

CLIENT BULLETIN

Covered Service Provider Fee Disclosures and Participant Fee Disclosures Compliance Dates Pushed Back

In [Client Bulletin 2012-05](#) we reported on the *Service Provider Fee Disclosures* and the *Participant Fee Disclosures*.

- Service Provider Fee Disclosures (*aka* "408(b)(2) disclosures") [Benefit News Briefs 2010-81](#); [Benefit News Briefs 2011-44](#); [Client Bulletin 2012-05](#)
- Participant Fee Disclosures (*aka* "404(c) disclosures") [Benefit News Briefs 2010-75](#); [Special Bulletin 2011-07](#); [Benefit News Briefs 2011-44](#); [Client Bulletin 2012-05](#)

Since that time the Department of Labor (DOL) announced a *Final Regulation* for the *Service Provider Fee Disclosures* will be published shortly and the compliance date of April 1, 2012 has been pushed back to July 1, 2012. Service providers not in compliance as of July 1, 2012, will be subject to the prohibited transaction rules of *ERISA* Section 406 and Internal Revenue Code Section 4975 penalties.

Pushing back the *Service Provider Fee Disclosures* in turn pushes back the compliance date for the *Participant Fee Disclosures*.

For calendar year plans, the initial annual *Participant Fee Disclosures* of "*plan-level*" and "*investment-level*" information (including associated fees and expenses) must be furnished no later than August 30, 2012 (i.e., 60 days after the 408(b)(2) regulation's July 1 effective date). The *first quarterly statement* must then be furnished no later than November 14, 2012 (i.e., 45 days after the end of the third quarter (July through September), during which initial disclosures were first required. This quarterly statement only needs to reflect the fees and expenses actually deducted from the participant or beneficiary's account during the July through September quarter related to the statement.

See [Benefit News Briefs 2010-75](#) for detailed information about the participant fee disclosure requirements.

Service Provider Fee Disclosure

Below is an *Overview of the Final Regulation*. A *List of Changes* in the *Final Regulation* compared to the prior *Interim Final Regulation* issued on July 16, 2010 is available by "[clicking here](#)." The *Final Regulation* is available by "[clicking here](#)." The following discussion is drawn from the DOL explanation of the *Final Regulation*.

Overview of Final Regulation

The *Final Regulation* requires covered service providers to provide responsible fiduciaries with information they need to:

- Assess reasonableness of total compensation, both direct and indirect, received by the covered service providers, its affiliates, and/or subcontractors;
- Identify potential conflicts of interest; and
- Satisfy reporting and disclosure requirements under Title I of *ERISA*.

The *Final Regulation* applies to *ERISA*-covered defined benefit and defined contribution pension plans. It does not apply to simplified employee pension plans (SEPs), SIMPLE retirement accounts, IRAs, and certain annuity contracts and custodial accounts described in Internal Revenue Code Section 403(b).

The *Final Regulation* does **not** apply to *employee welfare benefit plans*. The DOL intends to separately publish proposed disclosure requirements for welfare benefit plans in the future.

The *Final Regulation* applies to covered service providers who expect at least \$1,000 in compensation to be received for services to a covered plan:

- *ERISA* fiduciary service providers to a covered plan or to a "*plan asset*" vehicle in which such plan invests;
- Investment advisers registered under Federal or State law;
- Record-keepers or brokers who make designated investment alternatives available to the covered plan (e.g., a "*platform provider*");
- Providers of one or more of the following services to the covered plan who also receive "*indirect compensation*" in connection with such services:
 - Accounting, auditing, actuarial, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities brokerage, third party administration, or valuation services.

Plan service providers who DO NOT perform one of the enumerated services or DO NOT receive any indirect compensation DO NOT have any disclosures to make, although it is not uncommon for pension plans to ask all of their service providers to sign a statement that they do not perform such services or do not receive indirect compensation, etc.

