

New ERISA Retirement Plan Disclosure and Fiduciary Rules - No Time for Procrastination

April 2012

The U.S. Department of Labor has issued two important regulations affecting retirement plans subject to the Employee Retirement Income Security Act (ERISA). These regulations are intended to promote transparency of plan costs and to identify conflicts of interest. The first regulatory change requires certain providers servicing retirement plans to make important disclosures to “responsible plan fiduciaries” by July 1, 2012. The second regulation, generally effective August 30, 2012, requires plan fiduciaries disclose extensive plan and investment information to their participants and beneficiaries.

All non-governmental retirement plan sponsors (and fiduciaries) will be affected by these new regulations, and need to take action in the next few months. Penalties for failure to comply are potentially significant.

ERISA Section 408 – Disclosures by Covered Service Providers

ERISA was enacted in 1974 to protect retirement plan participants and beneficiaries. This responsibility falls heavily on ERISA plan fiduciaries and includes an obligation to ensure that the plan (and its participants) do not enter into unreasonable contracts and are not paying unreasonable compensation to service providers. To assist plan fiduciaries better understand and assess their contracts and related costs (which have traditionally been very difficult, if not impossible, to understand), the ERISA Section 408 regulations mandate that service providers timely disclose (in writing) detailed: (i) descriptions of their compensation (including the identity of payors); and (ii) information as to the services actually provided under the contract. ERISA Section 408 includes a very broad definition of compensation including all direct and indirect remuneration (and all remuneration paid between related entities) to better enable responsible plan fiduciaries to understand the complexities of the underlying compensation arrangements. Covered service providers must also acknowledge whether or not they are acting as ERISA fiduciaries or registered investment advisers.

While service providers are required to furnish these disclosures, ERISA plan fiduciaries (such as plan sponsors and/or investment committees) are required to demand, review and understand the disclosures. If the disclosures are not understood, questions must be asked and additional information obtained. ERISA Section 408 provides that plan fiduciaries that fail to properly obtain and process the disclosed information may be in breach of their fiduciary duties and/or be characterized as engaging in an ERISA prohibited transaction; both of which could result in significant fines and penalties, including the potential of personal liability.

ERISA Section 404 – Disclosures to Plan Participants

For retirement plans permitting participants to direct the investment of their accounts, ERISA Section 404’s regulations require that plan administrators disclose to participants information as to their investment rights and responsibilities. The regulations also require detailed disclosures illustrating a plan’s investment and administrative expenses and fees. The Department of Labor’s objective is to ensure that participants have sufficient information to make informed retirement plan decisions.

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On or before the date a participant can first direct his or her investments (and/or at certain intervals thereafter), plan administrators must disclose plan-related information, such as:

- a listing of the plan's investment options and its procedures for making investment elections, including any limitations and restrictions
- an explanation of plan administrative fees and expenses that may be directly charged against a participant's account but not reflected in an investment's annual operating expenses (e.g., recordkeeping, legal, accounting costs)
- a summary of fees that may be incurred by an individual participant (e.g., fees related to loans, domestic relations orders, brokerage windows)
- an illustration of any fees actually charged to the participant's account during the preceding quarter and an explanation of the related services
- a comparative summary of investment performance and fees
- the existence of revenue sharing arrangements, if applicable
- information as to the voting of proxies and similar rights
- identification of investment managers

Plan administrators must also timely furnish the following investment-related information in a proper comparative format:

- for each investment option, information as to the type of investment (e.g., money market fund, large cap stock fund, etc...)
- historical investment performance data for 1, 5 and 10 year periods
- investment benchmark data for 1, 5 and 10 year periods
- disclosures of key characteristics of fixed-return investments
- detailed fee and expense information for each investment, expressed as both a percentage of assets and dollar amount (per \$1,000 invested)
- website information enabling participants to obtain additional information

Immediate Action Required -- Act Now, There is No Time to Waste!

Miller Canfield is advising clients to start immediately identifying service providers from whom they must demand the required disclosures and to begin gathering information to be provided to participants. You should contemplate organizing a participant meeting to teach them to understand the new participant statement disclosures. You should also consider how your participants will respond to these disclosures, especially any revenue sharing arrangements. We are also recommending that plan sponsors revisit their provider contracts to ensure compliance with the regulations.

This is intended only as a basic summary of the regulations, which are very detailed and require the immediate attention of plan sponsors and fiduciaries.

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If you need assistance understanding your fiduciary responsibilities or you need assistance complying with these new extensive regulations, please contact your Miller Canfield attorney.

Hear more on this topic at "Shifting Sands of Fiduciary Duty: An SEC + ERISA Perspective" seminar, offered May and June 2012 in Kalamazoo or Bloomfield Hills, Michigan, or Chicago, Illinois.