amount of reporting required on Schedule C. However, if you don't comply with the alternative reporting option you must provide more extensive disclosures in the Schedule C which also could be construed that you have failed to comply with FAB 2002-3. This information could give the DOL the information they need to target audit plans to determine if they have not meet the FAB 2002-3 guidance. NOTE: Although Schedule C reporting only applies, in general, to plans with over 100 participants and to amounts that meet the $5000 threshold, it is not uncommon for third party administrators (TPA) to provide claims paying services to small plans. In this environment, a fiduciary must determine whether there are conflicts of interest and self-dealing which can occur when the TPA controls the length of time the distribution balance is held before processing the benefit distribution or until the check is cashed. Since the DOL guidance was not restricted to plans subject to filing the Schedule C it behooves all fiduciaries to inquiry about float income regardless of the plan size. Also, Code 62 float revenue must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14.*

63 Distribution (12b–1) Fees

Sample Services:

- 12b-1 applies exclusively to regulated investment companies i.e., mutual funds and has been used to pay commissions to properly licensed broker/dealers and their registered representatives or 12b-1s have been used to pay various service providers for plan administrative costs.
- 12b-1 fees are ongoing fees paid from the mutual funds assets.

Commentary *- Rule 12b-1 under Section 12 was added in 1980 to the Investment Company Act of 1940. In general, it provides:*

1. *Mutual funds can distribute annual fees directly from mutual fund assets to cover the cost of marketing and distributing the fund to investors.*
2. *The amount of 12b-1 fees is subject board approval.*
3. *12b-1 distributions may be paid to a properly licensed broker/dealer and their registered representatives.*
4. *12b-1 fees must be disclosed in the fund's prospectus.*
5. *12b-1 fees are already included in the Net Asset Value (NAV) of the mutual fund.*
6. *12b-1 fees are designed to encourage sales to achieve economies of scale so that all shareholders experience lower asset management fees.*

A generally accepted industry practice has evolved to use 12b-1 fees as subsidies to offset the cost of retirement plan services. This approach has come under fire by some industry practitioners. Common concerns raised include:

1. *No hard proof that investors benefit from the use of 12b-1 fees raising questions among some practitioners on their appropriateness for ERISA plans and for mutual funds in general.*
2. *Using 12b-1 fees hides the cost of administrative services when those same costs can be directly charged to participant accounts in a manner that provides participants with the necessary transparency to police their benefits and enforce their rights.*
3. *The 12b-1 fees are rarely collected equally, as a percentage of assets, from all investment alternatives. As a result, disproportionate 12b-1 fees mean some participants pay more for the same suite of services. Some practitioners argue that this disproportionate allocation of plan expenses violates FAB*

2003-3 which states, "if a method of allocation has no reasonable relationship to the services furnished or available to an individual account, a case might be made that the fiduciary breached his fiduciary duties to act prudently and "solely in the interest of participants" in selecting the allocation method."

4. *Some argue that a direct payment of 12b-1 fees to the plan or an ERISA account violates securities law and represents a fiduciary breach regardless of DOL blessing to collect and use 12b-1 fees. To support this position, practitioners reference ERSA § 514(b)(2)(A) which states, "[n]othing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." Violations typically cited include:*

   a *Section 18(f) of the Investment Company Act which generally prohibits a fund from selling any class of senior securities. See E*trade Securities, LLC, SEC Ref. No. 2005511, 2005 SEC No-Act. LEXIS 805 (Nov. 30, 2005).*

   b *Section 22(d) of the Investment Company Act which prohibits a fund, its principal underwriter and dealers from selling fund shares at a price other than the current offering price set forth in the fund's prospectus. See E*trade Securities, LLC, SEC Ref. No. 2005511, 2005 SEC No-Act. LEXIS 805 (Nov. 30, 2005).*

   c *Section 48(a) of the Investment Company Act of the Investment Company Act, in part, makes it unlawful for any person to do any act or thing indirectly "through or by means of any other person" which it would be unlawful for such person to do directly under the Act or rules there under. See E*trade Securities, LLC, SEC Ref. No. 2005511, 2005 SEC No-Act. LEXIS 805 (Nov. 30, 2005).*

   d *Finally, where shareholders of the same class of shares are treated differently there are those practitioners that would argue the rebate of 12b-1 fees could be considered a preferential dividend. See IRC §§ 561, 562, 852 and Revenue Procedure 96-47 (Sept. 6, 1996).*

