Benefits Alert

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New Interim Final Rule on Retirement Plan Fee Disclosures

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The Department of Labor has issued its final interim rule on fee disclosures to retirement plans by covered service providers. The rule is not effective until July 16, 2011. However, employers will need to consider as soon as possible what action is required to obtain the new required disclosures from their retirement plan service providers. The failure to comply with the new requirements could result in substantial penalties and excise taxes under the prohibited transaction rules.

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), compensation paid to retirement plan service providers must generally be "reasonable." The payment of unreasonable compensation to a service provider by a plan fiduciary is a prohibited transaction under the applicable requirements under ERISA as well as the Internal Revenue Code ("Code"). (Such transactions can result in civil penalties for plan fiduciaries under ERISA and excise taxes under the Code.) The new rule lends new substance to this requirement by providing that, unless detailed disclosures are made by covered service providers relating to all the compensation that the service provider will realize from the service relationship, compensation received from the plan will not be deemed to be reasonable.

Covered Service Provider Arrangements

The new rule covers service providers who enter into an arrangement with a retirement plan and reasonably expect to receive direct or indirect compensation of $1,000 or more in connection with providing any of the following services:

- Services provided directly to a retirement plan as a fiduciary or registered investment advisor, or services provided as a fiduciary to an investment contract, product, or entity that holds plan assets and in which the plan has a direct equity investment;
- Recordkeeping or brokerage services provided to plans like 401(k) plans that permit participants to direct the investment of their accounts, if one of the available investment alternatives will be made available in connection with such recordkeeping or brokerage services; and
- Services typically provided to a retirement plan by numerous retirement industry professionals (including accountants, auditors, actuaries, appraisers, bankers, consultants, custodians, insurers, investment advisors, attorneys, and third party administrators) that may result in certain indirect compensation.

The disclosure rules apply regardless of whether the services will be provided by the covered service provider, an affiliate, or a subcontractor. However, the interim final rule specifies that an affiliate or subcontractor to a covered service provider will not be subject to the same disclosure obligations as a covered service provider under the rule.[1]

1 Similarly, the rule does not apply to a provider solely because of services to an investment contract, product, or entity in which a retirement plan invests, regardless of whether the investment contract, product, or entity holds assets of the retirement plan (other than certain services as a plan fiduciary).

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Required Disclosures and "Compensation"

The new rule describes in detail required disclosures by covered service providers relating to services to be provided, the status of the provider as a fiduciary or an investment adviser, and the direct and indirect compensation that the provider reasonably expects to receive in connection with the provision of services to the plan. With respect to compensation, the rule will require the disclosure of all compensation paid directly by the plan, either in the aggregate or by service, that the provider, an affiliate, or a subcontractor expects to receive. All indirect compensation will also have to be so disclosed. For this purpose, "indirect" compensation includes any compensation received from any source in connection with the services provided to the plan. Similarly, any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor in connection with the services provided to the plan must also be disclosed, even if it is already otherwise disclosed as direct or indirect compensation (*e.g.*, commissions, soft dollars, finder's fees or other similar incentive compensation, and Rule 12b-1 fees). Compensation may be described as a monetary amount, a formula a percentage of the plan's assets, or a per capita charge.

Additional specific disclosure requirements also apply to fiduciaries to investment contracts, products, or entities, or the providers of recordkeeping and brokerage services. All the information required under the rule must generally be provided reasonably in advance of the date a contract is first entered into with a covered service provider, within 60 days of a change in information previously provided, an upon certain requests by a retirement plan fiduciary.

Consequences of Noncompliance

The failure to satisfy the new disclosure rules essentially exposes plan fiduciaries to the adverse consequences of causing the plan to enter into a prohibited transaction. Under ERISA, the fiduciary could essentially be required to unwind the transaction and pay a civil penalty of up to 20% of the "applicable recovery amount." Under the Code, the fiduciary could be required to pay an excise tax of 15% of the "amount involved." There is limited relief from this outcome under the interim final rule. In order to be eligible for this relief, plan fiduciaries must have reasonably believed that the service provider had provided the required information, must request in writing that the covered service provider provide the information, and, if it does not do so within 90 days, the plan fiduciary must report the service provider to the Secretary of Labor.

If you have any questions about the final interim rule, please contact one of the attorneys in the Employee Benefits & Executive Compensation Group at Bradley Arant Boult Cummings LLP.

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