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Enhancing value through thoughtful solutions

ISSUE 2 | VOLUME 1 | 2012

OnTrack

we keep you ERISA fit!

On Track informs you of benefit plan hot topics in a concise and timely manner. The information presented will be focused on critical ERISA matters, with a spotlight on explaining the issues in plain English, pointing out items that will be most impactful, and helping you develop steps that can assist in complying with changing regulations.

With 408(b)(2) Disclosures in Hand, What's Next?

Guest writer: David Witz, AIF, GFS Managing Director FRA/Plan Tools

Now that July 1, 2012 has passed and assuming the responsible plan fiduciary ("RPF") has received their 408(b)(2) disclosures, many Plan Sponsors are asking "What's next?"

The RPF has two options:

- Compare the disclosures to the regulations to confirm they are complete, or
- Retain the services of a professional to conduct the analysis on their behalf.

Failure to conduct this analysis may make the RPF personally liable for a prohibited transaction if it is determined the disclosures are incomplete. The analysis is so complex, few RPFs have the knowledge, skill and expertise to prepare this analysis. An RFP's best option is to retain a professional if the RFP cannot conduct a comprehensive analysis.

In preparation for the analysis, the RPF must assemble all 408(b)(2) disclosures including all contracts, service agreements and documents referenced in the 408(b)(2) disclosures. It also behooves the RPF to send a letter to each covered service provider ("CSP") requesting any information they know is missing. It is recommended that the professional send a request for additional information to each service provider even if they are not a CSP.

The purpose of the letter is to:

- Establish a documented process to confirm the disclosures are complete,
- Request information needed or confirmation of facts from each service provider,
- Reduce liability for the RPF, and
- Obtain a response from the service provider that can be relied upon in good faith.

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Check It Out!

√ 2013 IRS COLA limits are now available at: www.irs.gov/Retirement-Plans/COLA-Increases-for-Dollar-Limitations-on-Benefits-and-Contributions

√ Short publication called "Maximize Your Retirement Savings-Tips on Using the Fee and Investment Information From Your Retirement Plan" available on the DOL/EBSA website: www.dol.gov/ebsa/publications/feedisclosuretips

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If a CSP fails to respond within 90-days, the RPF has 30-days to report the CSP to the DOL. Failure to report a CSP, even if the CSP provides the required information during the 30-days following the 90-day grace period, may cause the RPF to become jointly liable for the prohibited transaction.

Once a determination is made that all disclosures from each CSP are complete, a determination must be made whether fees are reasonable for services rendered.

This requires a two-step process:

- Compare fees, and
- Document the reasons you believe fees are reasonable.

To conduct a proper comparison, the RPF must either be able to benchmark fees and/or engage in a formal request for proposal ("RFP") process. Benchmarking is certainly the most efficient, unbiased, conflict free and cost effective approach assuming the data is from an independent source. Preparation of the benchmarking report can be conducted by any incumbent service provider as long as the incumbent service provider does not have discretionary authority and control over plan assets and uses that authority to retain and pay himself/herself a fee that he/she sets and approves, and then declares their fee as reasonable.

Finally, with the benchmarking report in hand, the RPF must document why the RFP believes fees are reasonable. The documentation does not have to be meticulously detailed, but it must be sufficient to establish that the RPF believes fees are reasonable for services rendered. Keep in mind, reasonableness is not defined as the lowest or even the average fees. Instead, the RPF has the right to make a subjective decision based on objective facts.



From an Audit Perspective

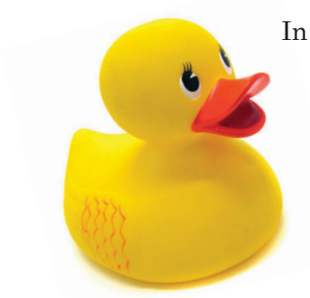
If they haven't already been making requests during the 2011 audit, your auditors should be making fee disclosure related requests in the 2012 audits. Your auditors may:

- Request copies of your fee disclosures from your covered service providers (408(b)2).
- Request copies of your fee disclosures to your participants (404(a)).
- Make inquiries regarding whether the Plan has received complete disclosures from all covered parties.
- Make inquiries regarding what your process was to determine if the disclosures were accurate and complete.
- Provide you with a management letter or verbal guidance on avoiding prohibited transactions.

Worker Classification:
If it walks like a duck, and quacks like a duck…

Guest writer: Karen Hsu Ford, CPA, MST, CEBS-Managing Member, HsuBox Consulting, LLC

In today's tough economic times, hiring independent contractors instead of employees can be a seductive solution to staffing shortages – and a ripe opportunity for abuse. Knowing this, federal and state agencies are sharing information about worker classification issues – that is, whether workers are truly employees or independent contractors – more than ever before.



In 2011, the Department of Labor (DOL), the Internal Revenue Service (IRS) and eleven states executed a memorandum of understanding to share information about worker classification issues identified. This increased information sharing makes it far more likely that any issues your organization has will come to the attention of various regulators, and that those regulators will then monitor your correction efforts.

Given this context, worker classification is an increasingly urgent issue for all kinds of companies. Understanding the legal tests that apply can help you determine whether hiring a contractor is right for you – and save you time, trouble and money down the road.

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