On the other hand, proponents that support the use of 12b-1 fees reference the growing list of DOL support that includes:

1. *12b-1 fees received by the trustee/plan administrator and used to benefit the plan; e.g., to pay fees owed by the plan or credit the revenue to the plan, is not a violation of ERISA's prohibited transaction provisions as long as the amount is reasonable for services rendered. Advisory Opinion 97-15A ("Frost" Letter).*

2. *It is not a prohibited transaction if a non-fiduciary service provider receives 12b-1 fees from mutual funds in which its client plans invest even if the service provider controls the list of funds from which the client plan or independent fiduciary selects the investments as long as the fees are reasonable for services rendered. Advisor Opinion 97-16A ("Aetna" Letter)*

3. *It is not a prohibited transaction if a fiduciary of a plan receives fees from mutual funds in which its client plans invest so long as the fiduciary does not exercise authority or control to cause the plan to invest in the funds. Advisor Opinion 2003-09A ("ABN AMRO" Letter)*

4. *Receipt of advisory and non-advisory fees e.g., 12b-1 by a trustee and its affiliates would not violate section 4975(c)(1)(E) or (F) of the code if fees received are used to reduced the amount of the trustee's compensation. Advisory Opinion 2005-10A ("Country Trust Bank" Letter)*

5. *The allocation of surplus revenue sharing (rebated 12b-1 fees, commissions, sub-TA fees) to participants is not considered a contribution by the employer and may be reallocated to participants. PTE 98-25 (OLDE Financial)*

The use of 12b-1 fees is a hotly contested issue among many practitioners in the retirement community particularly among licensed registered representatives of a Broker/Dealer. They posit that recipients of 12b-1 fees should be subject to the same requirements they are subject to including the requirement to pass the securities registration test, meet the continuing education requirements, purchase the required E&O, and subject themselves to an ever increasing barrage of compliance obligations. While this debate rages on, it is difficult to deny that rebating 12b-1 fees reduces the cost of investment management but it does not reduce the costs charged by service providers to the plan. A service provider, whether paid partially, completely or not at all from 12b-1 fees, should receive the same amount of fees regardless of the payment source. In other words, whether the service provider's fee is paid direct from the plan sponsor, via deduction from plan assets or paid from 12b-1 fees the amount should not change. If the service provider is paid more using 12b-1 fees for the same services had they charged a hard dollar fee directly assessed against the plan sponsor or plan assets there is arguably a violation of ERISA § 406 Prohibited Transaction rules due to unreasonable and excessive expenses. However, assuming a service provider is paid the same regardless of the method of payment, there

remains a question of prudency in regard to best execution when paying more for a specific security than the lowest possible cost without realizing some additional benefits.

While there appears to be no near term end to the debate, it is worth noting that 12b-1 fees reported on the Schedule C will provide the DOL with data to consider for future enforcement action. This heightened reporting obligation should give plan sponsors reason to re-evaluate the structure of their plan to ensure their reporting obligations do not become incriminating evidence that can be used against them by the DOL or a plaintiff attorney. Code 63 12b-1 fees must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14; however, a prospectus properly provided according to the disclosure requirements to meet the "eligible indirect compensation" definition will permit the preparer to utilize the alternative reporting option.

64 Recordkeeping Fees

Sample Services:

- Services of a contracted Third Party Administrator such as:
  - Allocating contributions, gains, and losses,
  - Processing transfers and distributions
  - Processing payroll feeds
  - Calculating vesting
  - Maintaining participant account balances e.g., such as daily valuation
  - Maintaining records of eligible COBRA recipients
  - Maintaining QDRO account balances
  - Compliance services
  - Preparing and mailing participant statements
  - Account maintenance services

Commentary *- A Form 5500 preparer has Code 15 and 64 to choose from for recordkeeping services which makes it a challenge to determine which code to list, if not both. There are no distinct definition differences other than the title and the number of the code. Since the instructions state, "Enter as many codes as apply" it would appear a preparer has no choice but to list both codes. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

65 Account Maintenance Fees (AMF)

Sample Services:

- Account maintenance fees have been referred to as management fees and investment advisory fees in other DOL publications.
- AMF is typically an ongoing charge against plan assets calculated as a percentage of assets; although, it can be calculated on a per capita basis.
- AMF may be used to subsidize administrative expenses, investment research as well as managing the assets of the plan.
- There is also a possibility that Code 65 would be proper to use in relation to annual loan maintenance fees.

