

# Now's the Time For Plan Sponsors to Prepare for Implementation of New DOL Fee Disclosure Regulations

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First, the good news: in July, the Department of Labor extended the deadlines for complying with new retirement plan fee disclosure regulations.

The bad news is that the extended deadlines are right around the corner.

## April 1, 2012 Deadline for Service Provider Fee Disclosures

By no later than April 1, 2012, covered service providers for ERISA pension and 401(k) plans must provide plan fiduciaries with specific information on fees and expenses. If a covered service provider fails to comply, the provider's contract or arrangement with the plan may be considered a prohibited transaction under ERISA and the Internal Revenue Code – even if the fees and expenses are otherwise reasonable.

Although the covered service provider is the party responsible for satisfying the service provider fee disclosure rules, the consequences of noncompliance are shared with the plan fiduciary responsible for causing the plan to enter into the arrangement (in most cases, this is the employer).

This means, for example, that the employer sponsoring the plan may be liable for prohibited transaction excise taxes on account of the service provider's failure to provide required disclosures.

An employer or other fiduciary responsible for causing a retirement plan to enter into an arrangement can insulate itself from the prohibited transaction risk. The regulations exempt a fiduciary from prohibited transaction penalties if the fiduciary does not know that the service provider has failed to comply, provided that the fiduciary reasonably believes that the service provider has disclosed the required information and the fiduciary takes certain other steps promptly upon discovering the failure.

Practically speaking, employers should take the following steps in preparation for the April 1, 2012 deadline:

- Identify plans that are subject to the new rules (generally, any funded pension, profit sharing, 401(k) or 403(b) plan subject to ERISA);
- Identify all of the fiduciaries for each covered plan;
- Identify service providers for each plan (including record keepers, accountants, actuaries, investment advisors, custodians, etc.), and confirm which providers are covered by the new rules;
- Ask covered service providers to confirm what they will be doing to comply, and when; and
- Implement procedures for the appropriate fiduciary to review service provider disclosures to make sure they comply with the regulations, to document the review process, and to take appropriate actions (as prescribed by the regulations) when noncompliance is suspected.

Employers also need to remember that the new rules are in addition to the general fiduciary duty to exercise prudence in the selection and monitoring of service providers, and in making sure

that fees paid by a retirement plan are reasonable. Plan fiduciaries will need to take the new service provider fee disclosures into account in determining whether fees and expenses are competitive given the nature and quality of the services.

## Don't Forget the New Participant Fee Disclosure Rules

The Department of Labor has issued a separate set of regulations imposing new participant disclosure rules for 401(k), 403(b) and other ERISA plans with participant-directed investments. For calendar year plans, initial disclosures must be provided to participants by May 31, 2012. Our next alert will discuss these rules.



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