BRYAN CAVE
A Broader Perspective
Alert

Employee Benefits and Executive Compensation
Client Service Group

To: Our Clients and Friends

July 26, 2012

What To Do with the Plan Level Fee Disclosures

Now that July 1, 2012 has come and gone, the administrators or other fiduciaries of most retirement plans should have received the plan level disclosures from each of the plan's covered service providers. As discussed in more detail in our blog post, the disclosures must describe:

- the types of services being provided,
- the status of the covered service provider as an ERISA §3(21) or registered investment advisor fiduciary,
- the type and amount of compensation the covered service provider receives from the plan,
- various investment-related disclosures, and
- the manner of receipt of compensation.

Plan fiduciaries (including plan administrators) have certain duties with respect to the receipt of this information and with respect to the possible failure to have a covered service provider disclose the information.

Review the Disclosures

The plan fiduciaries must be satisfied that they have received the disclosures from all covered service providers who are required to provide the information. The fiduciaries must read, understand, and evaluate the information in order to determine that the fees identified in the disclosures are reasonable and that the services being provided and paid for are appropriate and necessary for the administration of the plan. This does not mean that every plan should pay the lowest possible amount for services, but rather that the fiduciaries must determine that the fees being paid are reasonable with respect to the quality of necessary services being provided.

The failure of a plan to pay reasonable fees for necessary services will result in a prohibited transaction. Prohibited transactions subject the plan's fiduciaries to taxes, penalties and litigation risks. The fees of a covered service provider which fails to satisfy the fee disclosure rules will be

This Client Alert is published for the clients and friends of Bryan Cave LLP. Information contained herein is not to be considered as legal advice.
This Client Alert may be construed as an advertisement or solicitation. © 2012 Bryan Cave LLP. All Rights Reserved.

deemed unreasonable and thus subject to the prohibited transaction consequences described above unless plan fiduciaries promptly and properly address the failure in the manner discussed in the section entitled, "If Disclosures are Incomplete."

Once the fiduciaries have reviewed the information, it is advisable to have a meeting to discuss the disclosures and confirm that the fees are reasonable and that the services are necessary. This may require the assistance of the plan's investment advisor who should be able to benchmark the fees by comparing them to fees charged to plans by other providers for similar services or by conducting an actual or hypothetical Request for Proposal. For small plans that do not engage the services of an independent investment advisor to assist them with this process, the burden falls directly on the shoulders of the fiduciaries who must use the marketplace to make the appropriate determinations.

If Disclosures Are Incomplete (or Not Made at All)

If a fiduciary determines that the disclosures are inadequate or that a covered service provider did not make the disclosures, there are steps the fiduciary must take to rectify the failure to receive the information. The Department of Labor ("DOL") regulations provide that the plan fiduciary must request the missing information in writing from the service provider. Guidance does not dictate a specific timeframe under which the fiduciary must make this request; it must be done "upon discovering" that the service provider failed to disclose. Presumably this would be within a reasonable time after the fiduciary determined the disclosure had not been provided or was inadequate. What constitutes a "reasonable" timeframe may depend on how many disclosures a fiduciary has to review. Of course, if no disclosures have been received at all, those requests should go out posthaste.

If, after the written request is made, the covered service provider fails to comply within 90 days, the fiduciary must notify the DOL of the service provider's failure to disclose in order to protect the plan from a prohibited transaction. The notice to the DOL must be filed not later than 30 days following the earlier of: (1) the service provider's refusal to provide the information requested by the plan fiduciary; or (2) 90 days after the plan fiduciary's written request is made. The DOL has posted a model fee disclosure failure notice. Currently, the notice may be mailed or emailed to the DOL, but last Monday, a direct final rule was published that announces a new online submission process for such notices. Notices may still be mailed to the DOL even though the online system is now up and running, and the DOL has provided a new dedicated mailing address in the direct final rule. Because it is not clear whether that new dedicated mailing address should be used immediately or beginning with the effective date of the direct final rule (September 14, 2012), prudent fiduciaries will mail any such notices to both the old (as published in the February 3, 2012 final rule) and new mailing addresses.

