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Alert

What Do Retirement Plan Sponsors Have to Do Now that the ERISA 408(b)(2) Fee Disclosure Deadline Has Come and Gone?

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By now, plan sponsors of most defined benefit and defined contribution plans should have received disclosure statements from "covered service providers" to their plans regarding whether the provider is, in fact, a "covered service provider." If the provider is a "covered service provider," the provider's disclosure statement should also describe what services are being provided to the plan and the amount of compensation the provider receives for such services.

A "Covered Service Provider" includes those providers who are engaged by the plan to provide services to the plan of $1,000 or more, including:

- A plan fiduciary or trustee;
- A registered investment adviser;
- An investment contract provider;
- An investment manager; and
- An attorney, actuary, auditor, accountant, investment broker, insurance broker, custodian, third-party administrator or other similar provider who expects to receive $1,000 or more in indirect compensation.

Trustees, including those not compensated directly by the plan, should only report on compensation they receive from third parties because the plan should know how much compensation it paid to each of the trustees.

Review 408(b)(2) Statements for Reasonableness, Accuracy and Potential Conflicts of Interest
If all of the plan's covered service providers provided compliant disclosure statements by the July 1, 2012 deadline, plan sponsors must now begin assessing the reasonableness of each contract or agreement in light of the level and quality of services. Though there is no clear standard on what constitutes "reasonable," and the DOL has made it clear that "reasonable" does not necessarily mean the lowest-cost option, the DOL has indicated that a responsible plan fiduciary must engage in some comparative analysis to ensure that a contract or arrangement is reasonable. If the plan sponsor lacks the expertise to perform a comparative review or evaluate the reasonableness of the fees, the sponsor should retain an outside consultant to assist with a fee benchmarking analysis. Moreover, if the fees are determined to be on the higher end of the spectrum, the fiduciaries should negotiate the fees down in an amended agreement with the provider, consider a new provider by conducting a search or, at least, document why the services provided warrant the higher fee.

Plan fiduciaries should review the underlying service provider's contracts to make certain that the contract terms are clear and that the contract allows for the provider's services to be terminated on reasonably short notice. If the contract has not been re-negotiated in the last year or two, it is important to reevaluate the terms and renegotiate the agreement to ensure that the terms are the best possible for the plan and reasonable in the current marketplace. The fiduciaries should keep a clear record of the process used to evaluate the contracts, including any renegotiation or extension of terms.

In addition, plan sponsors must review the disclosure statements to determine whether any conflict of interest exists and analyze each statement to make sure they meet the requirements of Section 408(b)(2) of ERISA. If a plan sponsor does not have enough information to determine whether a conflict exists, the plan sponsor should send a follow-up letter to the covered service provider asking the provider to disclose, in writing, any relationship with a plan fiduciary that could cause a conflict of interest, including a family or business relationship.

Follow-up with Delinquent Covered Service Providers

If a covered service provider did not provide the disclosure on time or provided a disclosure with incomplete or difficult-to-understand information, plan sponsors have a continued fiduciary obligation to request further information from the delinquent provider in order to avoid potentially becoming a party to a prohibited transaction with their plans.

If, for example, a covered service provider did not respond to a plan sponsor's initial disclosure request, the plan sponsor must send a second letter to the provider requesting the necessary information. If the provider fails to comply with this second written request within 90 days, the plan sponsor must notify the DOL of the provider's failure to respond not later than 30 days after the earlier of the provider's refusal to provide the necessary information or 90 days after the date of the plan sponsor's second request.

If a delinquent covered service provider does not respond to a plan sponsor's second request for required information, a plan sponsor must revisit the arrangement with the delinquent covered service provider and determine whether to terminate or continue the arrangement. If, however, the requested information relates to future services and is still not disclosed by the end of the 90-day period, the plan sponsor must terminate the arrangement with the delinquent provider as soon as possible.

Prepare 404(a)(5) Participant Disclosure Notices

Plan sponsors of participant-directed individual account plans, such as 401(k) and 403(b) plans, should be drafting and reviewing initial participant fee disclosure notices, which must be distributed to plan participants and beneficiaries by Aug. 30, 2012. Plan sponsors that have not received draft notices from their vendors should reach out to their vendors as soon as possible.

The notices, intended to help participants and beneficiaries make informed decisions about the management of their individual accounts, must provide the following categories of information:

What Do Participants and Beneficiaries Need to Know?

- **General Operational and Identification Information**: when they can give investment instructions and any limits on those instructions (i.e., transfer restrictions between designated investment alternatives), what designated investment alternatives are offered under the plan and any investment managers that the plan employs.
- **Administrative Expenses**: what fees for general plan administrative services are charged against their individual accounts (e.g., legal, accounting and recordkeeping services) and how the charges are allocated (i.e., pro rata or per capita).
- **Individual Expenses**: what expenses are charged against their accounts on an individual, rather than plan-wide, basis based on the participant's or beneficiary's actions (e.g., fees for processing loans, QDROs or hardship withdrawals).

In addition, plan sponsors should ensure that participants' quarterly statements are revised to include the new required information. These revised quarterly statements must be distributed in the third quarter of 2012.

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If you have any questions about the required disclosures, or if you need help reviewing the disclosure statements that you have already received or drafting follow-up communications to service providers, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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