

Client Alert **Employment & Labor**

What Plan Fiduciaries Should Do in Connection with the New Fee Disclosure Rules

Two significant Fee Disclosure deadlines for plan fiduciaries (generally trustees, plan administrators or fiduciaries who work for the plan sponsor) are approaching. The United States Department of Labor's plan sponsor-level fee disclosure rules go into effect on July 1, 2012. In general, the rules require a service provider of a retirement plan to describe in writing all services performed by it on behalf of the plan and to disclose the service provider's fees. Service providers include, for example, investment institutions or brokers dealing with plan assets, record keepers, and third-party administrators ("TPAs"). This disclosure must be made to plan sponsors (generally employers) by July 1, 2012. Subsequently, participant-level fee disclosures must be provided to plan participants by August 30, 2012 for calendar year plans.

Plan Sponsor-level Fee Disclosure

Initially, plan fiduciaries should take steps to confirm that their covered service providers furnish disclosures timely and according to the new rules. In addition, the fiduciary duties imposed under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), compel a plan sponsor to analyze the disclosures and to evaluate the reasonableness of all fees. Plan sponsors must be cautious because any violation of the plan sponsor-level fee disclosure rules could cause a violation of ERISA's prohibited transaction rules.

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With regard to record keeping and TPA fees, a comparison of charges should not be difficult as these service providers generally charge fees in the same manner. However, investment professional fee methodologies vary greatly. Thus, plan fiduciaries may need to hire outside consultants to compare fees among investment firms and professionals. After fee disclosures are thoroughly examined, plan fiduciaries should consider making changes in service provider relationships if the fiduciaries determine that fees being assessed are too high.

The following are steps that plan fiduciaries should consider incorporating into their existing processes for selecting and monitoring plan service providers:

- 1) Establish a list of all service providers that work with the plan.
- 2) Determine which providers are subject to the new rules.
- 3) Confirm that covered service providers are aware of the disclosure requirements and are planning to timely provide them.
- 4) Obtain and review the disclosures.
- 5) Document that the disclosure was reviewed and the outcome of the review.
- 6) Incorporate the disclosures into the process of monitoring covered service providers.

Participant-level Fee Disclosure

The participant-level fee disclosure rules require fiduciaries of participant-directed individual account plans (such as 401(k) and 403(b) plans) to periodically disclose certain plan-level and investment-level information to eligible plan participants and beneficiaries. Non-ERISA plans (e.g., certain executive compensation plans) are not required to comply with these disclosure obligations, however, it may soon become a best practice to do so.

Plan administrators are ultimately responsible for providing the disclosures. However, much or all of the disclosure material will probably be furnished by service providers, particularly investment institutions and record keepers. Plan administrators should consult with their plan advisors to identify any areas of compliance with the new rules that are not being satisfied by the plans' service providers. Subsequently, plan administrators will need to ensure compliance in these areas.

Tips for Employers

Plan sponsors should be mindful that the new plan sponsor-level disclosures are likely to generate greater scrutiny of their decisions in selecting and continuing to retain plan service providers. Thus, close attention should be paid not only to reasonableness of the service provider's fees, but also to the quality of the services provided.

Further, plan sponsors must be aware that failure to satisfy the rules regarding participant-level fee disclosure is a violation of ERISA's duty of prudence. Thus, plan administrators should carefully review service provider materials that are provided to them for compliance with the rules. In addition, it may be worthwhile for a plan sponsor to require that the service provider specifically provide in its service agreement that it will assist the sponsor with compliance in connection with the rules.

For additional information concerning fee disclosure rules, please feel free to contact the following attorney from our Employment and Labor Practice Group.

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