Commentary *- The Schedule C instructions reference account maintenance fees as reportable indirect compensation paid from mutual funds, bank commingled trusts, insurance company pooled separate accounts, and other separately managed accounts and pooled investment funds in which the plan invests. Unless a fee was specifically identified as an account maintenance fee we would be hesitant to assign a fee Code 65. In many cases, the account maintenance fee is incorporated into Code 28 investment management, Code 51 investment management fees paid directly by the plan, or Code 52 investment management fees paid indirectly by the plan. In our experience, account maintenance fees applied to a flat dollar fee per participant for the*

account. For example, it could apply to individual variable or fixed annuity contract, self-directed brokerage accounts and/or loan maintenance fees.

66 Insurance Mortality and Expense Charges (M&E)

Sample Services:

- M&E fees cover insurance risks inherent to individual and group annuity contracts and life insurance.
- Also could apply to insurance produces used by health and welfare plans
- This expense is typically designed to cover the death benefit and guarantees promised to participants but may also cover distribution costs.

Commentary *- M&E fees are normally reflected directly in the contract, especially if the annuity product is a variable product subject to SEC registration requirements. Alternatively, the M&E expense could be part of a wrap fee imposed against total assets held under the individual or group annuity contract. Normally, M&E expenses are higher for individual than group annuity contracts and, in some cases, the M&E expense will reduce as the assets growth within a group annuity contract.*

67 Other Insurance Wrap Fees

Sample Services:

- Wrap fees can cover
    - mortality & expense charges,
    - marketing and distribution fees (commissions),
    - various plan services, and
    - investment management fees.

Commentary *- No explanation or definition is provided in the Schedule C instructions or the FAQ. Wrap fees, however, are associated with insurance company contracts and assessed against total plan assets held under the contract. Wrap fees can apply to a multitude of different services; although, rarely are Wrap fees bifurcated among the various services. The total wrap fee must be disclosed to the plan sponsor and may be disclosed to the participant. Wrap fees (as a percentage of the 401(k) fund) is typically inversely proportional to the value of assets in the 401(k) plan. Code 67 Wrap fees must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14; however, wrap fees can be treated as "eligible indirect compensation" subject to the alternative reporting option.*

68 ''Soft Dollar'' Commissions

Sample Services:

- Excess commissions that are over and above the cost to execute basic brokerage services and which are used to purchase additional services such as research

Commentary *- Code 68 represents reportable indirect compensation. This code does not apply to mutual funds but would apply to common or collective trust funds, separately managed accounts or separate accounts. A plan sponsor should ask if their investments are subject to soft dollar commissions and what services are being rendered in exchange for the soft dollar payment. If the investment manager indicates this does not apply, get it in writing for your records. On the other hand is the investment manager indicates soft dollar expenses are incurred you should request a quarterly activity report so you can monitor activity. Payment of soft dollar fees is permissible if the arrangement meets Section 28(e) safe harbor requirements of the Securities Exchange Act of 1934. [15 USC § 78bb(e)] Soft dollar commissions must be reasonable in relationship to the services rendered. The only permissible services are brokerage and research. [SEC Exchange Act Rel No 34-23, 170, 35 SEC Doc (CCH) 703, 706-07 (Apr 23, 1986)] The safe harbor applies to the party exercising investment discretion; however, a named fiduciary retains oversight responsibility for monitoring and reviewing manager practices. [DOL Technical Release 86-1 (May 22, 1986)] Monitoring responsibilities include:*

1. *Compensation must be reasonable in relationship to services rendered,*
2. *Confirming the broker-dealer is capable of providing best execution,*
3. *Best Execution is obtained,*

4. *Measure cost of transactions, and*
5. *Obtaining accounting of all services received and payments made.*

NOTE: Code 68 Soft dollar commissions must be reported on the Schedule C for bundled arrangements as it falls under the one of the exceptions listed in FAQ 14; however, Soft dollar commissions can be treated as "eligible indirect compensation" subject to the alternative reporting option.

