

## **Retirement Plan Update**

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### *New DOL Fee Disclosure Rules - What You Need to Know!*

Although you have likely heard about the new Department of Labor (DOL) fee disclosure rules, we want to be certain that all of our Plan Sponsor and fiduciary clients are on track to comply with the first phase of regulations that become effective on July 1, 2012.

These regulations complete the multi-year DOL initiative to increase the transparency of plan-related fees and expenses. Failure to comply has severe consequences and may result in monetary fines for the Plan Sponsor. In this Update and in our upcoming webcasts we provide the details of the Plan Sponsor fee disclosures – the what, why, when, how, and by whom. We provide practical action steps that Plan Sponsors and other fiduciaries should take. A future Update will provide the details on the second phase of disclosures, the participant-level fee disclosures.

### **DETAILS OF THE NEW FEE DISCLOSURE REGULATIONS**

#### **What do the new Regulations Cover?**

The regulations address service provider fees and participant fees as follows:

- Phase 1: The service provider fee disclosure regulation (ERISA §408(b)(2)) requires disclosures by a “covered” service provider to a “responsible plan fiduciary”. The purpose? To enable plan fiduciaries to evaluate whether engaging the service provider is a reasonable plan expense. Due date? **July 1, 2012.**
- Phase 2: The participant fee disclosure regulation (ERISA §404(a)(5)) requires disclosures by the plan administrator to participants in a participant-directed plan. The purpose? To enable participants to make informed decisions regarding their account investments. Due date? **August 30, 2012.**

#### **Why have Fee Disclosure Rules – ERISA §408(b)(2) and §404(a)(5)?**

The DOL has been concerned that Plan Fiduciaries and plan participants may be poorly informed about the amount of fees being paid to service providers or for investment choices. The conclusion? The most effective method for addressing fee transparency is to require increased fee disclosures to plan fiduciaries and plan participants.

## **What is the Focus of the ERISA §408(b)(2) rules?**

The DOL's final regulations address fee transparency for Plan Sponsors by requiring advance disclosure of the services to be provided and the compensation to be received by "Covered Service Providers" to "Covered Plans". Arrangements between plans and service providers must be "reasonable" and not more than "reasonable compensation" can be paid. The "reasonableness" requirement now imposes an obligation on service providers to give written disclosures to plan fiduciaries before they enter into a plan agreement...and within 60-days of any changes to the agreement. The disclosures are also intended to help the responsible plan fiduciaries determine conflicts of interest, the fiduciary status of any service providers, and both "indirect" and "direct" fees paid.

## **What are the Important Concepts for ERISA §408(b)(2) Fee Disclosures?**

- **Responsible Plan Fiduciary (RPF)** – Normally the Plan Sponsor.
- **Covered Plan** – Generally, a plan covered by ERISA. Covered Plans include 401(k), profit sharing, defined benefit, cash balance, money purchase, and ESOP plans, along with other ERISA plans. Plan types that are not "Covered Plans" include SEP's, SIMPLE plans, IRA's, and "frozen" 403(b) plans. Most "single employee" retirement plans (where the only participants are the owners and their spouses) will not be covered because they are not subject to ERISA reporting.
- **Covered Service Provider (CSP)** – A service provider that enters into a contract or arrangement with the Covered Plan, and reasonably expects at least \$1,000 in direct or indirect compensation from the contract or arrangement. There are three categories of CSP's. A brief description of each would be:
  - A. Providers of fiduciary services directly to the covered plan, including Registered Investment Advisors and other fiduciaries.
  - B. Recordkeepers or brokers who make investment alternatives available to a covered plan.
  - C. Providers who receive "indirect" compensation for services. Examples of types of services are: accounting, auditing, actuarial, appraisal, banking, investment or securities brokerage, custodial, insurance, investment advisory or management, recordkeeping, consulting, third party administration, or legal.
- **Direct Compensation** – Compensation or fees paid to the CSP directly from the Covered Plan – such as fees paid from the plan or Forfeiture account due to an invoice or individual participant fees withdrawn.
- **Indirect Compensation** – Compensation or fees paid to the CSP from any source other than from the Plan Sponsor, Covered Plan, or other Covered Service Provider (including affiliates and subcontractors). Examples would be revenue sharing payments and asset-based fees.

## **What information must be disclosed in order to satisfy ERISA §408(b)(2)?**

- 1) Description of CSP's services.
- 2) Explanation of status of arrangement, including conflicts of interest and whether the CSP is a fiduciary to the plan.
- 3) Amount of Compensation to be paid or expected to be paid:
  - a. Direct Compensation
  - b. Indirect Compensation
  - c. Compensation paid among related parties
  - d. Compensation for contract termination
- 4) Whether recordkeeping services are being provided and, if so, what the Compensation paid for these services are, even if recordkeeping services are part of a package of services and there is no explicit charge for these services.
- 5) Description of any Compensation paid on a transactional basis, such as commissions, soft dollars, finder's fees, or similar incentive-based fees. These include fees reflected in the net value of the investment, such as 12b-1 fees.
- 6) Expense ratio of any investment-related services along with the specific expense data for inclusion by August 30, 2012 in the participant-level disclosure.
- 7) Description of Compensation reasonably expected in connection with the termination of the contract or arrangement.
- 8) Manner of receipt – Method of payment (billed directly, deducted from participant accounts, authorized and paid from the Forfeiture account, etc.).

## **What happens if a CSP fails to disclose the required information?**

Plan Sponsors must replace any CSP who does not have a valid reason for failing to provide the complete fee disclosure information. In addition, the Responsible Plan Fiduciary must report the non-responding CSP to the DOL for the infraction.

Monetary consequences? Great financial risk for failing to follow these explicit rules. Both the Responsible Plan Fiduciary and the CSP will be assessed an excise tax equal to 15% of the "amount involved". If not corrected within the current plan year, the amount of the excise tax increases to 100% of the "amount involved".

## **Recommended Action Plan?**

In anticipation of the **July 1, 2012** deadline, we recommend that Plan Sponsors:

1. Make an extensive list of all service providers for your Plan, and
2. Contact your providers and ask about the timing of their disclosures.

Means & Associates will provide our clients and partners with 408(b)(2) checklists to assist in compiling and analyzing this data. Best practice? Collect fee information from all service providers for full fee transparency.

## **Questions?**

Contact Means & Associates, LLC at 619-696-7284 or [updates@meansllc.com](mailto:updates@meansllc.com). An upcoming Update will cover the ERISA §404(a)(5) participant fee disclosures.