April 24, 2014

Executive Director
State Board of CPA Examiners
Address
Address

Re: Scope of CPA ERISA audits

Dear Mr./Mrs.:

We work closely with several audit firms in your state but we are concerned that most of your state's ERISA 401k plan auditors we speak to do **not** believe that 1) ensuring IRS Forms 5330 are filed (exhibit 1) and 2) ensuring 15% excise taxes are paid via these Forms 5330 are *within the scope of their 401k audits*. In fact, recently at a popular New Orleans 401k conference many of your auditors stated that *Chapter 11, Party in Interest Transactions in the AICPA Audit and Accounting Guide is simply a "guide" not law*. Repeatedly hearing this over the years, we now understand better why Ms. Borzi believes most 401k audits are inadequate or ***"The limited-scope audit is practically useless," said Borzi, assistant secretary of the Department of Labor's Employee Benefits Security Administration.***[1] Consequently, we took this issue to the Federal agency with jurisdiction--Internal Revenue Service's EP Compliance unit last September.

> *http://www.dol.gov/ebsa/oemanual/cha12.html;* ***10. Jurisdiction****. Because most pension plans are qualified plans under the Code,* ***the IRS has primary authority for the administration of the minimum standards provisions of ERISA****. Thus, if the IRS determines that a plan meets the requirements for tax qualification, DOL is required, under section 3001(d) of ERISA, to accept the IRS determination as prima facie evidence of the plan's initial compliance with, among other things, parts 2 and 3 of Title I. Since the IRS is the agency within the Treasury Department that is responsible for the administration of the Code, including the provisions dealing with qualified plans, most complaints concerning the minimum standards provisions should be referred to IRS.*

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(2) ERISA section 408(b)(2) provides an exception for "reasonable arrangements" for necessary services. Under ERISA § 408(b)(2), no more than "reasonable compensation" may be paid.

(3) The 408(b)(2) regulation provides that a service arrangement is not reasonable unless specific disclosures are made to the hiring fiduciary.

What is the cause? Perhaps new 408b2[2] rules effective 7/1/12 are NOT being trained. The laws were not changed per se but new rules apply.

Who are we? We provide Continuing Professional Education (CPE) on IRS Code Section 4975 prohibited transactions to auditors and SHRM members. Many refer to us as "401k provider pay experts." Having paid providers from plans such as Krispy Kreme, Papa Johns and Wendy's in our former lives we

[1] http://www.bna.com/overreliance-limitedscope-audits-n12884909164/
[2] http://www.dol.gov/ebsa/newsroom/fs408b2finalreg.html

now provide CPE to auditors and SHRM members relating to *401k IRS Prohibited Transactions*. We also serve as SAS 118 "qualified third party."[3]

Let me reiterate that we have found several audit firms that do "Get it!" and they are helping their clients immeasurably by avoiding penalties and overpayments. WE ABSOLUTELY THINK ERISA AUDITORS ARE THE MOST UNDERPAID PROVIDER ASSOCIATED WITH 401K PLANS! However, other auditors' *apathy* regarding this *filing/reporting/paying taxes issue* in many states served as a catalyst for us to meet face to face with the IRS to discuss these matters on 9/13/13. The IRS seemed to wonder why we were asking such ridiculously simple questions (see IRS 5330 project at http://www.irs.gov/Retirement-Plans/Employee-Plans-Compliance-Unit-(EPCU)---Completed-Projected---Form-5330---Prohibited-Transactions-Project-Report).

Now we are contacting accountancy boards in 10-20 states in which we have or will perform CPE presentations about IRS Prohibited Transactions ("PT") in 401(k)s.

Other industry leaders or "disrupters." Our other friends of the audit industry with intelligent accounting and legal minds are echoing our frustration too. See the NCACPA presentation attached as exhibit 2.