Aside from notifying the DOL, a plan fiduciary who does not receive a disclosure or has only an inadequate disclosure will need to determine whether to terminate the arrangement with the covered service provider, in accordance with the ERISA fiduciary duty of prudence. If the information that was requested by the plan fiduciary and was not provided relates to *future* services, the plan fiduciary *must* terminate the arrangement as soon as possible.

Conclusion

Plan fiduciaries must do more than simply collect the information that they recently received from service providers. They must take affirmative steps to act upon that information, consult with relevant advisors to the extent appropriate, and make appropriate fiduciary decisions with respect to it.

Related Blog Posts

Summary of 408(b)(2) Disclosure Final Regulations

Participant-Level Fee Disclosure Guidance

Participant-Level Fee Disclosures and The Duty to Inform

If you have any questions regarding anything discussed in this Alert, the attorneys and other professionals of the Employee Benefits and Executive Compensation group of Bryan Cave LLP are available to answer your questions.

Richard (Rick) L. Arenburg	(404) 572-6765	richard.arenburg@bryancave.com
Brian W. Berglund	(314) 259-2445	bwberglund@bryancave.com
Harold G. Blatt	(314) 259-2216	hgblatt@bryancave.com
Bard Brockman	(404) 572-4507	bard.brockman@bryancave.com
Carrie E. Byrnes	(312) 602-5063	carrie.byrnes@bryancave.com
Paul F. Concannon	(404) 572-6856	paul.concannon@bryancave.com
Christine M. Daly	(303) 866-0486	christine.daly@bryancave.com
Carolyn E. Daniels	(303) 866-0391	carolyn.daniels@bryancave.com
Edmund (Ed) Emerson	(404) 572-6739	edmund.emerson@bryancave.com
Denise Pino Erwin	(303) 866-0631	denise.erwin@bryancave.com
Kyle P. Flaherty	(212) 541-2134	kpflaherty@bryancave.com
Carrie E. Herrick	(314) 259-2212	carrie.herrick@bryancave.com
Rebecca Holdredge	(314) 259-2042	rebecca.holdredge@bryancave.com
Jonathan Hull	(314) 259-2359	jthull@bryancave.com
Charles B. Jellinek	(314) 259-2138	cbjellinek@bryancave.com
Michele L. Lux	(314) 259-2519	mllux@bryancave.com
Hal B. Morgan	(314) 259-2511	hbmorgan@bryancave.com
Dan O'Keefe	(314) 259-2179	dmokeefe@bryancave.com
Christian Poland	(312) 602-5085	christian.poland@bryancave.com
Jeffrey S. Russell	(314) 259-2725	jsrussell@bryancave.com
Christopher (Chris) Rylands	(404) 572-6657	chris.rylands@bryancave.com
Steven G. (Steve) Schaffer	(404) 572-6830	steven.schaffer@bryancave.com
Kathleen R. Sherby	(314) 259-2224	krsherby@bryancave.com
Sarah Roe Sise	(314) 259-2741	srsise@bryancave.com
Michael Corey Slagle	(214) 721-8031	corey.slagle@bryancave.com
Sheldon H. Smith	(303) 866-0490	sheldon.smith@bryancave.com
Alan H. Solarz	(212) 541-2075	ahsolarz@bryancave.com
Jennifer W. Stokes	(314) 259-2671	jennifer.stokes@bryancave.com
Lisa A. Van Fleet	(314) 259-2326	lavanfleet@bryancave.com
Tom Wack	(314) 259-2182	tewack@bryancave.com
Julie A. Wagner	(314) 259-2637	jawagner@bryancave.com
Jay P. Warren	(212) 541-2110	jpwarren@bryancave.com
Carolyn Wolff	(314) 259-2206	carolyn.wolff@bryancave.com
Serena F. Yee	(314) 259-2372	sfyee@bryancave.com

Follow @ERISABryanCave on Twitter.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.