70 Consulting Fees

Sample Services:

- Services can be provided by attorney, accountant, actuary, consultant, trustee, fiduciary, advisor etc.
- Services provided under this code could apply to any fee tied to consulting

Commentary *- Code 16, 17 and 70 all include the term "consulting." There is no description provided in the instructions that defines when to use one code over another. If any individual or entity is paid for consulting from plan assets it is logical to assume the payment is a fee. Thus, it would appear that Code 70 Consulting fees would always be included in addition to either Code 16 or 17. The difference between 16 and 17 is in the name which leads me to conclude you use the code with the name that is most descriptive of the applicable consulting engagement or the recipient of the consulting engagement. For example, if the consulting is provided to a pension plan you use Code 17 and if it is not a pension related consulting fee then use Code 16. Recall that ERISA defines "pension" in section 3(2). The ERISA § 3(2) definition provides a generic definition for "pension" that applies to any type of qualified plan; therefore, any consulting applicable to a pension would use Code 17. Using deductive reasoning that leaves Code 16 to apply to any consulting that is not pension related. For example, health and welfare consulting would utilize Code 16. The challenge without guidance is the determination of when Code 16 would apply to consulting rendered to a pension plan that would not fall under Code 17. Since fees deducted from plan assets must be reasonable, must be used for the establishment or operation of the plan (ERISA § 408(b)(2)) and must be appropriate and helpful for the plan to achieve its purpose (29 C.F.R. § 2550.408b-2(b)) then any general consulting could be construed to be pension consulting requiring the use of Code 17. Also, you will notice we referenced several types of professionals that have their own applicable codes. For example, attorneys that provide legal services should use Code 29, accountants should use Code 10, trustees might use some combination of Code 20, 21, 24 and 25, an actuary should use Code 11, and an advisor could use some combination of 26, 27, 53, or 71. So, why would you also cite Code 16, 17 or 70 in addition to any of the other applicable codes? Quite simply, the instructions state," Enter as many as apply." Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.*

71 Securities Brokerage Commissions and Fees

Sample Services:

- Traditional trading fees paid to execute buy/sell transactions
- Fees assessed against a participant's self-directed brokerage accounts
- Commission recapture, soft dollars, bid/ask spreads, price concessions and securities lending fees
- Maintenance fees, cost for wire transfers, postage, copies of reports or other ancillary services subject to a fee
- The acquisition and sales cost for Company Stock or Company Stock fund

Commentary *- The title clarifies the need to tied "commissions" and "fees" associated with securities brokerage activities to Code 71. What should not be tied to this code would be trading fees assessed against a mutual fund. Mutual funds are regulated investment companies that are excluded from the definition of plan assets. The prospectus of a mutual fund does not disclose the trading fees but they can be found in the Statement of Additional Information. The SAI is a separate report prepared by the investment company and made available upon request. Mutual funds should fall under the definition of "eligible indirect compensation" which is dependent upon adherence to the disclosure requirements. On the other hand, collective funds, separate accounts and separately managed accounts do qualify as plan assets; therefore, there is the possibility that all securities brokerage commissions and all fees should be reported under Code 71. In addition, a preparer*

should give careful consideration to any overlap with Code 33 which is entitled "Securities Brokerage." Although it does not specify "commissions or fees" its inclusion in the menu of new C codes means it was obviously intended to be used for some type of securities brokerage cost. While it appears that Code 33 was not intended to be used to reflect commissions, we assume it was intended to reflect fees even though it does not mention fees in its title. We suggest you review Code 33 in comparison to Code 71 and give consideration to which code applies to the specific fees paid. Although you could assign both codes to the securities brokerage cost, the redundancy does little to support transparency and clarity of fees charged for services rendered. Note: A service provider subject to this Code is a Key Service Provider. As a result, if a service provider using this code has received any indirect compensation, other than eligible indirect compensation, of $1,000 or more or where a formula is reflected, the service provider must complete Line 3 of Part 1. The details that must be reported include the identity of the payor, services rendered, the amount paid, the source of the compensation, and the payor's relationship to the service provider.

