NEW ERISA DISCLOSURE REQUIREMENTS APPLICABLE TO PLAN ASSETS FUNDS AND INVESTMENT MANAGEMENT ARRANGEMENTS

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To Our Clients and Friends:

Under recently issued regulations by the Department of Labor ("DOL"), certain service providers to ERISA-covered defined benefit and defined contribution plans, including investment managers of "plan assets" funds, will be required to provide extensive disclosure to the responsible plan fiduciary of an ERISA plan investor. Driven by the DOL's perceived need for greater transparency about service provider compensation, the regulation sets forth initial and ongoing disclosure requirements. These new requirements are effective July 1, 2012 and apply to existing and new service arrangements.

While the new requirements under Section 408(b)(2) of ERISA apply to services provided with respect to investment products holding plan assets, these requirements do not apply to a fund that operates as a venture capital operating company or to "under 25%" funds (i.e., funds in which ERISA investors hold less than 25% of each class of equity interests). In the case of a "plan assets" fund, fortunately, most of the disclosure requirements will likely be satisfied by information already disclosed in documents such as a fund's offering documents; however, additional review will be necessary to ensure compliance. This Client Update is limited to a discussion of the information required from investment managers investing plan assets pursuant to an investment management agreement or for a plan assets fund.

CONTENT OF DISCLOSURE

The written disclosure requirements applicable to a plan assets fund or investment management agreement include a statement of whether the covered service provider will provide service as an ERISA fiduciary and/or as a registered investment adviser, along with descriptions of the following:

- The services to be provided.
- All "direct compensation" expected to be received from the plan by the covered service provider, its affiliate or its subcontractor.
- All "indirect compensation" including compensation expected to be received and gifts and entertainment in excess of $250, in the aggregate, over the course of the arrangement (and

not just annually). This description may be expressed as a monetary amount, formula, percentage of plan assets or per capita charge. In addition, to enable a responsible plan fiduciary to assess potential conflicts of interest, the regulations also require a description of the arrangement pursuant to which such indirect compensation is paid. To illustrate the breadth of this rule, the DOL has provided an example involving a conference held by a covered service provider for its plan clients and financial institutions but financial institutions pay a higher fee. This difference in fee is considered by the DOL to be indirect compensation if the covered service provider may make recommendations as to the products of the financial institutions.

- Any transaction-based compensation that will be paid among the covered service provider and its affiliates or subcontractors (e.g., commission, soft dollars, finders fees or other similar incentives based on business placed or retained) or that will be charged directly against the covered plan's investment and reflected in the net value of the investment. The covered service provider also must identify the services for which compensation will be provided and identify the payer and recipient of such compensation (including the status of a payer or recipient as an affiliate or subcontractor). This rule does not apply to compensation received by an employee from his or her employer on account of work as an employee.
- Any termination compensation that a covered service provider reasonably expects to receive upon termination of the arrangement.
- The manner in which the compensation will be received.
- With respect to a plan assets fund, any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, transfer of or withdrawal from the fund (such as sales loads, surrender charges or account fees).
- With respect to a plan assets fund, all annual operating expenses of the fund and any ongoing expenses in addition to operating expenses.

FORMAT OF DISCLOSURE

While the DOL has reserved for future rulemaking on whether a particular format for disclosure will be required, it strongly encourages the use of a "sample guide" included with the final regulation.

TIMING OF DISCLOSURE

- Information must be disclosed reasonably in advance of the date the contract or arrangement is entered into, renewed or extended.
- If the fund is not plan assets but becomes plan assets, the information must be provided no later than 30 days from the date the covered service provider knows that such entity holds plan assets.
- Changes must be generally disclosed within 60 days of the change and, with respect to changes to certain financial information such as operating costs of a plan assets fund, on at least an annual basis. In the case of an error in the disclosure, corrected information must be provided as soon as possible but no later than 30 days after the service provider discovers the error.

ADDITIONAL INFORMATION

The covered service provider must also provide the responsible plan fiduciary or plan administrator any other information requested in writing relating to the compensation that is necessary for the plan to comply with ERISA's reporting and disclosure requirements (such as Form 5500, Schedule C information). Absent extraordinary circumstances, this must be provided reasonably in advance of the date which the plan fiduciary states it must comply with the applicable requirement.

NON-DISCLOSURE CONSEQUENCES

If a covered service provider fails to comply with the new regulations, the arrangement with the plan or plan assets fund may be deemed a prohibited transaction and may be subject to draconian penalties under the prohibited transaction regime, including excise taxes. Responsible plan fiduciaries (i.e., the plan sponsors approving the arrangement) are also subject to penalties for non-compliance by a service provider unless they take certain steps, including a request to the service provider for the information and notice to the DOL if the request is not fulfilled within 90 days. The responsible plan fiduciary must then determine whether to terminate the arrangement.

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This memorandum was not intended or written to be used, and it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under U.S. Federal tax law.

Please do not hesitate to call us if you have any questions or wish to discuss the final rules in greater detail.

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