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Practical Application An Example

In the past, some record-keeping companies, most notably Vanguard, have steadfastly refused to break out recordkeeping fees separately from investment fees. Instead, these record-keepers have provided only the overall cost of all services as an aggregate amount. Under the new regulations, that will no longer be allowed. Companies who use these recordkeepers should ensure they receive the requisite information to avoid engaging in a prohibited transaction.



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New Fee Disclosure Rules for Retirement Plans

On July 15, 2010, the Department of Labor issued long-awaited interim final regulations on the fee disclosure requirements for service providers to retirement plans. The regulations are intended to assist plan fiduciaries in assessing both the reasonableness of the service providers' fees and any potential conflicts of interest that may impact the service providers' performance. ***All agreements between covered plans and service providers will need to comply with the regulations by July 16, 2011.***

Background. The Employee Retirement Income Security Act of 1974 (ERISA) generally prohibits a plan fiduciary from causing a plan to enter into a service contract or other arrangement with a "party in interest," which includes any person providing services to the plan. However, ERISA allows a plan to engage a service provider if the services are necessary to operate the plan and the agreement under which the services are provided and the compensation paid for those services are reasonable.

New Disclosure Requirements. The recent regulations clarify that, in order for a service agreement to be reasonable, the service provider must disclose certain information to the responsible plan fiduciary (*i.e.*, the fiduciary with the authority to cause the plan to enter into, extend or renew the agreement). Specifically, the regulations provide the following:

- **Covered Plans.** The disclosure requirements apply only to retirement plans. They are not applicable to health and welfare plans.
- **Covered Service Provider.** The disclosure rules generally apply only to service providers:
 - (i) that expect to receive at least \$1,000 in compensation; and
 - (ii) that either: (A) provide services as an ERISA fiduciary or a registered investment advisor; (B) make available plan investment options in connection with brokerage or recordkeeping services; or (C) receive indirect compensation for providing services to the plan.

For example, under (ii)(C) above, a recordkeeper that receives a portion of its fees from revenue sharing generated on plan assets is subject to these rules.

- **Content of Disclosure.** The service provider must provide a written description of the services that will be provided to the plan under the agreement, as well as all direct and indirect compensation that will be received. If recordkeeping services are to be provided, the service provider must separately disclose the cost of those services, even if the service agreement does not identify an explicit charge for the services. Certain service providers must also disclose additional compensation information related to plan investments.

Although this information must be provided in writing to the plan fiduciary, the regulations, in contrast to the proposed regulations, do not require that the service agreement itself be in writing or that they outline the service provider's disclosure obligations.

- **Timing of Disclosure.** The service provider must disclose the required information reasonably in advance of the date the agreement is entered into, extended or renewed. Any changes to this information must be disclosed within 60 days of the change.

Exemption from Prohibited Transaction Rules. The regulations also provide an exemption from ERISA's prohibited transaction rules for a responsible plan fiduciary that enters into an agreement with a service provider without knowing that the service provider has failed to comply with the new disclosure obligations. For the exemption to apply, upon learning of the failure, the fiduciary must ask the service provider to disclose the required information and must file a notice with the Department of Labor if the service provider does not comply.

Contact Information. For additional information, please contact David Putnal (404.888.8836), Toby Walls (404.888.8870), Teri King (404.888.8847), Andrew Overway (404.888.8858) or Angela Marino (404.888.8822).

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