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EMPLOYEE BENEFITS UPDATE

Thompson Hine’s employee benefit and investment management attorneys understand the challenges of complying with the regulatory requirements associated with sponsoring and providing services to retirement plans. We work closely with our clients in monitoring the changing regulatory requirements associated with retirement plan administration. The breadth and depth of our experience allows us to identify best practices as they emerge and provide responsive, legally-compliant and cost-effective solutions.

New Retirement Plan Fee Disclosures – Getting Ahead of the July 16, 2011 Deadline

The DOL recently published interim final regulations (the “fee disclosure regulations”) that explain the fees that must be disclosed by certain service providers to retirement plan sponsors and the timing for providing fee disclosures. The fee disclosure regulations supplement the new Form 5500, Schedule C fee reporting rules that are currently effective for 2009 Forms 5500.

Although the Schedule C fee reporting rules and the new fee disclosure regulations are similar, the disclosure and reporting requirements imposed by the fee disclosure regulations place significant new burdens on service providers to disclose the fees they expect to receive from retirement plans. In addition, plan sponsors must confirm that proper disclosures are made. Accordingly, both retirement plan sponsors and retirement plan service providers need to be prepared to identify, track and properly disclose compensation paid for services provided to retirement plans.

THE FEE DISCLOSURE REQUIREMENTS

Background. ERISA requires that retirement plan sponsors monitor arrangements with, and compensation paid to, plan service providers to ensure that such arrangements, and the compensation paid pursuant to those arrangements, are “reasonable.” Although the fee disclosure regulations do not modify the requirement to evaluate whether compensation is “reasonable,” the fee disclosure regulations provide that an arrangement is not “reasonable” if the service provider does not comply with the fee disclosure regulations summarized below.

Who Is Subject to Disclosure? The fee disclosure regulations apply to service providers to qualified retirement plans (other than SEPs, SIMPLE IRAs, and IRAs). The following types of retirement plan service providers who directly contract with a retirement plan and expect to receive \$1,000 or more in fees (directly or indirectly) are subject to the disclosure requirements.

- Fiduciaries. Service providers with administrative discretion and/or investment discretion.



- *Plan Asset Managers.* Managers of any investment vehicle that holds “plan assets” (within the meaning of ERISA) and in which the plan holds an equity interest.*
- *Investment Advisers.* Registered investment advisers, whether or not fiduciaries.
- *Recordkeepers and Brokers.* Recordkeepers and brokers if the recordkeeper or broker makes at least one investment alternative available as an investment option to participants.
- *Other Service Providers.* Most other service providers that expect to receive indirect compensation or related party compensation (as those terms are defined below).

Affiliates (including subsidiaries and parent companies) and subcontractors of the service provider are not required to provide fee disclosures. However, the service provider must disclose fees received by affiliates and/or subcontractors.

When Is Disclosure Required? For contracts in existence before July 16, 2011, the disclosures must be provided by July 16, 2011. With respect to contracts entered into, extended or renewed after July 16, 2011, the service provider must provide the disclosures reasonably in advance of the date the covered service provider enters into, renews or extends the contract with the plan. If changes are made to the expenses charged to the plan, then the service provider must update the required disclosures. Plan sponsors/administrators are obligated to monitor compliance with the fee disclosure requirements and report service providers who fail to comply to the Department of Labor.

What Must Be Disclosed? Service providers must disclose the following information.

- *Description of Services.* A description of the services expected to be provided to the plan under the contract.
- *Direct Compensation.* A description of the direct compensation expected to be paid by the plan for services under the contract.
- *Indirect Compensation.* A description of the compensation expected to be received for services under the contract, other than direct fees and fees paid by the plan sponsor, and the services to which the fees relate. For example, fees that a broker pays an unrelated recordkeeper for services to a retirement plan, or vice versa.
- *Related Party Compensation.* A description of any compensation expected to be paid between the service provider and its affiliates and subcontractors that is transaction-based (i.e., commissions, soft dollars, finders fees) or charged against the plan's investment (i.e., Rule 12b-1

* For purposes of the fee disclosure rules under ERISA 408(b)(2), an investment vehicle holds “plan assets” if 25% or more of the assets of the investment vehicle are owned by retirement plans. The managers of investment vehicles holding “plan assets” are treated as fiduciaries of the investing plans.





fees). The service provider must also disclose the payee, the payor, and the services to which the compensation relates. For example, a service provider must make these disclosures if a fund advised by an affiliate will pay Rule 12b-1 fees to the service provider for recordkeeping services.

- *Compensation at Termination of Contract.* A description of any compensation expected to be received by the service provider when the contract is terminated and how any refund of pre-paid fees will be calculated and paid.
- *Manner of Payment.* A description of the manner in which compensation will be received by the service provider, such as whether the plan will be billed or whether fees will be deducted from plan accounts.

Additional Disclosures for Recordkeeping Services. Recordkeepers must separately disclose the direct and indirect compensation that they expect to receive for recordkeeping services. Service providers that provide recordkeeping services for “free” in connection with other services (such as investment management) must disclose a reasonable and good faith estimate of the cost of the recordkeeping services, including the methodology and assumptions used to determine the estimate.

Additional Investment-Related Disclosures. Plan asset managers serving as fiduciaries and recordkeeper/brokers that provide participant investments must also disclose (i) any fees that will be charged related to the acquisition, sale, transfer of or withdrawal from the investment, (ii) the annual operating expenses of the investment, if the return is not fixed (i.e., the expense ratio), and (iii) any additional ongoing expenses (e.g., wrap fees and mortality fees). For example, a recordkeeper providing investment options must disclose the expense ratio for each investment option and all applicable transfer fees.

Fiduciary/Investment Adviser Statement. If a service provider (or an affiliate or subcontractor of the service provider) expects to be a fiduciary or investment adviser to the plan, then the service provider must include a statement in its disclosure that it is a fiduciary or investment adviser. Plan asset managers who are fiduciaries are subject to this disclosure.

Form 5500, Schedule C. In addition to the fee disclosure requirements, service providers must also report to plan sponsors the actual fees charged to the plan so that the plan sponsor is able to complete Schedule C of the Form 5500.

NEXT STEPS

Plan sponsors and service providers should begin now to prepare to comply with the disclosure rules.



Plan Sponsors

- Identify arrangements/service providers subject to the disclosure rules.
- Discuss with the service provider its expected timing for and method of satisfying the disclosure requirements (along with the Form 5500, Schedule C fee reporting requirements).
- Monitor changes to the terms of agreements that may trigger new or additional disclosures.
- Review plan documents, SPDs and trust documents to confirm that the documents are consistent with the disclosures being provided and the expenses being paid by the plan.
- Adopt procedures that ensure compliance with the disclosure requirements and document such compliance.

Service Providers

- Identify contracts/arrangements with retirement plans.
- Communicate with plan sponsors regarding the disclosure requirements and the expenses that will be tracked (including those required for Form 5500, Schedule C reporting).
- Develop a procedure for tracking arrangements subject to the disclosure rules and develop a “model” disclosure document that complies with the rules.
- Determine whether services provided to retirement plans include recordkeeping, investment adviser, brokerage or fiduciary services, and be prepared to provide the additional disclosures applicable to these types of services.
- If commissions, soft dollars, finders’ fees or Rule 12b-1 fees are shared among affiliates or subcontractors, be sure systems are in place to track these fees and other details, such as the payee and payor of such fees and the services to which they relate.

FOR MORE INFORMATION

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