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Once Is Not Enough: Ongoing Fee Disclosure Obligations Under ERISA

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Firms that manage ERISA plan assets are subject to the US Department of Labor regulations on fee disclosures. In addition to the initial fee disclosure, these regulations require disclosure of changes to fee information previously provided to plan fiduciaries. This client publication describes the requirements for reporting such changes to plan fiduciaries.

Firms that manage separate accounts or funds that hold assets of ERISA plan clients are subject to ongoing disclosure obligations to these clients under the fee disclosure regulations of the US Department of Labor (the "DOL"). It has been nearly a year since the DOL's regulations on service provider fee disclosures first became effective. These regulations required asset managers and certain other service providers to ERISA plans to provide their plan clients with detailed disclosures related to the direct and indirect fees charged to the plans. The regulations resulted in a round of fee disclosures to existing plan clients last summer ahead of the July 1st effective date of the new regulations.

The DOL regulations also require asset managers to keep their fee disclosures current. New disclosure obligations are triggered when there are changes, whether or not material, to the information that managers previously provided to plan fiduciaries. Some of the changes to the fee disclosure may be covered in an amended investment management agreement, which, by definition, would have been given to the plan fiduciary as part of the amendment process. Alternatively, an emerging best practice appears to be a single disclosure document, similar to the template provided in the DOL regulations, capturing all changes to covered disclosure items since the last update. If you used that template for the July 2012 disclosure, it should be sufficient to amend that template, with the changes flagged.

Some of the most common changes that require supplemental disclosure are described below:

First, *at least annually*, managers of plan asset funds need to disclose changes to each of the following:

- The compensation that is charged directly against the plan asset fund (such as commissions, sales loads, sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees) and that is not included in annual operating expenses;
- The annual operating expenses charged against the plan asset fund, if the return is not fixed [and other ongoing expenses in addition to annual operating expenses]; and
- If the fund being managed is an investment option in a client's self-directed individual account plan (such as a 401(k) plan), other information about the fund that is within the manager's control or reasonably available to the manager and which the plan client is required by the DOL to disclose to plan participants.

For purposes of the DOL regulations, the phrase "at least annually" appears to mean at least once in any 12-month period. The first anniversary of the effective date of the fee disclosure regulations is July 1, 2013. Therefore, due to the ambiguity in the regulations, some managers are taking the precautionary step of making any required updated disclosure by July 1, 2013.

Second, managers of plan asset funds and separate accounts must disclose changes to any of the following no later than 60 days after becoming aware of the change:

- Fiduciary services provided by the manager;
- Direct or indirect compensation that the manager, its affiliates or subcontractors expect to receive in connection with the fiduciary services provided to the plan asset fund or separate account;
- Compensation paid among the manager, its affiliates or subcontractors (referred to as "related parties") for the fiduciary services provided to a plan asset fund or separate account, if the compensation is set on a transaction basis or charged against a plan's investment and reflected in the net asset value of the fund or separate account;
- Compensation to be paid to the manager, its affiliates or subcontractors for terminating the arrangement; and
- Changes in the manner in which any compensation will be received by the manager, its affiliates or subcontractors. For example, a change from billing a plan for the compensation to deducting the compensation from the separate account managed for the plan must be disclosed.

There may be overlap between these disclosure requirements. For example, changes in compensation among related parties may overlap with the disclosure of changes in direct or indirect compensation. Additionally, changes that require disclosure within 60 days may overlap with the changes that require disclosure at least annually, such as the requirement to disclose changes in direct compensation and the requirement to disclose changes in compensation that will be charged against a plan asset fund. Typically, compliance with the 60-day deadline should suffice to satisfy the annual disclosure requirement.

The DOL regulations do not include a materiality threshold for reporting changes and failure to comply could require termination of the arrangement with the ERISA plan. As a result, managers will want to ensure timely compliance with the disclosure requirement outlined above.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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