EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION ALERT

Alert June 2012

REMINDER: Upcoming Obligations On Retirement Plan Sponsors And Administrators Regarding Fee Disclosure

In continuing our series of Client Alerts pertaining to new requirements from the U.S. Department of Labor ("DOL") regarding retirement plan fee disclosures, we now remind you of obligations on most retirement plan sponsors and plan administrators that will become effective as early as July 1, 2012.

As we have previously alerted you, there are two sets of final regulations from the DOL in this area that will soon become effective—(1) so-called "Service Provider Fee Disclosure Regulations," which require certain service providers (e.g., investment advisors, recordkeepers and others[1]) to most retirement plans that are covered by the Employee Retirement Income Security Act ("ERISA") to disclose their compensation and fees to retirement plan fiduciaries, and (2) so-called "Participant Fee Disclosure Regulations," which require plan administrators of participant-directed investment defined contribution retirement plans that are covered by ERISA (e.g., most 401(k) plans and 403(b) plans) to disclose certain plan and investment-related information, including fee, expense and comparative investment performance information, to participants and beneficiaries. While it may be obvious that the Participant Fee Disclosure Regulations will require affirmative actions by plan administrators, it is important to note that the Service Provider Fee Disclosure Regulations also will require actions by responsible plan fiduciaries—i.e., those who have decision-making authority over the retirement plans.

Fiduciary Duties on Plan Sponsors Imposed by the Service Provider Fee Disclosure Regulations

The Service Provider Fee Disclosure Regulations, which will take effect on **July 1, 2012**, require covered service providers to disclose certain information to ERISA retirement plan fiduciaries about the services they will provide to the retirement plan and the compensation they will receive, including indirect compensation from sources other than the plan.[2] The DOL has said that the purpose of the disclosures is to enable responsible plan fiduciaries to understand the services, assess the reasonableness of the compensation (direct and indirect) received by the service providers, and identify any conflicts of interest that may impact the service provider's performance. Accordingly, responsible plan fiduciaries are obligated to review the disclosures and assess whether fees being charged to the plan are "reasonable." While the DOL has yet to provide meaningful practical guidance on what steps responsible plan fiduciaries must take to make a determination of whether such fees are reasonable, one way to satisfy this determination may be to compare the fees being charged with other alternatives and/or possible service providers. Responsible plan fiduciaries should consider making changes to existing arrangements if they determine that fees being paid to and received by any service providers are too high.

Notably, if a service provider fails to provide the required information, the contract or arrangement between the retirement plan and the service provider is prohibited under applicable law, and responsible plan fiduciaries will have engaged in a "prohibited transaction." However, the Service Provider Fee Disclosure Regulations give relief from the requirement to treat the arrangement as a prohibited transaction to responsible

plan fiduciaries who enter into an arrangement for services with a reasonable belief that the service provider will comply with the Service Provider Fee Disclosure Regulations. To qualify for the relief, the responsible plan fiduciaries must:

- review the disclosures made by the service provider for any obvious errors or omissions so as to be able to form a reasonable belief that the required disclosures have been made; and

- upon discovering that the service provider failed to disclose the required information, request the missing information from the service provider in writing and, if the service provider does not provide the requested information within 90 days:

    1. Determine whether to terminate or continue the contract or arrangement consistent with the duty of prudence. However, if the requested information relates to future services and is not disclosed promptly after the 90-day period, the responsible plan fiduciaries must terminate the service arrangement as quickly as possible; and

    2. Notify the DOL within 30 days following the earlier of either the service provider's refusal to provide the requested information or 90 days after the responsible plan fiduciaries' written request was made. The DOL has published a model notice that can be used for this purpose, which is available here. The DOL is also working on an on-line filing system for this notice.

Participant Fee Disclosure Regulations – More Guidance from the DOL

In our prior Alerts, we gave detailed information about the substantive requirements on defined contribution plan administrators and the compliance deadlines under the Participant Fee Disclosure Regulations, which require action by most plan administrators by **August 30, 2012** (for plans with a 2012 plan year that begins after July 1, 2012 and before November 1, 2012, initial action will be required within 60 days following the first day of the plan's 2012 plan year). Please click here and here to read those prior Alerts. Since those Alerts, the DOL has published more guidance with respect to the Participant Fee Disclosure Regulations in the form of frequently asked questions contained within a Field Assistance Bulletin available here, which provides some clarification and explanation about the Participant Fee Disclosure Regulations. Included within this additional guidance is confirmation that plan administrators can satisfy the comparative format requirement for investment-related information by combining in one mailing envelope (or other transmission medium) the comparative investment charts and other documents that it receives from each individual investment provider, but would not be in compliance with the requirement if it permitted the individual investment issuers (or other service providers) to separately distribute to plan participants comparative documents reflecting their particular investment alternatives. The new guidance also provides some surprising direction from the DOL about the fee disclosure required for brokerage windows, self-directed brokerage accounts and other similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the retirement plan, where it was previously thought that many of the fee disclosure rules would not apply to these arrangements.

Further guidance from the DOL with respect to the DOL's fee disclosure rules is expected and will hopefully give practical solutions to some of the more onerous fee disclosure requirements on retirement plan sponsors and administrators, although such additional guidance is not likely in time for the July 1, 2012 effective date of the Service Provider Fee Disclosure Regulations. As such, pending that additional guidance, plan sponsors and administrators, as applicable, should be prepared to comply with the two sets of fee disclosure regulations based on current guidance. We are prepared to assist in understanding and complying with the requirements. Please contact one of the attorneys named below if you would like assistance.

[1] Some service providers (e.g., actuaries, accountants, attorneys and consultants) are only covered by the Service Provider Fee Disclosure Regulations if they reasonably expect to receive indirect compensation (e.g., compensation received from a source other than the covered plan or plan sponsor).

[2] The DOL has indicated that it will generally not require disclosures with respect to fully vested annuity contracts and custodial accounts under 403(b) plans where no contributions have been made after 2008, and where all rights to benefits under the 403(b) plan contract or account are enforceable by the plan participant without involvement by the employer.

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