ERISA Fee Disclosure Requirements Part I: Service Providers

Client Advisories

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Effective July 1, 2012, agreements between retirement plans and plan service providers must describe most direct and indirect fees associated with the services in writing in order to avoid "prohibited transaction" penalties under ERISA. Effective October 1, 2012, plan fiduciaries are required to disclose to plan participants all fees that can affect plan balances. This article discusses the first of these rules, and we will discuss the second in an upcoming article.

The rationale for requiring fee disclosures comes from ERISA's mandate that expenses paid by a plan be "reasonable." The multitude of fee arrangements that have developed in the retirement plan industry can make it difficult for a plan fiduciary to determine what all the service fees are. Plan fiduciaries will need this information both to ensure contracts for services are reasonable and in order to fulfill the responsibility to disclose the fees to participants. Service providers must disclose the fees for services in writing to avoid imposition of a 15% "prohibited transaction" excise tax.

Most retirement plans, including 401(k), profit sharing, pension, and most 403(b) plans, but not SEPs, SIMPLE plans, or IRAs, are subject to these rules.

A covered service provider ("CSP") for purposes of these rules is a person or entity that reasonably expects to receive $1,000 or more in direct or indirect compensation for most services provided to a retirement plan, whether provided by the CSP directly or through an affiliate or subcontractor. These include: services as a fiduciary or registered investment adviser; recordkeeping and brokerage services to individual account plans that permit participants to direct plan investments; and indirect compensation for other services, such as accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities or other brokerage, third party administration, or valuation services. Certain payments are not subject to these requirements (for example, amounts paid by the employer sponsoring the plan directly to a TPA for a limited service arrangement encompassing only compliance testing and Form 5500 preparation).

Direct compensation may be disclosed either in the aggregate (i.e., listing all services and the aggregate fee) or by service (broken down). Disclosures of indirect compensation must identify the services as well as the payer of the indirect compensation and a description of the arrangement between the payer and the CSP, affiliate, or subcontractor.

The CSP generally must provide initial fee and service disclosures reasonably in advance of the effective date of a contract or arrangement for services and again when the information changes.   Where a CSP fails to provide the required notices, the regulations specify the actions a plan fiduciary should take to remedy the failure.

Although the Department of Labor rules do not specify the methodology for determining reasonableness of fees, some plan Administrators are using the proposal process to determine whether fees for services of a given provider are reasonable by comparing costs for similar services from different providers.

There are many fee arrangements applicable to retirement plans. Each plan contract or arrangement for services must be examined and analyzed to ensure all compensation is captured, described, and disclosed in accordance with ERISA.

If you would like to discuss the new fee disclosure requirements or other employee benefits matter, please contact Nancy L. Wasch, Esquire, of Archer's Employee Benefit Plans/Executive Compensation/ERISA Practice Group, at nwasch@archerlaw.com or (215) 246-3106, or L. Gerald Rigby, Esquire, Group Chair, at grigby@archerlaw.com or (215) 279-9684.

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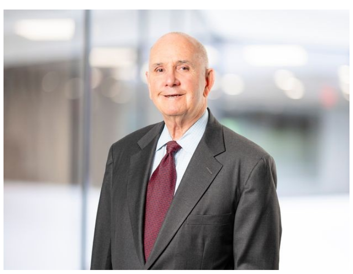

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