

DOL Further Delays Service Provider and Participant Fee Disclosure Deadlines

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The U.S. Department of Labor (DOL) recently extended the deadlines for two major disclosure rules: the service provider fee disclosure rule and the participant fee disclosure rule. The service provider regulation requires covered service providers to disclose certain fee information to retirement plan fiduciaries. The participant regulation requires most 401(k) and other defined contribution plans to disclose certain fee and expense information to any eligible employee. Plan participants must also receive a quarterly accounting of what fees and expenses were actually deducted from an individual participant's account.

Under these extensions, service providers have until April 1, 2012, to provide fee disclosures to plan fiduciaries, and calendar year plans will have until May 31, 2012, (60 days after the service provider disclosure due date) to provide fee disclosures to participants. In addition, plans will have until August 14, 2012, (a 45-day grace period) to provide the first quarterly disclosure to participants regarding fees and expenses actually deducted from an individual participant's account during the relevant quarter. Note that different timing rules apply for plans with non-calendar plan years.

Background: The Service Provider Fee Disclosure Rule

As previously described in our August 23, 2010, [newsletter](#), the service provider regulation requires covered service providers to disclose information to assist plan fiduciaries in assessing the reasonableness of the service provider's compensation and potential conflicts of interest. The regulation applies to pension, 401(k), 403(b) and other retirement plans.

The rule defines "covered service providers" as any service provider that enters into a contract or arrangement with a covered plan and reasonably expects to receive at least \$1,000 (paid to the provider, its affiliates or a subcontractor) in direct or indirect compensation in connection with providing one or more of the following:

- Services provided by fiduciaries
- Recordkeeping or brokerage services involving participant-directed plans
- Certain other services such as accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, third-party administration or valuation services, for which the service provider reasonably expects to receive either “indirect compensation” (*i.e.*, compensation received from any source other than the plan, the plan sponsor, the service provider, an affiliate or a subcontractor) or “compensation received among related parties,” such as transaction-based compensation or charges against the net value of a plan’s investment as part of a bundled service arrangement

Covered service providers must provide plans with a description of the services provided to the plan, a description of direct compensation and indirect compensation that the service provider reasonably expects to receive, a description of compensation paid among related parties (including bundled service arrangements) and a reasonable estimate of unbundled stand-alone recordkeeping services.

Under the DOL extension, initial disclosures must be provided by April 1, 2012. Thereafter, disclosures must generally be made reasonably in advance of the date an arrangement is entered into, extended or renewed. Changes must also be disclosed as soon as practicable, but not later than 60 days from the date the covered service provider is informed of the change.

Background: The Participant Fee Disclosure Rule

As previously described in our November 5, 2010, [newsletter](#), the participant regulation requires plan administrators to make significant disclosures to individuals participating in 401(k), 403(b) and other defined contribution plans that have participant-directed investments. Participants, as well as employees who are eligible to participate, must receive two major categories of information: “plan-related information” and “investment-related information.”

The rule specifies three types of plan-related information:

1. *General information*, including an explanation of the circumstances under which participants may give investment instructions, identification of the investment options under the plan, an explanation of any limitations on investment rights, including transfer restrictions, a description of any voting, tender or similar rights associated with investment options under

the plan, identification of any designated investment managers and a description of any self-directed brokerage accounts available under the plan

2. *Administrative expense information*, including a description of any general fees or expenses that will be charged against an individual's account during the plan year, which are not otherwise reflected in the investment option operating expenses
3. *Individual expense information*, including a description of any individualized fees or expenses for plan loan processing or other services that may be charged against an individual's account during the plan year.

The rule defines investment-related information to include a host of data, such as the name and type of each investment option available under the plan, the average annual rate of return for investment options that do not bear a fixed rate of return, fee and expense information, and a glossary of financial and investment returns. Further, the participant disclosure rule requires that investment-related information be distributed to participants in a chart or other comparative format that facilitates comparison among investment options.

Generally, plan administrators must provide both plan-related and investment-related information on or before the date the eligible employee can first direct his investments under the plan. However, under the DOL extension, the first disclosure is not required until 60 days after the effective date of the service provider fee disclosure rule. Therefore, calendar year plans have until May 31, 2012, to provide the initial disclosure. Thereafter, annual plan-related and investment-related general disclosures must be made to all participants, as well as employees who are eligible but do not participate in the plan. Under the DOL extension, plan administrators have until August 14, 2012, to start providing quarterly accountings of fee and expense deductions to individual participants.

Electronic Disclosure

The DOL has announced that participant fee disclosures may be provided using electronic media, relying on the Internal Revenue Service's 2006 electronic disclosure rules, which provide more flexibility than the DOL's 2002 electronic disclosure rules. The DOL has indicated that it intends to propose revised electronic disclosure rules later in the year, and that it will issue transitional guidance on electronic delivery in the next few weeks.

Sample Service Provider Disclosure Checklist for Plan Administrators

1. Make a listing of all service providers and identify which ones qualify as covered service providers required to provide disclosures.
2. Develop a project plan to confirm all disclosures are received and presented to plan fiduciaries.
3. Confirm that all covered service providers have furnished reports and that the reports contain sufficient detail to enable the plan fiduciaries to assess the reasonableness of the compensation. If a covered service provider fails to provide the disclosure, or sufficient detail in the disclosure, the responsible fiduciary must notify the provider, consider terminating the arrangement or even notify the DOL.
4. Plan fiduciaries must review disclosures and consider whether fees are competitive for the quality of service provided.
5. Consider whether a request for proposal (RFP) or request for information (RFI) should be issued to compare service providers.
6. Determine whether service provider fee structure and agreement terms should be renegotiated.
7. Memorialize the service provider review process and maintain adequate documentation of the review process.

Sample Participant Fee Disclosure Checklist for Plan Administrators

1. Identify all plans for which participant disclosures must be provided.
2. Review eligibility and participation rules under each plan.
3. Identify eligible employees who do not participate in the plans.
4. Determine whether disclosures will be provided by recordkeeper or plan administrator, including how eligible employees who do not participate in the plan will receive disclosures.
5. Review service provider disclosures to incorporate relevant information that needs to be included in the participant-level fee disclosures.

6. If the plan has multiple vendors, develop process to compile relevant information.
7. Determine whether fee disclosures will be provided with other participant documents (summary plan descriptions, newsletters).
8. Consider whether to provide participant education services in connection with initial participant-level disclosure.
9. If disclosures are transmitted electronically to participants, confirm compliance with IRS electronic disclosure regulation, which requires that participants have effective ability to access the electronic medium and are advised that they can request a paper copy of the disclosure for free.

Notwithstanding the deadline extensions, plan administrators would be well-advised to familiarize themselves with these disclosure requirements and to begin developing their compliance plans.

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