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# **Current Fiduciary & ERISA Issues in Qualified Plans**

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# Topics we will cover:

- Introduction
- Issues with Control Groups
- Issues with Prohibited Transactions
- Fee Disclosure

# Who is in the Control Group?

- Aggregation Rules (Section 414 of IRC) treat related entities as one employer for qualified plan purposes.
- Remember to look for Management company relationships, possible aggregation.
- Possible attribution between family members.
- Unintended failures of minimum coverage and non-discrimination requirements.

# **Employee Plans Compliance Resolution System**

- Revenue Procedure that permits voluntary correction by plan sponsors.
- Self-Correction Program – no IRS filing / fee.
- Voluntary Correction Program – IRS filing / fee.
- Audit Cap Program – IRS found you / significant fee.

# What is a Prohibited Transaction?

- Between Plan and disqualified individual, direct or indirect:
  - Sale, exchange or lease of property;
  - Lending of money or extension of credit;
  - Furnishing of goods, services or facilities;
  - Transfer of plan assets to, or use by or benefit of disqualified individual.

# Who is a Disqualified Individual?

- Fiduciary
- Person providing services to plan
- Employer whose employees are covered by plan
- Employee organization whose members are covered by plan
- Owner, direct or indirect, of 50% (voting, value, profits interest) which is employer or employee organization
- Family member of one of the above

# The use of Plan assets for Business Startups

- Promoters tout “the ultimate business start up strategy” and “bet your retirement on you!”
- Distribution by qualified plan to New Co. qualified plan or IRA funds new business.
- Technical memorandum issued by IRS in 2008 cautioned on inherent issues.
- Recent tax court case illustrates potential problem.

## Fee Disclosure: Introduction

- ERISA § 408(b)(2) exempts transactions between plans and disqualified individuals for necessary services, so long as the compensation paid is reasonable
- “Reasonable” arrangements are defined by Department of Labor regulations

# Reasonable Arrangements

- Unless the proper disclosures are made by the Covered Service Provider to the plan fiduciary,
  - The arrangement is per se **UNREASONABLE**

# Who Must Provide Disclosure?

- “Covered Service Providers”
  - Enters into contract/arrangement with “covered plan”
  - Expects at least \$1,000 in compensation
  - Receives “indirect compensation”
- Includes registered investment advisors and record-keepers/brokers

## To What Plans?

- “Covered Plans”
  - Basically, all ERISA-covered defined benefit and defined contribution plans
    - Includes ERISA-covered 403(b) plans
  - But not
    - SEPs or SIMPLEs
    - IRAs
    - Certain 403(b) annuity contracts and custodial accounts
  - And NOT welfare benefit plans

# Initial Disclosure Requirements

- Services provided
- Status (fiduciary/reg'd investment advisor)
- Compensation (direct/indirect)
- Additional disclosure required if:
  - CSP holds plan assets
  - Recordkeeping/brokerage services
  - Designated Investment Alternative

# Initial Disclosure Timing & Delivery

- Must disclose all required information “reasonably in advance of the date the contract or arrangement is entered into”
- DOL “strongly encourages” CSPs to provide a summary or guide to assist plan fiduciaries
  - Not currently a requirement, *but*
  - Published a sample with the final rule

# On-Going Disclosure

- Changes:
  - To services, status or compensation:
    - As soon as practicable, but no more than 60 days
  - To investment information:
    - Annually
- General reporting and disclosure requirement:
  - Upon request
  - Reasonably in advance of plan fiduciary's reporting requirements

## Corrections

- CSP's error/omission does not make arrangement unreasonable if
  - Good faith and reasonable diligence
  - Timely correction
    - No later than 30 days after CSP knows of error

## Failure to Disclose

- Plan fiduciaries have an out if CSPs do not provide proper/comprehensive disclosure:
  - Must request in writing from CSP
  - Must report CSP to the DOL if disclosure not provided within 90 days of request
  - Must terminate contract or arrangement as soon as possible after 90-day window
    - “[If no disclosure], the plan fiduciary shall terminate the contract or arrangement as expeditiously as possible.”

## Penalties

- Plan MUST report failure to disclose to the DOL
- CSPs can be liable to DOL for:
  - Excise taxes
  - Additional 20% penalty
- CSPs must “correct the violation”
  - Refund all compensation plus interest to the plan