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New ERISA Retirement Plan Service Provider Disclosure Regulations

The U. S. Department of Labor recently adopted new regulations affecting service provider disclosure requirements for pension plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA). The regulations will become effective July 1, 2012. Employers and other plan fiduciaries must take steps to evaluate the information to determine what fees a plan is paying for services and whether they are appropriate and reasonable.

The regulations are complex, extensive, and cannot be ignored. Compliance is critical or severe penalties may be imposed. We strongly encourage plan sponsors, plan fiduciaries, and service providers who receive these disclosures to contact us if you have questions as to why are you receiving this information, what the information means, how it should be evaluated, what steps should be taken in light of it, and what and how appropriate information should be communicated with plan participants.

The service provider regulations require individuals or entities providing services to retirement plans subject to ERISA to disclose to plan fiduciaries information pertaining to compensation received from the plan for the provided services. Fiduciaries should use this information to evaluate whether provided services are appropriate and necessary and that the plan is not paying for duplicate expenses and paying no more than reasonable amounts. Employers and plan fiduciaries will need the service provider disclosures in order to make required participant level disclosures to plan participants no later than August 30, 2012.

July 1, 2012: Service Provider Disclosure Requirements

The service provider regulations apply to nearly all ERISA retirement plans, including 401(k) and traditional pension plans. The service provider regulations relate to an exception to the prohibited transaction rules in ERISA Section 408(b)(2). Normally, a service provider is considered to be a party in interest and, therefore, prohibited from receiving compensation from a plan. However, under ERISA Section 408(b)(2), these transactions are not prohibited, if the contract or arrangement entered into between the plan and service provider is reasonable, the services are necessary for the operation of the plan, and only reasonable compensation is paid for the services. To help ensure these criteria are met, the service provider must disclose specific information to the plan sponsor.

Under the service provider regulations, certain service providers are required to report any compensation received for the services rendered for the plan.

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Service provider compensation may be either direct or indirect. Direct compensation is defined as any compensation received directly from the plan, while indirect compensation is any compensation received from sources other than the plan, such as a plan affiliate or subcontractor.

"Covered service providers" must disclose information under the new regulations. In order to be a "covered service provider," the provider must be an ERISA fiduciary, an investment adviser registered under federal or state law, or a recordkeeper or broker who makes investment alternatives available to plans (i.e., a platform provider). These service providers must expect to **receive** $1,000 or more in **either direct or indirect** compensation from services relating to a plan. It is important to note that direct compensation includes compensation that is paid initially by the plan sponsor but is later reimbursed by the plan. Also, service providers **receiving** $1,000 or more of **only indirect** compensation are considered covered service providers, if the individual or entity is providing accounting, actuarial, appraisal, auditing, banking, custodial, insurance, investment advisory, legal, recordkeeping, securities brokerage, third-party administration, valuation, or consulting services to the plan.

The covered service provider regulations require two types of disclosures: initial disclosures and special disclosures. The goal of the disclosures is to aid plan fiduciaries in understanding the services provided and assessing the reasonableness of the compensation the service provider receives. The disclosures must be provided in writing to the plan fiduciary. The regulations specify the timing of disclosures.

Initial disclosures must be provided prior to entering into, renewing, or extending a service contract or arrangement. The regulations do not specify a format in which these disclosures must be made, but includes a guide to serve as an example for initial disclosures. Disclosures do not need to contain specific monetary amounts, but may include formulae, percentages, or per capita charges. Initial disclosures must include a description of the services to be provided under the contract or arrangement, the direct compensation that the service provider, its affiliates, or subcontracts expect to receive under the contract or arrangement, and any indirect compensation expected to be received. Indirect compensation disclosures must identify the individual or entity paying the indirect compensation, the services relating to the compensation, and a description of the contract or arrangement between the individual or entity paying the indirect compensation and the service provider. Also, the initial disclosures should include allocations of compensation among related parties, such as affiliates or subcontractors, a description of termination fees that the service provider would receive if the agreement or contract was terminated, a method for payment, and a statement that the service provider is a fiduciary under ERISA or is a registered investment advisor, if applicable.

Additional specific disclosures need to be provided by service providers engaging in certain activities. If recordkeeping services are being provided, the service provider must disclose any compensation attributable to those services and a description of the services to be rendered. If the service provider provides fiduciary services pursuant to a contract, product, or by virtue of a relationship with an entity that holds assets in the plan and the plan has direct ownership investment, the service provider must disclose information relating

to compensation charged directly against assets or income from the assets unless the amounts are disclosed by the platform provider. **Also, if services are provided to self-directed individual account plans and designated investment alternatives are available, service providers must disclose fiduciary services, if any, that are provided.**

The service provider must disclose any material changes to the initial or specific disclosures as soon as practicable but no later than 60 days after learning of the material change. If a plan fiduciary submits a written request for additional information from the service provider in order to comply with participant disclosures, the service provider must provide the information before the plan fiduciary is required to provide the participant disclosures.

Service providers must correct errors or omissions in required disclosures no later than 30 days from the date the service provider becomes aware of the error or omission. If a service provider fails to make the disclosures outlined above, the service provider will fail to qualify under the Section 408(b)(2) prohibited transaction exemption. However, even if the service provides fails to make the required disclosures, the plan fiduciary will not be liable for engaging in a prohibited transaction, if the plan fiduciary reasonably believes the disclosure requirements were satisfied. If a plan fiduciary discovers the service provider's failure to make required disclosures, the plan fiduciary must request in writing that the service provider provide the disclosures. **If requested disclosures are not made within 90 days, the plan fiduciary must terminate the contract or arrangement with the service provider and, within 30 days, notify the Department of Labor of the service provider's failure to disclose. Failure to terminate the relationship and notify the Department of Labor will result in the plan fiduciary engaging in a prohibited transaction.**

Fraser Stryker is a leader in employee benefits law. Attorneys in the Firm's Employee Benefits & ERISA Practice Group advise individuals, business entities, governments, and nonprofit/tax-exempt organizations on a wide variety of employee benefits matters and transactions. Fraser Stryker works with employers to implement and maintain employee benefit plans that help attract and retain top talent. Fraser Stryker also represents ERISA plan fiduciaries and service providers advising them on their duties and responsibilities. For more information on the fee disclosure regulations, please contact Dan Wintz, Brian Bartels, or Nicole Hanson.
