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ERISA Fee Disclosure Deadline Looms

On January 1, 2012, certain fee disclosure regulations go into effect that will impact many registered investment advisors, plan administrators, plan fiduciaries, and other individuals and entities who provide services to, and receive fees from, ERISA-governed retirement plans. These regulations may also impact certain private investment funds, collective trusts and private equity partnerships.

Under ERISA and the Internal Revenue Code, the general rule is that the providing of services to, and receiving a fee from, a retirement plan pursuant to a contract or arrangement constitutes a prohibited transaction. Obviously, however, such contracts and arrangements do exist. (In fact, they are necessary in order for a plan to operate.) This is because such contracts and arrangements generally fall under an exemption to the prohibited transaction rules that allows for contracts and arrangements between a plan and a service provider that are “reasonable” and “necessary” for the plan, if “no more than reasonable compensation is paid.”

Prior to the regulations, there was little guidance on what constitutes a reasonable contract or arrangement for this purpose. However, under the new regulations effective next year, no contract or arrangement for services between a “covered plan” and a “covered services provider” (nor any extension or renewal of such contracts or arrangements) is reasonable unless certain fee disclosures are made to the “responsible plan fiduciary.”

A “covered retirement plan” is a retirement plan subject to ERISA (including many/most 403(b) plans) but excludes arrangements such as IRAs, SIMPLE IRAs, SEP IRAs, and welfare plans. “Covered services” generally include fiduciary services and certain recordkeeping and brokerage services, as well as certain accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities, brokerage, third party administration, or valuation services if the service provider reasonably expects to receive indirect compensation (as defined in the regulations) for such services.

Importantly, under the ERISA “plan asset rules,” certain assets of private investment funds, collective trusts, and private equity partnerships in which “benefit plan investors” hold 25% or more of the value of the fund (with exceptions for certain operating companies) are deemed plan assets and, as a result, the managers of those arrangements are deemed to be plan fiduciaries. In other words, the managers are considered to be providing fiduciary services and, thus, they are also subject to the disclosure requirements.

The disclosure requirements can be very complex, but generally require disclosure of the service providers’ services to the plan, status as a plan fiduciary and/or as a registered investment advisor (if applicable), and the compensation expected to be received. The disclosures must be in writing and satisfy certain timing requirements. *A plan fiduciary who enters into a contract or arrangement that does not comply with the new requirements will be deemed to have caused the plan to engage in a prohibited transaction, violating his or her duties to the plan, and a covered service provider who fails to comply with these requirements may be liable to repay the plan his or her fees and may be subject to an excise tax for engaging in a prohibited transaction.*

As indicated, the fee disclosure requirements can be complex and it may take some time for a covered service provider to prepare to comply with the requirements. Accordingly, those who may be impacted by the new requirements are advised to begin this process well in advance of their effective date.

If you have any questions regarding this alert, please feel free to contact Clay Walts, Chris Crevasse, or your Miller & Martin attorney.

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