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employee benefits & executive compensation alert

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Our Employee Benefits and Executive Compensation attorneys have a diversified national practice. We assist clients of all shapes and sizes - businesses in virtually every industry sector, 501(c)(3)s and other tax-exempt organizations, and governmental entities under 414(d) - on compensation and benefit-related issues.

New Service Provider Fee Disclosure Rules for Retirement Plans

Interim Final Regulations Issued

Last month, the Department of Labor (DOL) issued interim final regulations with fee disclosure obligations impacting retirement plan service providers and plan sponsors. The regulations are scheduled to become effective as of July 16, 2011, but remain subject to modification by the DOL before that time. Service arrangements in place on July 16, 2011 will not be grandfathered, so service providers and plan sponsors will need to act soon to ensure compliance by July 16, 2011. The regulations apply to ERISA-governed retirement plans (except SEPs, SIMPLEs and IRAs).

Plan Sponsor Responsibilities

While much of the onus of complying with the new disclosure requirements will fall on service providers, plan sponsors will be responsible for ensuring that service providers disclose the necessary information. A prohibited transaction (resulting in excise taxes for the plan sponsor) will occur if the disclosure requirements are not met, unless the plan sponsor makes a written request of the service provider for the required disclosures, and notifies the DOL in writing if the service provider does not supply the requested information.

Covered Service Providers

Several categories of service providers are covered:

- Providers of certain fiduciary or registered investment advisory services to a plan (or an investment vehicle holding plan assets – such as a collective investment fund).
- Providers of recordkeeping or brokerage services to a participant-directed individual account plan (such as a 401(k) plan or an ERISA-governed 403(b) plan).
- Certain other providers of professional or administrative services for which "indirect" compensation is received, or which are compensated on a transaction basis or through charges reducing the net asset value of plan investment funds.

There is a *de minimus* exception for service providers that expect to receive less than $1,000 under the arrangement.

Information to be Disclosed

Covered service providers must provide written disclosures to plan fiduciaries (not directly to participants) about "direct" and "indirect" compensation to be received in connection with their services.

- "Direct" compensation is that received directly from the plan.
- "Indirect" compensation generally includes compensation received from any source other than the plan, the plan sponsor, the covered service provider (or its affiliate) or a subcontractor.

The disclosures must describe:

- The services to be provided.
- Whether the provider is performing any services as an ERISA fiduciary or registered investment advisor to the plan.
- A description of all direct compensation, either in the aggregate or by service.
- A description of all indirect compensation, including identification of the services for which the indirect compensation will be received and the payer of the indirect compensation.
- Any compensation paid among the covered service provider and its related parties, if the compensation is set on a transaction basis or is charged against plan assets and reflected in fund net asset values.
- The manner in which the compensation will be paid (e.g., billed directly, transaction-based, revenue sharing, etc.).
- Any compensation due upon termination of the service provider relationship.

Notably, providers of multiple services must also unbundle, or separately report, fees charged for recordkeeping services and the compensation attributable to these services. When recordkeeping is provided without an explicit cost (or at a reduced cost) due to revenue sharing payments, the disclosure must include an estimate of the cost of the recordkeeping services (including detail about the methodology and assumptions used to arrive at the cost estimate), and must contain a detailed explanation of the recordkeeping services to be provided.

For participant-directed individual account plans (such as 401(k) plans and ERISA-governed 403(b) plans), providers of recordkeeping or brokerage services must disclose investment transaction-based charges (such as loads, sales charges and surrender fees), annual operating expenses, and other ongoing expenses (such as wrap fees and mortality and expense charges).

Timing of Disclosures

Disclosures must be made in writing before entering into a covered arrangement (or before July 16, 2011 for existing arrangements). If information changes, a service provider must provide an update as soon as practicable, but in no event later than 60 days after the service provider is informed of the change. Service providers also must furnish, within 30 days following a request by a plan administrator or plan fiduciary, any other information required for the plan to comply with ERISA's reporting and disclosure requirements (such as information necessary to complete Schedule C of Form 5500).

Conclusion

The new disclosure regulations represent a significant compliance task for service providers. Plan sponsors must be vigilant to ensure that their service providers furnish the required disclosures. Once the DOL issues any revisions to the interim final regulations, service providers will be positioned to begin finalizing and circulating their disclosure documents. The attorneys in Venable's Employee Benefits & Executive Compensation group are available to help plan sponsors and service providers navigate the new disclosure rules.

Please contact any of the attorneys in our Employee Benefits & Executive Compensation group if you have any questions regarding this alert.

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