

## CLIENT ALERT

### DOL Provides New ERISA Guidance Regarding Reporting of Commissions and Fees Paid to Insurance Brokers and Agents

Mar.02.2005

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The Department of Labor has issued a [new advisory opinion](#) in an effort to bring clarity to whether and how insurance companies should report commissions, fees and other compensation paid to brokers and agents for ERISA-covered plans, especially “contingent” or bonus compensation. The guidance comes in the midst of controversy surrounding these forms of compensation and insurers' level of disclosure to customers about them.

DOL issued Advisory Opinion 2005-02A on February 24, 2005 in response to an application contending that there has been widespread under-reporting of commissions and fees by insurance companies as the result of misinterpretations of prior DOL guidance. Specifically, the applicants alleged that some in the insurance industry were using language from DOL's prior advisory opinion, A.O. 86-17A (April 28, 1986), along with language from the instructions for the Form 5500, Schedule A, to justify reporting only those payments linked directly to specific contracts or policies issued by insurance companies to ERISA-covered plans.

To address this request, DOL surveyed all of the ERISA statutory and regulatory provisions governing the reporting of commissions and fees on the Form 5500. Although acknowledging that Schedule A to the Form 5500 requires the listing of each specific contract issued by an insurer to a plan, DOL nevertheless concluded that the obligation to report fees and commissions extends beyond those payments related directly to the contracts and policies listed on the Schedule A. Thus, DOL announced the general rule that an insurer is required to report any payment where the eligibility for or amount of such payment

is based, in whole or in part, on the value ( e.g. , policy amounts, premiums) of contracts or policies (or classes thereof) placed with or retained by an ERISA plan, including, for example, persistency and profitability bonuses.

So long as the payment is based in any way on the value of the policy or contract issued to the plan, the reporting obligation would attach regardless of whether, among other things, the payment was classified as a sales commission or was paid from a special bonus fund. Indeed, DOL noted that even non-monetary compensation (for example, trips, cruises, gift certificates, club memberships, etc.) must be reported if this test is met. DOL stated that it is up to the insurer to assure that fees or commissions calculated with respect to more than one contract are accurately apportioned and reported on a contract-by-contract basis as required by Schedule A.

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