Plan Fee Disclosures: DOL Issues Interim Final Rule

Publication:

Riker Danzig's July 2010 Employee Benefits ALERT

The Department of Labor (Employee Benefits Security Administration) recently released an interim final rule on fees and other information that employee benefit plan service providers must disclose to plan fiduciaries. The rule was published in the Federal Register on July 16, 2010, but does not become effective until July 16, 2011. The public has until August 30, 2010 to submit comments on the rule (as described below).

Background

The Employee Retirement Income Security Act (ERISA) requires plan fiduciaries to act prudently and solely in the interest of the participants and beneficiaries of the plan when selecting and monitoring service providers. In particular, plan fiduciaries must ensure that arrangements with service providers are “reasonable” and that only “reasonable” compensation is paid for services.

The interim final rule establishes, for the first time, specific disclosure obligations designed to ensure that plan fiduciaries receive the information they need to make informed decisions about services, costs and service providers. The enhanced disclosure is intended not only to help plan fiduciaries assess the reasonableness of compensation paid to service providers, but also any conflicts of interest that may impact a service provider’s performance.

Overview of Interim Final Rule

The rule concerns defined contribution and defined benefit pension plans only (guidance on disclosures with respect to welfare plans will come later).
The rule applies to service providers that expect to receive at least $1,000 in compensation and that provide certain services, including:

- Fiduciary or registered investment advisory services;
- Recordkeeping or brokerage services to a participant-directed individual account plan in connection with the investment options made available under the plan; or
- Other services for which indirect compensation is received.

**Disclosure Requirements**

**Disclosure of Services and Compensation**

Under the interim final rule, service providers must disclose, in writing to the plan fiduciary, certain information, including:

- A description of the services to be provided and all direct and indirect compensation to be received by the service provider, its affiliates or subcontractors;
- Plan investment and investment option information, if the service provider is a fiduciary to an investment vehicle that holds plan assets or is a recordkeeper or broker facilitating investments in various options by participants in an individual account plan, such as a 401(k) plan; and
- Whether the service provider is providing services as a fiduciary to the plan.

For this purpose, direct compensation is generally compensation received directly from the plan and indirect compensation is generally compensation received from any source other than the plan sponsor, the covered service provider, an affiliate or subcontractor.

Because certain services and costs are so significant or present the potential for conflicts of interest, information concerning these services and costs must be disclosed regardless of whether the services are being furnished as part of a bundle or package. For example, a service provider must disclose whether recordkeeping services are being provided and the compensation attributable to such services, even if no explicit charge for recordkeeping is identified as part of the service contract.

While these disclosures must be made in writing, the rule does not require a formal written contract or arrangement delineating the disclosure obligations.

**Ongoing Disclosure Obligations**

Service providers generally must disclose any changes to the initial information required to be disclosed. Changes to
such information must be disclosed as soon as practicable, but no later than 60 days from the date on which the service provider first learns of the change.

Service providers must also, upon request, disclose compensation or other information related to their service arrangements that is requested by the responsible plan fiduciary or plan administrator in order to comply with ERISA’s reporting and disclosure requirements.

**Class Exemption**

In addition, the interim final rule contains a class exemption from ERISA’s prohibited transaction provisions for a plan fiduciary who enters into a contract without knowing that the service provider has failed to comply with the disclosure requirements.

**Comments on the Interim Final Rule**

Public comments can be submitted electronically to e-ORI@dol.gov or by using the Federal eRulemaking portal at www.regulations.gov. Persons interested in submitting comments on paper should send or deliver their comments to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210, Attention: 408(b)(2) Interim Final Rule. All comments will be available to the public, without charge, online at www.regulations.gov and www.dol.gov/ebsa, and at the EBSA Public Disclosure Room.


If you have any questions about the interim final rule, please contact Jim Karas or Amanda Albert of Riker Danzig’s Employee Benefits and Executive Compensation Group.

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