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The New Disclosure Rules: Plan Sponsor Obligations

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Agenda

- Background and Context
 - Regulatory Overview
 - Typical 401(k) Fee Claims
- Service Provider Disclosure – 408(b)(2)
 - Overview of Rules
 - What Are the Obligations of Plan Sponsor Fiduciaries?
Moderated Discussion
- Participant Disclosure – 404(a)
 - Overview of Rules
 - How Will Plan Sponsors Meet These Obligations? Moderated Discussion

Regulatory Overview

- Congressional Interest
- Regulatory Initiatives
 - Modifications to Form 5500 Schedule C
 - Interim final regulations under ERISA section 408(b)(2)
 - Participant disclosure final regulations under ERISA section 404(a)

Typical 401(k) Fee Claims

- Plan service providers as fiduciaries
- Excessive fees
 - Recordkeeping
 - Investment management
- Underperformance
- Prohibited transactions
 - Self-dealing is the overarching theme
- One or more high-damages claims
- Build case around core of defendant documents

Current State of Cases

- Courts have granted motions to dismiss
- And summary judgment
- But plaintiffs are reaching discovery and trial
- State of the law arguably in flux
 - *Deere & Co.; Motorola; Kraft Foods Global Inc.*

408(b)(2) Overview

- Whose Obligation?
- Effective Date
- Covered Plans
- Covered Service Providers
- Content Requirements
- Special Rules
- Timing and Manner of Disclosure
- Service Provider Relief – Disclosure Errors
- Plan Administrator Relief – Class Exemption
- Consequences of Noncompliance

408(b)(2) – Moderated Discussion

- Responsible Fiduciary
- Data Collection
- Evaluation of Data
- Marketplace Studies
- Plan Sponsor Response
- Consequences of Noncompliance
- Impact on ERISA Litigation

Participant Disclosure Overview

- Whose Obligation?
- Covered Plans
- Effective Date
- Content Requirements
 - Plan-Related Information
 - Investment-Related Information
- Other Requirements (Website, Comparative Chart, Glossary)
- Timing and Manner of Disclosure
- ERISA section 404(c) Amendment

Participant Disclosure – Moderated Discussion

- Resources
- Methodology
- Cost
- Special Rules
- 404(c) Compliance
- Consequences of Noncompliance
- Impact on Future Fee Litigation

Questions?

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I. Lee Falk is senior counsel in Morgan Lewis's Employee Benefits and Executive Compensation Practice. Mr. Falk has substantial expertise in all facets of employee benefits law and executive compensation matters and has considerable experience with a broad range of employee benefit and deferred compensation plans and programs, including tax-qualified pension and profit-sharing plans, qualified cash or deferred arrangements (401(k) plans), master and prototype plans, stock option and other incentive compensation and capital accumulation programs. A significant part of Mr. Falk's practice involves ERISA fiduciary and prohibited transaction matters for clients in the financial services industry and pension investments, including hedge funds and private equity funds, for large single employer and multiemployer plans. Mr. Falk also has extensive experience handling employee benefits aspects of corporate transactions, such as mergers and acquisitions, joint ventures, reorganizations, and loans and similar financing arrangements.

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Hofstra University School of Law, 1974, J.D.
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Azeez Hayne is a partner in Morgan Lewis's Labor and Employment Practice. Mr. Hayne's practice focuses primarily on employee benefits plan litigation and general employment litigation, including Sarbanes-Oxley whistleblower litigation. His practice includes representing employee benefits plans and employers in disputes with plan participants and beneficiaries, representing employee benefit plans in disputes with plan trustees, and representing employers in Sarbanes-Oxley whistleblower suits, discrimination suits, and executive compensation disputes. In addition, Mr. Hayne regularly counsels clients in employment and benefits decisions.

Education

University of Virginia School of Law, 2001, J.D.
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R. Randall Tracht is a partner in Morgan Lewis's Employee Benefits and Executive Compensation Practice. Mr. Tracht's clients include those in the energy, manufacturing, construction, and healthcare industries. Mr. Tracht's practice encompasses all aspects of employee benefits work, including the design, drafting, and operation of tax-qualified retirement benefit plans, health and welfare plans, and 403(b) plans. He advises clients on compliance with the Internal Revenue Code, ERISA, COBRA, and other federal and state laws affecting employee benefits plans, and represents clients before the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation under the agencies' remedial correction programs and within the context of agency-initiated audits.

Mr. Tracht's practice also includes work with executive compensation arrangements—including the design, drafting, and operation of nonqualified deferred compensation plans and equity compensation plans and the drafting and negotiation of executive employment agreements. He advises clients on compliance with 409A, 162(m), and other requirements affecting executive compensation arrangements.

Mr. Tracht is a leading member of Morgan Lewis's Workforce Change Taskforce and he has experience working with clients to address the employee benefits issues that arise within the context of mergers, acquisitions, restructurings, reductions in force, and other corporate transactions. He has drafted and negotiated transaction document provisions relating to employees and employee benefits plans; drafted employment, severance, retention, change in control, and other agreements and plans; advised clients on 280G "golden parachute" issues; evaluated the impact of a particular transaction on the parties' employee benefits plans and revised existing employee benefits plans or established new plans to facilitate the parties' objectives; and worked with clients to identify and resolve issues impacting collectively bargained employee benefits plans.

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Marianne R. Yudes is an associate in Morgan Lewis's Employee Benefits and Executive Compensation Practice. Ms. Yudes's practice encompasses all areas of employee benefits law and executive compensation, with a particular focus on vendor practice; 403(b), IRA, and other master/prototype products; pension/welfare and other plan investments and services; and fiduciary compliance.

Ms. Yudes advises a wide array of leading vendors of financial products and services regarding emerging legal issues and key industry concerns pertaining to retirement plan products and services, such as the investment of plan assets, revenue sharing, retention of float, fee rebate and disclosure issues, delivering participant investment advice, compliance with ERISA section 404(c), and electronic delivery. She provides support services to financial institutions for 403(b) plan, traditional/Roth IRA, and other "retail" products, such as SEPs, SIMPLEs, and CESAs, including preparation and maintenance of account applications and agreements, disclosure statements, and other account documentation; obtaining nonbank custodial approvals; coordinating the acquisition, merger, and transfer of custodians; and navigating complex reporting and filing issues, transfer agency and customer service issues, investments in alternative vehicles, and prohibited transaction issues.

She drafts and negotiates agreements in connection with single- and multiemployer plan investments, including investment management and agreements for investment-related services, such as trust, transition management, securities lending, commission recapture, directed brokerage, trust and custody services, and third-party administration. She provides analysis and advice to plan sponsors as to fiduciary structure and committee membership, appropriate delegation of authority and oversight responsibilities, and other fiduciary "best practices." She also provides guidance and educational seminars as to ERISA fiduciary duties and responsibilities, prohibited transaction exemptions and corrections, the provision of investment advice and participant education, the payment of plan expenses, and reporting and disclosure requirements.

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