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Nonprofit Retirement Plan Fee Disclosure – Action Needed

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Nonprofit organizations that sponsor retirement plans such as 401(k) and 403(b) plans are subject to two separate, but related, newly finalized U.S. Department of Labor regulations regarding disclosure of retirement plan fees that will become effective soon: (1) vendor-to-plan disclosure, and (2) plan-to-participant disclosure. Compliance with the vendor-to-plan regulation is required no later than July 1, 2012, and the plan-to-participant disclosure generally is required by August 30, 2012. In this alert, we provide an overview of these regulations and provide action items for the immediate attention of nonprofits that sponsor retirement plans.

The regulations apply to retirement plans of nonprofit entities governed by ERISA; most nonprofit retirement plans are subject to ERISA.[1]

Vendor-to-Plan Disclosure

The regulations are another step in the expansion of reporting on administrative fees and mutual fund expenses that began with the changes to IRS Form 5500 a few years ago. Vendors that serve as plan fiduciaries, registered investment advisors, recordkeepers, or brokers, or that provide certain professional services for "indirect compensation," are required to provide detailed fee-related disclosures to the plan fiduciaries responsible for selecting and monitoring them. Here is what to expect from the vendors:

- The initial vendor-to-plan disclosures apply to all types of retirement plans (including defined benefit plans) and must be provided to plan fiduciaries by July 1, 2012. The disclosures must explain, in the manner set forth in the regulations, the fees to be charged and the services to be provided. The disclosures must be made by July 1, 2012 for existing vendor contracts, and must be made in advance for new vendor contracts entered into on or after July 1, 2012.
- While the vendor will be responsible for providing these disclosures, the nonprofit is obligated to ensure that it receives the disclosures. If a nonprofit fails to receive the disclosures, the nonprofit is responsible for notifying the U.S. Department of Labor that a vendor has not provided the necessary disclosures. The plan fiduciary for the nonprofit will be deemed to have engaged in a "prohibited transaction" subject to excise taxes if the required steps are not taken.
- The nonprofit is responsible for determining whether the total compensation received by a vendor is reasonable, and for understanding the relationships among vendors in order to identify conflicts of interest.
- There is an exemption from the fee disclosure requirements for pre-2009 403(b) funding vehicles that qualify for the U.S. Department of Labor's existing exemption from Form 5500 reporting.

Plan-to-Participant Disclosures

- Nonprofits that maintain 401(k), 403(b) and other similar participant-directed plans are required to provide detailed fee-related disclosures directly to plan participants. This means that plan committees, employees responsible for the plan, or officers in charge of plan investment and administration must obtain the necessary information and provide it to participants by the deadline. The fees to be disclosed are fees related to plan investments (i.e., mutual fund fees), as well as fees for the day-to-day administration of the plans. Although the regulations were just finalized, the principles are consistent with the existing requirements for plan fiduciaries to monitor whether plan fees are reasonable and make changes, if necessary. For most plans (including calendar-year plans and July 1 – June 30 plans), the initial annual plan-to-participant disclosures must be provided by August 30, 2012. That means many nonprofits will have only two months after receiving the vendor-to-plan disclosures to put together written fee disclosures to participants reflecting information provided by the vendors (as late as June 30, 2012). Moreover, the first quarterly disclosure of actual expenses charged to each participant will be due by November 14, 2012 for most plans.

- The plan-to-participant disclosures must be provided to all eligible employees (regardless of actual participation in the plan). For plans with a substantial number of employees who do not use employer-provided computers as an integral part of their jobs, there can be cost and/or logistical issues with distributing the disclosures.
- In a recently-issued Field Assistance Bulletin, the U.S. Department of Labor announced a non-enforcement policy for plan-to-participant disclosures relating to pre-2009 403(b) funding vehicles that qualify for the Department of Labor's existing exemption from Form 5500 reporting. However, it is not clear that this non-enforcement policy would protect plan fiduciaries from private lawsuits.

Action Items

- For plan sponsors that have not yet started to work on compliance with these new requirements, now is the time.
- Nonprofits should contact their vendors now to request (1) a draft of the initial vendor-to-plan disclosure document and a commitment regarding the date when the completed disclosures will be delivered, and (2) assistance from the vendor with drafting and distributing the plan-to-participant disclosures. Plan sponsors need to build in enough time following receipt of the vendor-to-plan disclosures to prepare the initial plan-to-participant disclosures by the August 30th deadline.
- If feasible, service agreements with vendors should be updated to provide that (1) vendors that are subject to the vendor-to-plan disclosure requirements will comply with their obligations, and (2) vendors will assist nonprofits with drafting and distributing the plan-to-participant disclosures.
- Plan committees and employees responsible for the plan should meet to review the disclosures provided by their vendors and determine whether the information is sufficient to meet the requirements of the regulations, and give themselves enough time to request additional information, if necessary.
- Plan sponsors should consider how the plan-to-participant disclosures will be distributed. This is especially true for plan sponsors with a substantial number of employees who do not use employer-provided computers as an integral part of their jobs. Mail is acceptable, but can be costly.
- If desired, nonprofits can contact us for assistance with vendor discussions, review and customization of materials provided by vendors, and development of procedures for distributing the disclosures to participants.
- Plan committees and employees responsible for plan investments should meet to review fees in existing vendor service agreements. Plan committees and fiduciaries should memorialize the review process and their decisions regarding the reasonableness of vendor arrangements.
- This is also a good time for a nonprofit to review its retirement plan governance to ensure compliance with fiduciary duties, including the review and update by the plan committee of the investment policy statement.

The information in this alert is intended only as a general overview. Please contact any member of our **Employee Benefits and Executive Compensation Practice Group** for advice about how these developments will specifically affect your nonprofit's retirement plans.

The authors are attorneys in the law firm of Venable LLP. This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

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[1] - "Church plans" are exempt from ERISA, and therefore, from the fee disclosure requirements. Nonetheless, church plans are typically subject to state fiduciary duty laws, and therefore, sponsors of church plans might choose to adopt voluntarily some or all of the new fee disclosure practices.