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Plan Sponsors Prepare for New Fee Disclosure Requirements

Since 2007, the Department of Labor (DOL) has passed new regulations regarding the disclosure of retirement plan fees. These regulations are a part of a broad-based effort by the DOL to enhance the transparency around the many types of plan fees that exist today, and foster better understanding by plan sponsors and participants about the fee components.

Three new regulations have been issued to achieve this goal. The first obliges plan sponsors to include a Schedule C with their annual Form 5500 filing. Schedule C requires the plan sponsor to list the name and compensation amount of service providers that received \$5,000 or more in compensation during the plan year, either directly or indirectly from plan assets. Released by the DOL in 2007, this regulation became effective for 2009 plan year-end filings.

A second regulation, which covers fee disclosure to participants, requires extensive details about all investment fees, plan fees and other fee information, so that participants can make informed investment decisions. It is the plan sponsor's responsibility to ensure that such information is provided to the participants by May 31st, 2012. This regulation applies to all ERISA and electing Church plans, and requires both an initial fee disclosure notice and an ongoing communication regarding plan fees. (This regulation will be the subject of a future Cammack LaRhette Consulting *Benefits & HR Update* newsletter article).

The third disclosure regulation, referred to as 408(b)(2), requires plan sponsors to collect disclosure information from Covered Service Providers (CSPs) that receive \$1,000 or more from the plan for services. CSPs include ERISA fiduciaries or investment advisors, providers of recordkeeping or brokerage services allowing participant direction of investments, and providers of specific plan services (e.g., auditing, legal, consulting) expecting to receive direct or indirect payment from related parties. This regulation applies to all ERISA and electing Church plans, and requires both an initial fee disclosure notice and an ongoing communication regarding plan fees. This regulation also applies to all ERISA and electing Church plans, and requires both an initial fee disclosure notice and an ongoing communication regarding plan fees.

For the initial disclosure, a plan sponsor should confirm from each CSP the specific details of the fee arrangement, the nature of the provider relationship to the plan and any information regarding potential conflicts of interest. While there is no required format for the notification, the details must include either the dollar amount of fees received from the plan, or the schedule or formula used to determine the fee payment amounts.



For example, assume in a given year a CSP received \$10,000 in compensation. This compensation was paid based on the amount of assets in the plan at a rate of 0.25% multiplied by the total plan assets. In this case, the provider may either disclose the \$10,000 it received, or the 0.25% schedule.

The plan sponsor should also confirm the services delivered to the plan by each CSP. As with the fee information, there is no specified format for this notification. Some providers will supply the plan sponsor with a document similar to a service agreement, listing each service provided. Others may include a breakdown of services in the body of an annual written report presented to the plan committee. Still others may reference different plan agreements or contracts which describe all of the services delivered, though not necessarily in one document. Because of the regulation, which does not specify any particular format, any of these disclosure methods would be compliant. However, as part of the description of services delivered, the CSP must disclose whether or not it is a fiduciary to the plan. The plan sponsor must collect all of this information no later than April 1, 2012.

In addition to the initial disclosure, each CSP must also distribute to the plan sponsor a notification of any changes to the plan fees. This might occur if an investment option in the fund lineup were replaced with a different option. The fund replacement might change the underlying fees charged to the plan. The CSP is required to notify the plan sponsor of this change in writing within 60 days from the date that the provider becomes aware of these changes.

Having received all of this information, the fiduciaries of the plan are required to evaluate whether or not the fees are reasonable, given the services delivered, as well as to assess the potential for any conflicts of interest. In order to determine any potential conflict, the plan sponsor should request information regarding any revenue sharing arrangements the CSP may have, and then follow up with questions or concerns.

Upon review of the fees and related services, if the plan fiduciaries believe the value received is consistent with the fees paid, they should document in their meeting minutes their review and approval of the plan fees and services description. If they do not feel the plan fees are justified by the services delivered, they must take appropriate actions to better align plan fees and services. These initiatives might include working with the current provider to reduce fees, to enhance services or a combination of both. The review may also lead the plan sponsor to switch CSPs. Here again, all of the decisions and action steps taken by the plan fiduciaries should be documented in meeting minutes of the plan committee.

The reason plan sponsors must take all of these steps is to avoid any prohibited transactions. The collection and review of this information provides the plan with an exemption from the prohibited transactions regulations for



having CSPs paid out of plan assets. However, if the plan fiduciaries do not conduct this review, or if having determined that the fees are too high relative to services, they fail to take any appropriate action to resolve the disparity, then any subsequent payments from the plan to the service provider in question can be construed as a prohibited transaction. This may subject the plan to potential disqualification.

In light of the requirements, and potential penalties for failure to fulfill them, plan sponsors should consider taking the following steps:

- Identify all ERISA CSPs
- Confirm who within the organization will be the contact to receive and maintain all disclosure information
- Review the disclosure from each CSP
- Consider the reasonableness of the fees relative to the services delivered
- Assess whether the revenue-sharing arrangements could cause a potential conflict of interest
- Document the process taken
- Follow up with non-disclosing providers – the DOL has instructions for escalation and reporting of service providers, so that the plan fiduciaries may be protected from liability

If you have questions about the regulations and your role in the process, please contact your Cammack LaRhette representative for help with clarification.

About the Author

Earle W. Allen is Vice President, Retirement Plan Services at Cammack LaRhette Consulting. Earle has 20 years of experience as an employee benefits consultant and his primary responsibilities include the implementation and management of strategic initiatives and the overall delivery of services to defined contribution plan clients. He is also the compliance manager for the New York office. Earle received a bachelor's degree from Dartmouth College. He also holds a master of business administration from New York University's Stern School of Business with a dual emphasis on management and marketing.

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