Department of Labor Issues Final Regulation Relating to Fee Disclosures by Service Providers to Plan Fiduciaries

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On February 2, 2012, the Department of Labor published in the Federal Register its final regulation regarding mandatory fee disclosures by plan service providers to plan fiduciaries for ERISA-governed defined benefit and defined contribution pension plans. These disclosure requirements are now a condition of the "service provider" statutory exemption from ERISA's prohibited transaction provisions under ERISA Section 408(b)(2). The disclosures must be furnished before plan fiduciaries enter into, extend or renew contracts or arrangements for services. The final regulation is effective July 1, 2012 for all existing and new contracts or arrangements between plans and their "covered service providers" (CSPs). The regulation defines CSPs as entities, including, but not limited to, those that provide fiduciary services, registered investment adviser services, recordkeeping services, brokerage services, insurance services, legal services or custodial services to an ERISA-governed plan and who reasonably expect to receive $1,000 or more in direct or indirect compensation from the plan in connection with the services to be provided.   Disclosures mandated by the regulation, which may be done electronically through an accessible website or other electronic medium, include: (1) descriptions of the services provided by a CSP; (2) all direct and indirect compensation the CSP, its affiliates or subcontractors will receive for their services; (3) whether the CSP is providing recordkeeping services to a plan and, if so, the compensation to be received for such services; (4) in some instances, an investment's annual operating expenses and any ongoing operating expenses; and (5) in the case of participant directed individual account plans, the "total annual operating expenses" pursuant to the disclosure requirements of 29 CFR § 2550.404a-5. The regulation also includes a description of direct compensation and indirect compensation. If indirect compensation is received, the CSP must now disclose both the identification of the payer and a description of the arrangement between the payer and the CSP, affiliate or subcontractor pursuant to which the indirect compensation is paid. To the extent compensation is to be allocated among a CSP, its affiliates and/or subcontractors, as a result of charges being made against a plan's investment or where charges are assessed on a transactional basis, the CSP must disclose how such compensation will be allocated. Finally, the final regulation includes a class exemption from ERISA's prohibited transaction provisions for governed plan fiduciaries who fail to comply with the disclosure obligations because they entered into service provider contracts without knowing of their CSP status under the regulation. Where required disclosures contain errors or omissions, the regulation permits CSPs who act in good faith and with reasonable diligence to make corrections to their disclosures within 30 days of discovering the errors or omissions. Additionally, when information disclosed by a CSP changes, the CSP must inform the plan fiduciary of the changes as soon as practicable, but not later than 60 days after the change. However, when changes relate to investment-related information, such changes can be disclosed annually.

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