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Ask Kidder.®

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408(b)(2) and 404(a)(5) Regulations STARTING DATE CHANGED AGAIN, but Coming July 1st

As reported in previous newsletters (located at www.askkidder.com/Newsletters), the starting date of April 1st for the various disclosure regulations affecting all qualified plans and all service providers to plans has been moved to July 1st. The 408(b)(2) regulation disclosure relates to information being provided to the responsible plan fiduciary. The 404(a)(5) regulation is for information being provided to plan participants. While these disclosure requirements will assist the responsible plan fiduciary, i.e. plan sponsor, in making informed decisions, the final regulation commentary states that "The disclosure requirements of the final rule are independent of a fiduciary's obligations under ERISA section 404". What that means is the disclosure requires covered service providers to provide the information, but the responsible plan fiduciary needs to evaluate that information and monitor the providers using a prudent decision making process.

Now that the DOL has provided final regulations (although many clarifications are still needed), we are finalizing our required documentation. Kidder will be mailing you a new 408(b)(2) compliant Service Engagement Agreement/Schedule of Services around May. There will be no change to your current fee schedule(s) and nothing for you to sign. However, the formatting will be different and additional required disclosures relating to our services will be provided.

The Effect on 408(b)(2) Regulations by a New Proposed Definition of Fiduciary

In addition to the disclosure regulations, the Department of Labor (DOL) had proposed expanding the definition of "fiduciary". After a year of review and objections from many in the financial services industry, the DOL withdrew the proposal in September 2011 and announced they would provide a revised proposal later in 2012. The current definition utilizes a 5-part test to determine if a service provider is acting in a fiduciary capacity to a plan. A key element in this test involves discretionary decision-making. The proposed definition would have eliminated the 5-part test because the DOL believed many providers utilized technicalities to avoid being classified as a fiduciary. The proposed change in the definition of fiduciary ties directly into the 408(b)(2) regulation which are intended to provide the responsible plan fiduciary, i.e. plan sponsor, with adequate information to make informed decisions to satisfy their requirements as the plan fiduciary.

In the 408(b)(2) regulation effective July 1, 2012, covered service providers need to state if they are serving as a fiduciary to the plan or as an investment advisor under the Investment Advisor Act of 1940. Consequently, knowing the definition of "fiduciary" will be an important aspect of plan sponsors' decision making. Not all covered service provider services are considered fiduciary in nature. Services provided by investment platforms and Third Party Administration firms are typically a non-fiduciary activity and are considered a ministerial function being provided on behalf of the plan sponsor. However, decision-making regarding investment fund selection, investment reviews and investment platform selection performed by the broker/advisor may be considered a "fiduciary" function whether or not the broker/advisor says they are or are not an investment fiduciary. That is where the clarification is needed.

The reason this definition change is important and controversial is if a party is deemed to be a fiduciary to the plan, they must provide complete disclosure, avoid conflicts of interest and make decisions for the exclusive benefit of the plan and participants. The final 408(b)(2) regulation eliminated a requirement in the interim regulation that if the broker/advisor stated they were not serving as a "fiduciary" then they were to inform the plan sponsor that their guidance was not impartial. Instead, the actual requirement is only to inform the responsible plan fiduciary, i.e. plan sponsor, if they are serving as a fiduciary. As a best practice, the responsible plan fiduciary should understand what types of services are fiduciary in nature and whether those providing those services will act in a fiduciary capacity. For purposes of 408(b)(2) disclosure requirements, the definition of fiduciary as it relates to investment fiduciaries and Investment Advisors is ERISA Section 3(21).

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Many brokers/advisors that traditionally were not considered a fiduciary to the plan would have increased fiduciary liability exposure under the originally proposed expansion of the definition of fiduciary. Many broker/dealer firms have already started to limit their brokers/advisors that can service qualified plans because their liability exposure to fiduciary activities has increased.

For plan sponsors, the current direction is that the definition of fiduciary will probably be expanded and will encompass more service providers. Considering the 408(b)(2) and 404(a)(5) regulations and additional information available on Form 5500, it is very important for plan sponsors and plan fiduciaries to understand the roles of each service provider, the scope of the services they provide, and how they are compensated for said services. The focus is not to find the lowest cost provider, but rather if the service provider is providing sufficient value for the cost being incurred by plan participants and the plan sponsor.

DOL Sending Notices to Plan Sponsors on Form 5500 Filings

The Employee Benefits Security Administration (EBSA) of the US Department of Labor (DOL) administers and enforces pension laws and regulations for private-sector employee benefit plans under Title 1 of the Employee Retirement Income Security Act of 1974 (ERISA). An area that has been reviewed on an increasing basis are the annual Form 5500 filings.

These reviews are triggered by how a particular question on Form 5500 is answered and the DOL sends a response letter to the plan sponsor. In that letter the DOL may state it appears the plan sponsor failed to administer some aspect of the plan correctly and a corrective action may be necessary. The DOL provides a lengthy answer that can be confusing to many plan sponsors on how to make any correction(s).

