



Attorneys at Law

The New Fee Disclosure Rules

408(b)(2) and You

October 20, 2011

What Does it Mean?

- New regulations published July 15, 2010, initially effective July 16, 2011. Now -- January 1, 2012
- ERISA Sec. 408(b)(2) -- conditional exemption from prohibited transaction rules of ERISA for payment of fees for Plan services from Plan assets
- It is a Prohibited Transaction for a plan and a party-in-interest to exchange services and/or goods for a fee

What Does it Mean?

- Prohibited Transaction –
 - A transaction that constitutes a direct or indirect ... furnishing of goods, services, or facilities between the *plan* and a *party* in interest;
- Party in Interest
 - a person providing services to the plan;
 - any fiduciary, counsel, or employee of the plan

Exception

- Reasonable contracts for or legal, accounting, or other services necessary for the establishment or operation of the plan (408(b)(2))
- Requirements for Exemption –
 - Services must be necessary
 - Pursuant to a “reasonable” contract or arrangement
 - Compensation must be “reasonable”

What is reasonable?

- An arrangement will be considered “reasonable” if it is adequately described in disclosures
- Arrangement need not be in writing
- Disclosures must be in writing

Covered Plan

- An employee pension benefit plan or a defined contribution plan covered by ERISA
- Does not include SEPs, Simple Plans, IRAs, or non-ERISA 403(b)s or 457s
- Does include ERISA covered 403(b) plans

Covered Service Provider

- A Covered Service Provider
 - receives or expects to receive \$1,000 or more in direct and/or indirect compensation for services including:

Covered Service Provider

- Services as a fiduciary
 - Services to an investment contract, product or entity that holds plan assets and in which the Covered Plan has a direct equity investment
 - Services directly to the Plan as an investment advisor
 - Services provided directly to the plan as an advisor, manager or administrator

Covered Service Provider

- Con't:
 - Recordkeeping or brokerage services
 - individual account plan
 - permits participants to direct their investments
 - if one or more *designated investment alternatives* is made available in connection with the recordkeeping or brokerage services
 - Not brokerage windows or self directed brokerage accounts

Covered Service Provider

- Any of the following services if provider expects to receive indirect compensation –

Accounting	Custodial
Auditing	Legal
Actuarial	Investment Consulting
Appraisal	Recordkeeping

Covered Service Provider

- Exceptions to Covered Service Provider
 - Affiliate or subcontractor performing services under a contract between the Plan and a Covered Service Provider
 - Entity providing services (other than fiduciary services) to an investment contract in which the Covered Plan invests

Disclosure Requirement

- Covered Service Providers of Covered Plans
- Must make specified disclosures to
- Responsible Plan Fiduciary
 - The plan official with authority to cause the plan to enter into, or to extend or renew, a contract with a covered service provider

Content of Disclosures

- Disclosures must contain *in writing*:
 - All services provided by Covered Service Provider
 - All payment sources, amounts and recipients of compensation
 - All compensation paid – direct, indirect, monetary and non-monetary
 - Statement of Covered Service Provider's fiduciary status

Compensation

- Anything of monetary value (such as money, gifts, awards and trips, but excluding non-monetary items of \$250 or less received during the term of the contract or arrangement).

Compensation

- Direct Compensation – compensation received directly from the Plan
- Indirect Compensation –
 - received from any source other than the Covered Plan, Plan sponsor, Covered Service Provider for services provided under contract with Covered Plan
 - Identification of services
 - Identification of payor

Compensation

- Compensation Among Related Parties –
 - Set on a transaction basis (e.g., commissions, soft dollars, finders fees)
 - charged directly against the plan's investments and reflected in the net value of the investments (e.g., 12b-1 fees)
 - Identify services and payor
- Compensation for Termination of Contract
 - reasonably expects to receive
 - how any prepaid amounts will be calculated and refunded upon such termination.

Compensation

- Compensation may be expressed as
 - monetary amount,
 - formula,
 - percentage of the covered plan's assets, or a per capita charge.

Compensation

- If compensation cannot reasonably be expressed in such terms
 - by any other reasonable method.
- Sufficient information to permit evaluation of the reasonableness of the compensation

Compensation

- Record Keepers – Additional Requirements (cont.) –
- reasonable and good faith estimate of the cost of such recordkeeping services, including:
 - methodology and assumptions used to prepare the estimate; and
 - a detailed explanation of the recordkeeping services that will be provided to the plan.

Compensation

- Manner of Receipt
 - Billed or deducted
- Investment Disclosure–Recordkeeping and Brokerage Services --
 - for each designated investment

Timing of Disclosures

- Initial Disclosures must be provided reasonably in advance of contract start date
- If investment contract is initially not expected to receive investments and subsequently receives funds, disclosure must be made within 30 days of date Covered Service Provider is aware of investment

Timing of Disclosures

- Changes in Required Disclosures
 - Changes in information required to be disclosed must be provided as soon as feasible, but not later than 60 days from date Covered Service Provider is aware of the change
 - Exception to 60 day rule if delay is due to “extraordinary circumstances” beyond Covered Service Provider’s control

Timing of Disclosures

- Covered Service Provider must provide information needed for Covered Plan Administrator to comply with Form 5500 and ERISA filing requirements within 30 days of a written request from the responsible plan fiduciary or Plan Administrator
- Error or omission in information disclosed not a violation if Covered Service Provider acted in good faith

Exemption for Responsible Plan Fiduciary

- Responsible Plan Fiduciary not deemed to fail to provide disclosures if –
 - Responsible Plan Fiduciary was not aware of any failure by Covered Service Provider and reasonably believed proper disclosures were made
 - Responsible Plan Fiduciary immediately requests in writing to Covered Service Provider that disclosures be made
 - If Covered Service Provider fails to comply with written request within 90 days, Responsible Plan Fiduciary notifies DOL

Participant Disclosures

- 404a-5 Regulations
- Effective Plan years beginning on or after November 1, 2011

Participant Disclosures

- 404a-5 Regulations require --
 - Each participant's individual portion of the total expenses of the plan.
 - A comparative chart of investments to appropriate indexes. Each designated investment option is disclosed.
 - Plan expenses allocated to the participant must be disclosed in dollars and cents paid by the participant.

Participant Disclosures

- 404a-5 Regulations require (cont.) –
 - Investment expenses per \$1,000 of investment.
 - Quarterly report of expenses allocated to the participant and expenses incurred directly by the participant
 - Investment expenses are reported initially, when changes occur and annually thereafter

Participant Disclosures

- 404a-5 Regulations require (cont.) –
- Fee offset reflected in the expenses
 - For example, a 12b-1 fee paid to an adviser is an offset to the fee that the adviser would otherwise charge to the plan.

Action Items

- Determine how services are provided to your plan
- Determine how service providers are compensated
- Obtain fee statements
- Assess reasonableness of fees
- Determine how fees are allocated to participants

Questions?

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