72 Other Investment Fees and Expenses

Sample Services:

- Apparently this code applies to fees and expenses associated with a plan investment held by a plan that has no other applicable code. For example, there is no specific code for the following types of investment fees and expenses:
    - Bid/Ask spreads
    - Commission Recapture
    - Securities Lending
    - Trading fees
    - Price concessions
    - The acquisition and sales cost for Company Stock or Company Stock fund

Commentary *- Without any narrative description in the Schedule C instructions we would suggest you can use Code 72 in combination with every other investment related code or use Code 72 only for investment fees and expenses that are not specifically covered by any other code. If you choose to used Code 72 in combination with other investment related codes your options could include Code 26 Investment advisory (participants), 27 Investment advisory (plan), 28 Investment management, 51 Investment management fees paid directly by the plan, 52 and Investment management fees paid indirectly by the plan (e.g. mutual fund investment adviser fees). On the other hand, if the investment fee or expense is not an advisory or management fee or if it is not a specific fee like Code 54 Sales loads (front end and deferred), 59 Shareholder servicing fees, 60 Sub-transfer agency fees, 61 Finders fees/placement fees, 63 Distribution (12b-1), and/or 68 "Soft Dollar" commissions then use 72. Of course, a reason to use Code 72 with every other appropriate code is because the instructions state, "Enter as many codes as apply."*

73 Other Insurance Fees and Expenses

Sample Services:

- Apparently applies to fees and expenses charged by insurance companies to an ERISA plan that have no other applicable code

Commentary *- We suspect this will be used sparingly by knowledgeable preparers and as a catch all for those unfamiliar with insurance company products for retirement plans. Another place where this code may apply is health and welfare plans that are subject to insurance company fees that do not have another applicable code.*

99 Other Fees

Sample Services:

- Any fee paid to an individual or entity not specifically identified by another code number.
- Examples of such services include:
    - Recapture arrangement which is a type of soft dollar whereby a portion of the brokerage commission is rebated to the plan or to some other service provider to defray the cost of specified services.

- Securities lending, repurchase agreements, or reverse repurchase agreements whereby the plan lends securities to banks, broker-dealers, or other financial institutions to cover short positions, avoid failures to deliver, or engage in limited arbitrage.
- ERISA bond can be paid from plan assets [DOL Reg § 2509.755, FR-9; DOL Adv Op [no number], 1987 ERISA LEXIS 24 (Mar 2, 1987)]
- Printing and mailing cost.
- Preparation of SPDs ERISA § 103.
- Preparation of Annual reports ERISA § 103.
- Preparation of Summary annual report DOL Reg § 2520.104b-10.
- Preparation of Summaries of material modifications (SMMs) ERISA § 102.
- Preparation of COBRA Notices ERISA § 606.
- Preparation of HIPAA ERISA § 701(e).
- Preparation of Newborns' and Mothers' Health Protection Act notices ERISA § 711.
- Preparation of Women's Health and Cancer Rights Act notices ERISA § 713.
- Preparation of Required Plan Amendments.
- Preparation of Plan Document.
- Preparation of Investment Policy.
- Preparation of Funding Policy.
- Preparation of the Section 204(h) notice.

Commentary *- A preparer will have to decide to what extend the instructions requirement to "Enter as many as apply" will apply to Code 99. To provide meaningful data that can be relied upon, we recommend using Code 99 only if no other codes apply. Also, it seems reasonable to assume that expanding the codes was designed to capture more specific information that can be evaluated. As a result, it should be rare that Code 99 applies. For example, if any of the items listed in the sample services above are prepared by an attorney then use Code 29 - "legal" instead of Code 99. Furthermore, if any fee for services deducted from plan assets cannot fall under any other code that specifics the service use Code 49 - "other services" versus Code 99. In short, try to use Code 99 only when you cannot find another code that applies to avoid duplication and the creation of meaningless data.*