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# IN BRIEF

## MAHONEY, SILVERMAN & CROSS, LLC

822 Infantry Drive  
Suite 100  
Joliet, Illinois 60435  
(815) 730-9500

126 S. Main Street  
Oswego, Illinois 60543  
(630) 554-7800

### **Attorneys:**

[George F. Mahoney III](#)

[David J. Silverman](#)

[Thomas H. Cross III](#)

[Eric P. Hanson](#)

[James A. Murphy](#)

[Sean D. Brady](#)

[Kevin D. Yusman](#)

[Jean A. Kenol](#)

[Ashley A. Kwasneski](#)

[Robert A. Wolz](#)

[Laura L. Malinowski](#)

### **Counsel to the Firm:**

[R. Peter Grometer](#)

[Grant S. Wegner](#)

*This is the second installment of MSC's Small Business Check-Up Series - a series of articles highlighting issues of common concern to our business clients. These articles are intended to alert you to issues that we commonly encounter in servicing our business clientele and to advise you of other current issues of concern.*

### **What You Need to Know about the Department of Labor's New Service Provider Disclosure Requirements for Retirement Plans**

Most small businesses, as a result of other business priorities, typically pay little attention to the retirement plans they provide for their employees. From a liability perspective, this is a dangerous approach. The fiduciary obligations assumed by the sponsor of any qualified retirement plan are serious and require periodic attention as part of a good risk management policy. Recently, many cases seeking money damages have been filed by disgruntled plan participants alleging that their retirement savings has been dissipated by excessive fees and expenses, by imprudent investment options in plans, or by plan sponsors concealing material information regarding plan fees and expenses.

To address these concerns, the US Department of Labor has recently issued its Service Provider Disclosure Regulations in an effort provide plan officials and fiduciaries with sufficient and complete information to fulfill their ERISA obligation with respect to the hiring, monitoring and retention of plan service providers. Starting in 2011, Plan sponsors should expect to receive detailed disclosures from all parties that provide services to the plan,

including trustees, custodians, investment advisors, brokers, record keepers and banks. These disclosures must now be provided for any contract or arrangement where a plan service provider reasonably expects to receive \$1,000.00 or more in direct or indirect compensation.

In general, a Covered Service Provider's disclosure must include the following:

- **Description of Services** - A Covered Service Provider must provide a description of the services it will provide to the plan under a service contract. The level of detail required is dependent upon the needs of the responsible plan fiduciary.
- **Fiduciary Acknowledgement**- A statement clarifying whether the Service Provider will be acting a fiduciary capacity when performing the services.
- **Description of Compensation** - A description of the type of compensation and the manner in which the compensation will be paid is required. This must include all direct compensation (compensation paid from the Plan), indirect compensation (compensation received from any source other than the plan or the plan sponsor, typically from mutual fund companies or other investment providers), related party compensation (any reallocation of compensation between a service provider and its affiliates must be disclosed) and any compensation required to be paid upon termination of the service provider's contract ;
- **Breakout of Costs for Recordkeeping Services**- The cost of recordkeeping services must be separately broken out in the disclosure materials. The DOL intention is to allow plan sponsors to compare the cost of recordkeeping services in cases where those charges may be built into a flat fee or buried within other service charges; and
- **Manner of Payment** - The DOL wants disclosures to be made in terms of a dollar amount, formula, percentage of plan assets or a per capita charge so long as the disclosure is sufficient to permit a responsible fiduciary to compare and evaluate the reasonableness of the compensation.

Under ERISA, the federal law that governs retirement plans, the fiduciary obligations of a plan sponsor require all plan sponsors, large and small, to ensure that:

- Any decision to enter into or retain a contract or arrangement with any plan service provider is reasonable, prudent and was made solely in the

interest of the Plan's participants and beneficiaries; and

- In order to comply with ERISA's prohibited transaction rules, that any contract or arrangement with a plan service provider is reasonable, that the services contracted for are necessary for the establishment and operation of the plan, and that no more than reasonable compensation is paid for the services. A violation of the prohibited transaction rules can potentially subject a plan sponsor to excise taxes and potential adverse tax results for the plan.

The Regulations state that "The DOL generally expects plan fiduciaries to use the disclosure information to fulfill their fiduciary duties to select and monitor service providers and investments in the best interest of plan participants." It's likely that, going forward, there will be little excuse in an audit or enforcement action if a plan sponsor cannot establish that it is fulfilling this duty.

Our recommendation on how to best address this issue is to initiate a reasonable and regular monitoring process for plan expenses and service provider relationships and to document that process. In defending fiduciary claims involving employee benefit plans, the implementation and execution of a regular monitoring process will go a long way towards limiting your potential liability for fiduciary breaches. It is our opinion that such a process should include the following elements:

- Identify all current covered service providers;
- Request and review the required disclosures from any covered providers that do not automatically provide the disclosures;
- Review Disclosures before engaging new service providers and upon any contract extension or renewal;
- Follow up if any compensation item disclosed is surprising, ambiguous or apparently unreasonable;
- Ensure that the services described in the disclosures are consistent with the plan's needs and expectations and are necessary for the operation of your plan;
- Document that the disclosures provided have been reviewed by the Plan's fiduciaries in connection with decisions to hire, fire, retain or renew a covered service provider and whether the provider responded to the Fiduciaries' questions or inquiries regarding the disclosures; and
- Identify circumstances where additional disclosures may be required from existing providers, such as when a new investment alternative is made available.

Please contact us if you have any questions, or if we can assist your business in any way.

**Mahoney Silverman & Cross, LLC**  
**Business Services Practice Group**

Sean D. Brady, [sbrady@msclawfirm.com](mailto:sbrady@msclawfirm.com)

Jean A. Kenol, [jkenol@msclawfirm.com](mailto:jkenol@msclawfirm.com)

Kevin D. Yusman, [kyusman@msclawfirm.com](mailto:kyusman@msclawfirm.com)

Robert A. Wolz, [rwolz@msclawfirm.com](mailto:rwolz@msclawfirm.com)

The Law Firm of Mahoney, Silverman and Cross, LLC strives to provide superior legal representation with the objective of exceeding our clients' expectations. Each member of our firm is committed to utilizing critical analysis and innovative approaches to achieve timely resolutions with the best possible results for our clients.

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MAHONEY, SILVERMAN & CROSS, LLC | 822 Infantry Drive | Suite 100 | Joliet | IL | 60435

