

THE FINAL RULE FOR 408(B)(2) - FEE DISCLOSURES

Feb 03, 2012

Yesterday, the Department of Labor (“DOL”) issued the [final rule](#) on the disclosures that a covered service provider must furnish to a plan fiduciary in order for a contract or arrangement for services for a covered plan to be “reasonable” as required under ERISA §408(b)(2). These fee disclosure requirements become effective July 1, 2012 and apply not only to service contracts and arrangements entered into on or after that date but existing contracts and arrangements entered into prior to July 1, 2012.

For those of you who remember in detail the disclosure requirements under the interim rules issued in July, 2010, the DOL has posted an [overview](#) of the changes from the interim final rule its website. For everyone else, the disclosure requirements under the final rule are briefly described below.

Covered Plans

The final rule generally applies to ERISA-covered defined benefit and defined contribution pension plans. However, simplified employee pension plans, simple retirement accounts, individual retirement accounts, individual retirement annuities and certain Keogh plans and 403(b) annuity contracts and custodial accounts are excluded.

Covered Service Providers

Disclosure is required in the case of a service provider who enters into a contract or arrangement with the covered plan and reasonably expects to receive at least \$1,000 in direct or indirect compensation in connection with the provision of services in one or more of the following categories:

- Services as an ERISA fiduciary or as an investment advisor registered under either the Investment Advisors Act of 1940 or any state law.
- Recordkeeping or brokerage services to an individual account plan that permits participant-directed investments, if one or more designated investment alternatives will be made available in connection with such recordkeeping or brokerage services.

- Accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, third-party administration or valuation services to the covered plan when the provider (or an affiliate or subcontractor) reasonably expects to receive indirect compensation or certain payments from related parties.

The fee disclosure requirements continue to apply to a service provider even if some or all of the covered services are performed by affiliates or subcontractors.

Required Information for Disclosure

Reasonably in advance of entering into, or extending or renewing the services contract or arrangement, the covered service provider must furnish the following information in writing to the responsible plan fiduciary:

- a description of all services to be provided (including services that will be performed by affiliates and subcontractors);
- a statement that the service provider, an affiliate or subcontractor will provide, or reasonably expects to provide services as a fiduciary, within the meaning of ERISA § 3(21), if applicable;
- a statement that the service provider, an affiliate or subcontractor will provide, or reasonably expects to provide services as an investment advisor registered under the Investment Advisors Act or State law, if applicable;
- comprehensive information about the direct and indirect compensation that will be received in connection with the provided services;
- a description of any compensation that will be paid among the service provider, an affiliate or a subcontractor that are set on a transaction basis or are charged directly against the covered plan's investment and reflected in the net value of the investment, identification of the services for which such compensation is paid and the identity of the payers and recipients of such compensation (including the status of the payer or recipient as an affiliate or a subcontractor);
- a description of any compensation that the service provider, an affiliate or a subcontractor reasonably expects to receive in connection with the termination of the contract or arrangement and how any prepaid amounts will be calculated and refunded upon such termination; and
- a description of the manner in which any of the above-listed compensation will be received (e.g., covered plan will be billed or the compensation deducted directly from the covered plan's accounts or investments).

The following additional disclosures are required depending on the category of services to be provided to the covered plan:

- *Recordkeeping Services*. A description of all direct and indirect compensation that the service provider, an affiliate or a subcontractor reasonably expects to receive in connection with the recordkeeping services. If the service provider reasonably expects recordkeeping services to be provided, in whole or in part, without explicit compensation for such services, or when compensation for recordkeeping services is offset or rebated based on other compensation received by the service provider, an affiliate or a subcontractor, the covered service provider must furnish a reasonable and good faith estimate of the cost to the plan of such recordkeeping services, including an explanation of the methodology and assumptions used to prepare the estimate and a detailed explanation of the recordkeeping services that will be provided.
- *Fiduciary Services*. A description of (1) any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, transfer of, or withdrawal from the investment contract, product, or entity (e.g., sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees); (2) the annual operating expenses (e.g., expense ratio) if the return is not fixed; (3) any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees), or for an investment contract, product or entity that is a designated investment alternative, the total annual operating expenses expressed as a percentage and any other information or data about the designated investment alternative that is within the control of, or reasonably available to, the covered service provider and that is required for the administrator of the covered plan to comply with its participant-level disclosure obligations
- *Recordkeeping and Brokerage Services*. If one or more designated investment alternatives will be made available in connection with the recordkeeping or brokerage services, the covered service provider must furnish the same information described above with respect to fiduciary services for each such designated investment fund alternative.

The final rule does not require a specific format for providing the required disclosure; however, the DOL expressed its intent to publish a Notice of Proposed Rulemaking under which service providers may be required to furnish a guide or similar tool with the initial disclosures. To encourage service providers to provide a guide or index to the disclosures, the final rule includes a “sample guide”.

Changes in Reported Information and Disclosure Errors

A covered service provider generally must disclose changes to the previously disclosed information as soon as practicable, but not later than 60 days from the date on which the service provider is informed of such changes. The final rule provides a compliance alternative for changes to

investment information. Rather than furnishing notification of a change within 60 days, the service provider must, at least annually, disclose any changes to the investment information.

If a covered service provider makes a good-faith error or omission in disclosing the required information, the service provider must disclose the correction information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

Prohibited Transaction Exemption Available

If a prohibited transaction occurs because the covered service provider does not make the required disclosure, and the plan fiduciary did not have reason to know of the failure and reasonably believed that the service provider disclosed the information, prohibited transaction relief is afforded to the plan fiduciary if: (1) the plan fiduciary makes a written request for information from the service provider, and (2) if the service provider does not respond within 90 days, the plan fiduciary reports the service provider to the DOL within 30 days of the earlier of the 90th day following the request or the 30th day following the service provider's refusal. No prohibited transaction relief is available for the covered service provider.

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