



Alert

Employee Benefits and Executive Compensation Client Service Group

To: Our Clients and Friends

February 7, 2012

DOL Issues Final Fee Disclosure Rule

Last week, the Department of Labor (“DOL”) issued a final rule on the disclosure requirements for a contract or arrangement for services to a covered plan to be deemed “reasonable” under Section 408(b)(2) of the Employee Retirement Income Security Act of 1973 (“ERISA”). These disclosure requirements become effective July 1, 2012 and apply to service contracts and arrangements entered into both before and after that date.

Covered Plans

A “covered plan” refers to any employee pension benefit plan or pension plan within the meaning of ERISA Section 3(2)(A), but does not include any of the following:

- a simplified employee pension plan;
- a simple retirement account;
- an individual retirement account;
- an individual retirement annuity; or
- a Keogh plan covering only partners or a sole proprietor.

The final rule also excludes a 403(b) annuity contract or custodial account issued to a current or former employee before January 1, 2009 for which the plan sponsor ceased to have any contribution obligations (including employee deferrals) and in fact ceased making contributions for periods prior to January 1, 2009. To qualify for the exclusion, the individual owner must be fully vested in the contract or account and all benefits under the contract or account must be legally enforceable against the issuer by the individual owner without any involvement of the employer.

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Covered Service Providers

A covered service provider is a service provider that enters into a contract or arrangement with a covered plan and reasonably expects to receive at least \$1,000 in direct or indirect compensation in connection with providing services in one or more of the following categories:

- Services as (i) an ERISA fiduciary, (ii) a fiduciary to an investment contract, product, or entity that holds plan assets and in which the plan has a direct equity investment, or (iii) an investment advisor registered under either the Investment Advisors Act of 1940 or any state law;
- Recordkeeping or brokerage services to a covered plan that is an individual account plan that permits participants to direct investment of their accounts, if one or more designated investment alternatives will be made available in connection with such recordkeeping or brokerage services; or
- Accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities, or other investment brokerage, third-party administration, or valuation services when the provider reasonably expects to receive indirect compensation or certain payments from related parties.

The fee disclosure requirements apply to a service provider even if some or all of the covered services are performed by affiliates or subcontractors.

Required Disclosures

Reasonably in advance of entering into, extending, or renewing the services contract or arrangement, the covered service provider must furnish the following information in writing to the responsible plan fiduciary (including information regarding services performed by an affiliate or subcontractor):

- A description of all services to be provided pursuant to the contract or arrangement;
- A statement that the service provider will provide, or reasonably expects to provide, services as a fiduciary, within the meaning of ERISA § 3(21), if applicable;
- A statement that the service provider will provide, or reasonably expects to provide, services as an investment advisor registered under the Investment Advisors Act or State law, if applicable;
- Comprehensive information about the compensation that will be received in connection with the services provided, including:
 - all direct compensation from the covered plan (including compensation initially paid by the plan sponsor but reimbursed from the plan), either in the aggregate or by service, that the service provider reasonably expects to receive; and
 - all indirect compensation from sources other than the plan that the service provider reasonably expects to receive, including (i) identification of the services for which the indirect compensation will be received, (ii) the payer of the indirect compensation, and (iii) a description of the arrangement between the payer and the service provider pursuant to which the indirect compensation is paid.
- A description of (i) any compensation that will be paid among the service provider, affiliate, or subcontractor in connection with the services that are set on a transaction basis (e.g.,

commissions, soft dollars, finder's fees, or other similar incentive compensation based on business placed or retained) or are charged directly against the covered plan's investment and reflected in the net value of the investment (e.g., Rule 12b-1 fees), (ii) identification of the services for which such compensation is paid, and (iii) the identity of the payers and recipients of such compensation (including the status of the payer or recipient as an affiliate or a subcontractor of the covered service provider);

- A description of any compensation that the service provider reasonably expects to receive in connection with termination of the contract or arrangement and how any prepaid amounts will be calculated and refunded upon such termination; and
- A description of the manner in which any such compensation will be received, such as whether the covered plan will be billed or the compensation will be deducted directly from the covered plan's accounts or investments.

Additional disclosures are required with respect to certain categories of service as follows:

- Recordkeeping Services. A description of all direct and indirect compensation that the service provider, an affiliate or a subcontractor reasonably expects to receive in connection with the recordkeeping services. If the service provider reasonably expects recordkeeping services to be provided, in whole or in part, without explicit compensation for such services, or if compensation for recordkeeping services is to be offset or rebated based on other compensation received by the service provider, an affiliate or a subcontractor, the covered service provider must furnish a reasonable good faith estimate of the cost to the plan of such recordkeeping services, including an explanation of the methodology and assumptions used to prepare the estimate and a detailed explanation of the recordkeeping services that will be provided.
- Fiduciary Services. Unless included in the disclosure for recordkeeping or brokerage services, the covered service provider must furnish the following description for each investment contract, product, or entity for which fiduciary services will be provided: (i) any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, transfer of, or withdrawal from the investment contract, product, or entity (e.g., sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees); (ii) the annual operating expenses (e.g., expense ratio) if the return is not fixed; and (iii) any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees), or for an investment contract, product, or entity that is a designated investment alternative, the total annual operating expenses expressed as a percentage and any other information or data about the designated investment alternative that is within the control of, or reasonably available to, the covered service provider and that is required for the administrator of the covered plan to comply with its participant-level disclosure obligations.
- Recordkeeping and Brokerage Services. If one or more designated investment alternatives will be made available in connection with recordkeeping or brokerage services, the covered service provider must furnish the information described required with respect to fiduciary services for each designated investment fund alternative.

Although the final rule does not require a specific format for the required disclosures, the DOL expressed its intent to publish a Notice of Proposed Rulemaking under which service providers may be

required to furnish a guide or similar tool with the initial disclosures. To encourage service providers to assist plan fiduciaries by providing such a guide or index to the disclosures or a summary of certain key disclosures, the final rule includes a sample guide.

Changes in Reported Information and Disclosure Errors

A covered service provider generally must disclose changes to the required information previously disclosed as soon as practicable, but not later than 60 days after the service provider is informed of such changes. When such disclosure is precluded due to extraordinary circumstances beyond the services provider's control, the information must be disclosed as soon as practicable. The final rule provides a compliance alternative for changes to investment information. Rather than furnishing notification of a change within 60 days, the service provider must disclose any changes to the investment information at least annually.

If a covered service provider makes a good-faith error or omission in disclosing the required information, the service provider must disclose the correction information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

Prohibited Transaction Exemption Available to the Plan Fiduciary

If a prohibited transaction occurs because the covered service provider does not make the required disclosures, and the plan fiduciary did not have reason to know of the failure and reasonably believed that the service provider disclosed the information, the plan fiduciary may obtain prohibited transaction relief if (i) the plan fiduciary makes written request for the information from the service provider, (ii) the service provider does not respond within 90 days, and (iii) the plan fiduciary reports the covered service provider to the DOL within 30 days of the 90th day following the request or the 30th day following the service provider's refusal to provide the information, whichever occurs first. No prohibited transaction relief is available for the covered service provider.

If you have any questions regarding anything discussed in this Alert, the attorneys and other professionals of the [Employee Benefits and Executive Compensation](#) group of Bryan Cave LLP are available to answer your questions.

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