This presentation conveys what the IRS' Mid Atlantic Regional Director Michael Sanders (and Ms. Baumgardner) told us. *(Ms. Baumgardner said to offer her card to anyone with 5330 questions).*

As you can see in Novant's[4] case (exhibit 3) excess compensation is noted. In fact, we estimate based on Forms 5500 Schedule Cs filed for plans in your state that *excessive compensation* (a "PT) is occurring **three out of four times for years 2009 through 2014 (6 years)**. Yet, we **cannot find a single plan** in your state that filed a Form 5330 or indicated a PT had occurred (on line 4d, Schedule H). **This means the IRS is NOT receiving their Forms 5330 and related 15% excise taxes regularly from your state.**

That is why we are writing. We thought this would be an interest item for you that perhaps many ERISA auditors are *not attempting to ensure the IRS Forms 5330 are filed and not attempting to get "improper compensation" back into their clients' plans*[5] as a regular practice. Several large audit firms have admitted us *off the record* that their staff ***"Is clueless about PTs and parties in interest transactions."***

We often recommend 401k plans **fire their current auditor if they fail to follow the Internal Revenue Code** and **hire firms that obey the Code**. Why? Because http://www.dol.gov/ebsa/publications/selectinganauditor.html states *"A **quality audit also will help you carry out your legal responsibility** to **file a complete and accurate annual return/report for your plan each year**. Because an **incomplete,***

[3] http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00550.pdf

[4] http://www.investmentnews.com/article/20140312/FREE/140319963

[5] http://www.irs.gov/pub/irs-tege/se702.pdf

inadequate, *or untimely audit report may result in penalties being assessed against you as the plan's administrator, selection of an experienced and reliable auditor is very important."*

Potential "inadequate audits" **may even violate Circular 230 and SAS 118**:

- Circular 230 § 10.51 Incompetence and disreputable conduct.
  - (6) **Willfully failing to make a Federal tax return** in violation of the Federal tax laws, or willfully evading, **attempting to evade**, or **participating in any way** in evading or attempting to evade any assessment or payment of any Federal tax.
- SAS-118 Other Information in Documents Containing Audited Financial Statements
  - Material Inconsistencies-if the auditor **identifies a material inconsistency**, they should determine if either the audited financial statements or the other information needs to be revised.
  - MATERIAL MISTATEMENTS OF FACT- If the auditor **becomes aware of an apparent material misstatement of fact**, they should discuss the matter with management. If after the discussion, the auditor still considers that **there is an apparent material misstatement of fact, they should request that management consult with a qualified third-party**.

Bottom line. We want to train and protect your auditors so they may avoid litigation and regulatory actions. We want to educate your auditors so they **NEVER again**:

1) Ignore required IRS 15% excise taxes for excessive compensation;
2) Ignore SAS 118 but instead state facts that clients may be required to file IRS Forms 5330 for every year excessive compensation occurred,
3) Fail to note the improper compensation due from overpaid providers so they can ensure money is returned to harmed participants and noted on the plan's audited financial statements as "receivables" to the 401k plan?

(11) Correction period

(A) In general

For purposes of subsection (d)(23), the term "correction period" means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

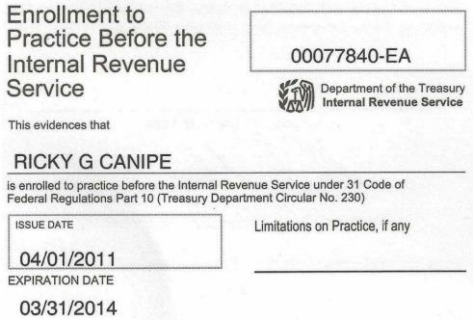
(B) Exceptions

(i) Employer securities Subsection (d)(23) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1) of the Employee Retirement Income Security Act of 1974) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) of such Act).

(ii) Knowing prohibited transaction In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a prohibited transaction.

We do **not** want to perform continuing education (CPE) **based on an IRS position** that **conflicts with your office's guidance on the scope** of CPA 401k Audit practitioners' work. These issues we mentioned can be easily *fixed* with Forms 5500 amendments and the IRS' EPCRS[6] and DOL's Voluntary Fiduciary Correction[7] programs.

Sincerely,


Enrollment to Practice Before the Internal Revenue Service

00077840-EA

Department of the Treasury
Internal Revenue Service

This evidences that

RICKY G CANIPE

is enrolled to practice before the Internal Revenue Service under 31 Code of Federal Regulations Part 10 (Treasury Department Circular No. 230)

ISSUE DATE
04/01/2011

EXPIRATION DATE
03/31/2014

Limitations on Practice, if any

Rick Canipe, EA, CFP®, QKA, MBA
Enrolled Agent 77840, No Lim

[6] http://www.irs.gov/Retirement-Plans/Correcting-Plan-Err
[7] http://www.dol.gov/ebsa/newsroom/fs2006vfcp.html