The *Final Regulation* includes a class exemption from the prohibited transaction provisions of *ERISA* for responsible plan fiduciaries that enter into service contracts without knowing that the covered service provider (CSP) has failed to comply with its disclosure obligations. The class exemption requires that fiduciaries notify the Department of the disclosure failure. Fiduciaries can file the notice online at www.dol.gov/ebsa/regs/feedisclosurefailurenotice.html.

Disclosure Requirements

Disclosure of Services and Compensation

Information required to be disclosed by a CSP must be furnished in writing to a responsible plan fiduciary for the covered plan. The *Final Regulation* does not require a formal written contract delineating the disclosure obligations.

CSPs must describe the services to be provided and all direct and indirect compensation to be received by a CSP, its affiliates, or subcontractors.

"*Direct compensation*" is compensation received directly from the covered plan. "*Indirect compensation*" generally is compensation received from any source other than the plan sponsor, the CSP, an affiliate, or subcontractor.

In order to enable a responsible plan fiduciary to assess potential conflicts of interest, CSPs who disclose "*indirect compensation*" also must describe the arrangement between the payer and CSP pursuant to which indirect compensation is paid. CSPs must identify the sources for indirect compensation, plus services to which such compensation relates.

Compensation disclosures by CSPs will include allocations of compensation made among related parties (i.e., among a CSP's affiliates or subcontractors) when such allocations occur as a result of charges made against a plan's investment or are set on a transaction basis.

CSPs must disclose whether they are providing recordkeeping services and the compensation attributable to such services, even when no explicit charge for recordkeeping is identified as part of the service "*package*" or contract.

Some CSPs must disclose an investment's annual operating expenses (e.g., expense ratio) and any ongoing operating expenses in addition to annual operating expenses. For *participant-directed individual account plans*, such disclosures must include "*total annual operating expenses*" as required under the new participant-level disclosure regulation at 29 CFR Section 2550.404a-5.

The *Final Regulation* contains a "*pass-through*" for investment-related disclosures furnished by recordkeepers or brokers. A CSP may provide current disclosure materials of an unaffiliated issuer of a designated investment alternative, or information replicated from such materials, provided that the issuer is a registered investment company (i.e., mutual fund), an insurance company qualified to do

business in a State, an issuer of a publicly-traded security, or a financial institution supervised by a State or Federal agency.

Service providers *may* use electronic means to disclose information under the 408(b)(2) regulation to plan fiduciaries provided that the CSPs disclosures on a website or other electronic medium are readily accessible to the responsible plan fiduciary, and the fiduciary has clear notification on how to access the information.

Summary or Guide to Initial Disclosures

The DOL **strongly encourages** CSPs to offer responsible plan fiduciaries a "*guide*," summary, or similar tool to assist fiduciaries in identifying all of the disclosures required under the *Final Regulation*, particularly when service arrangements and related compensation are complex and information is disclosed in multiple documents.

The DOL has included a *Sample Guide* as an appendix to the *Final Regulation* that can be used on a voluntary basis by CSPs as a model for such a guide.

In the near future the DOL intends to publish a notice of proposed rulemaking under which covered service providers may be required to furnish a guide or similar tool to assist responsible plan fiduciaries' review of initial disclosures.

Ongoing Disclosure Obligations

- **Changes:** Generally, CSPs must disclose changes to initial information as soon as practicable, but no later than 60 days from when the CSP is informed of such change. Disclosures of changes to investment-related information are to be made *at least annually*.
- **Reporting and Disclosure Requirements:** Service providers must disclose compensation or other information related to their service arrangements upon the request of the responsible plan fiduciary or plan administrator, reasonably in advance of the date upon which such person states that they must comply with *ERISA's* reporting and disclosure requirements.

Disclosure Errors

The *Final Regulation* allows for timely corrections of an error or omission in required disclosures when a CSP is acting in good faith and with reasonable diligence. Such corrections must be made not later than 30 days from the date that the CSP knows of the error or omission.

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