If you should get such a letter, please notify your Primary Administrator at Kidder immediately. Even though we prepare your Form 5500 for submission, we do not receive a copy of any DOL response letters. In the normal course of providing services to you, we have probably addressed any issues or are working directly with you to handle any corrections and adjustments. Therefore, do not be alarmed by any such letters. Just contact us.

IRS Stresses the Importance of Maintaining Signed and Dated Documents

Qualified plan documentation consists of the Plan Document, Adoption Agreement, Amendments, Summary Plan Descriptions, Board Resolutions and a plethora of additional documents. As a plan matures over time, many plan sponsors want to know if they can purge some of these documents. Since these are qualified plans that provide tax advantaged benefits for both the plan sponsor and plan participants, it is generally required that all signed documents be maintained indefinitely. Often when we take over a plan from another provider, the plan sponsor may not have maintained all documentation or may have misplaced some documents.

The IRS suggests that upon takeover of any plan's administration, if a new client cannot produce all signed and dated amendments and documents back to the GUST amendments deadline in 2001/2002 (GUST refers to four separate laws passed in the mid to late 1990's), that a Voluntary Correction Program (VCP) filing under the Employee Plans Compliance Resolution System (EPCRS) be considered in order to avoid any sanctions if the plan is subject to an IRS audit. Once the IRS begins an audit, the VCP program is no longer an option. The IRS states that it will NOT be lenient on plans that cannot find such signed and dated documents. It is also very important that these documents not only be signed, but also dated. The following examples illustrate the difference in having a VCP filing to correct the issue versus having the IRS audit a plan and impose a sanction:

150 participant plan:
- VCP filling -- IRS user fee to fix missing signature pages: $5,000
- No VCP filing (but subject to an IRS audit) -- potential IRS sanction: $35,000 and up

25 participant plan:
- VCP filing -- IRS user fee to fix missing signature pages: $1,000
- No VCP filing (but subject to an IRS audit) -- potential IRS sanction: $18,000 and up

Bottom line -- maintain all your signed and dated documents. Utilize our large Ask Kidder binders. If you are missing any documentation, there is a solution that is much less costly than waiting for the IRS to knock on your door.

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Kidder Announcements

Kidder Benefits has been certified by CEFEX, Centre for Fiduciary Excellence, LLC as adhering to the American Society of Pension Professionals & Actuaries (ASPPA) Standard of Practice for Retirement Plan Service Providers. Kidder is among the first in the United States to successfully complete the independent certification process. The required designation standard include best practices for governance, organization, human resources, operations, planning, systems, and disclosure, and is modeled after the "Prudent Practices for Investment Stewards" published by Fiduciary360. This designation provides assurance to fiduciaries, board members and stakeholders of organizations that Kidder has demonstrated adherence to the best practices in the retirement industry and providing accountability to its clients.

Kidder completed the acquisition of Lane & Associates, an actuarial firm located in West Des Moines, Iowa and established a new entity, Kidder-Lane Actuarial Services, LLC. Doug Lane, founder of Lane & Associates, remains President of the new entity with the goal to continue expansion of actuarial services for Defined Benefit and Cash Balance plans for clients throughout the country as well as supporting other service providers with actuarial services for their clients. The Kidder organization and Lane have worked together for 16 years and strategically determined this combination will increasingly benefit clients of both firms. Kidder Benefits now services over 1,100 qualified plans and 31,000 participants with assets exceeding $1.5 billion.

Kidder Benefits expanded its Consulting ranks with the addition of Ray Hansen as a Regional Pension Consultant in Iowa. Ray was previously President of Benefit Source Financial Services. Kidder Benefits and Benefit Source, Inc., a regional health and benefits firm headquartered in West Des Moines, Iowa, entered into a marketing alliance in which Ray Hansen will help to expand qualified plan services to the clients of Benefit Source throughout the Midwest.

Keith Gredys, CEO & President of Kidder Benefits, and Bob Miller, Vice President of Kidder Benefits, recently provided continuing education programs for the Financial Planning Association in West Des Moines, IA, Horizon Wealth Management and Multi-Financial Securities Corp. in Baton Rouge, Louisiana, the Missouri Society of Accountants in St. Louis, Missouri, and the Bettendorf Society of Financial Service Professionals in Silvis, Illinois on the topics of 408(b)(2) and 404(a)(5) regulations, Cash Balance plans and sophisticated Plan Designs for 401(k) plans.

Keith Gredys, CEO & President of Kidder Benefits, was nominated and elected to the Retirement Advisor Council headquartered in East Granby, Connecticut. Council membership is limited to 75 Professional Retirement Plan Advisors and Retirement Practice Leaders of advisory firms, 8 service providers and 6 investment management firms from across the United States. The mission of the Council is to advocate for successful qualified plan and participant retirement outcomes through the collaborative efforts of experienced qualified retirement plan advisors, investment firms, asset managers, and defined contribution plan service providers. The Council undertakes initiatives in the areas of research, public education, regulatory positions and practice management.