




## EMPLOYEE BENEFITS UPDATE

March 2012

### Department of Labor Issues Final Fee Disclosure Regulation for Qualified Plans

On February 2, 2012, the Department of Labor's Employee Benefits Security Administration (EBSA) issued final regulations relating to the disclosure of information by those who provide services to certain employee benefit plans. These regulations, which are referred to below as the "Service Provider Fee Disclosure Regulations," represent the final piece of the EBSA's two-pronged effort to improve the disclosure of pertinent information to both plan fiduciaries and plan participants. The second prong, the Participant Disclosure Regulations, was finalized on October 14, 2010. The final Service Provider Fee Disclosure Regulation reflects certain changes to the interim final rule that was published in the Federal Register on July 16, 2010.

#### The key changes to the modified Service Provider Fee Disclosure Regulation include:

- An extension of the effective date from April 1, 2012 to July 1, 2012.
- An exclusion for certain Code Section 403(b) contracts and custodial accounts.
- The expansion of the information that must be disclosed concerning a covered service provider's receipt of indirect compensation to include a description of the arrangement between the payer and the service provider pursuant to which the compensation will be paid.
- A placeholder for the future development of provisions that would require the covered service provider to separately furnish a guide or similar tool designed to enable the responsible plan fiduciary to locate compensation information disclosed through multiple or complex documents. The Department has included a Sample Guide as an appendix to the final rule to encourage service providers to assist plan fiduciaries with their review of required disclosures.
- A modified definition of compensation allowing for a reasonable and good faith estimate of compensation or cost if the covered service provider cannot otherwise readily describe the compensation or cost.
- The requirement that if a covered service provider fails to comply with a written request for information related to future service within 90 days, the responsible plan fiduciary must

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terminate the service arrangement.

Under the final Service Provider Fee Disclosure Regulations, plan service providers must provide certain information to plan fiduciaries by July 1, 2012. For calendar year plans, plan fiduciaries then must provide certain information to plan participants by August 30, 2012 (i.e., 60 days after the Service Provider Fee Disclosure Regulation's July 1, 2012 effective date). The first quarterly statement must then be furnished to plan participants 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 needs to only reflect the fees and expenses actually deducted from the participant's or beneficiary's account during the July through September quarter to which the statement relates.

#### **Service Provider Fee Disclosure Regulations**

The Service Provider Fee Disclosure Regulations apply to employee pension benefit plans (including Section 401(k) plans), other than simplified employee pension plans, simple retirement accounts and IRAs. The final regulations also provide relief for certain frozen 403(b) contracts. The regulations require "covered service providers" to provide advance disclosure of their compensation and fees to plan fiduciaries.

"Covered service providers" include plan fiduciaries and other service providers offering covered services to the plan who reasonably expect to receive \$1,000 or more in direct or indirect compensation. Covered services include generally:

- Services provided as a fiduciary to the plan (or to an investment product that is a "plan asset").
- Services provided as an investment adviser.
- Recordkeeping services or brokerage services if:
  - The plan is an individual account plan;
  - Participants are allowed to direct the investment of their accounts; and
  - One or more designated investment alternatives will be made available in connection with the services.

If the service provider (or an affiliate or a subcontractor) reasonably expects to receive indirect compensation or share compensation with related parties, covered services also generally include the following:

- Accounting
- Investment advisory (for plan participants)
- Actuarial
- Legal
- Auditing
- Recordkeeping
- Banking
- Securities or other investment brokerage
- Consulting
- Third-party administration
- Custodial valuation
- Insurance

*The regulations require a covered service provider to make significant written disclosures to a responsible plan fiduciary. The*

***Service Provider Regulations Checklist*** provides a listing of some of the more significant disclosures that must be provided to the responsible plan fiduciary.

#### **Participant Disclosure Regulations**

The Participant Disclosure Regulations call for two types of disclosures: (1) plan-related disclosures and (2) investment-related disclosures.

##### *(1) Plan-Related Disclosures*

Three categories of plan-related information must be provided to participants: (A) general plan information, (B) information regarding administrative expenses and (C) information regarding individual expenses. The initial disclosures of plan-related information must be provided to each participant or beneficiary on or before the date on which the participant becomes eligible to participate in the plan and annually thereafter. It is permissible to provide this information in a summary plan description, but depending on how often the summary plan description is updated and published, it may not be the best method for providing these disclosures.

If there is a change in the plan-related disclosures, the updated information must be provided at least 30 days, but no more than 90 days, in advance of the effective date of the change, unless there were unforeseeable circumstances or events beyond the plan administrator's control. In such cases, the information must be provided as soon as reasonably practicable.

The Participant Disclosure Regulations apply to individual account plans for plan years beginning on or after November 1, 2011. The initial annual disclosure is due 60 days after the later of: (1) July 1, 2012, or (2) the date the regulations apply (i.e., plan years beginning on or after November 1, 2011).

***The Participant Disclosure Regulations Checklist*** provides more detail regarding the type of plan-related disclosures that are required.

##### *(2) Investment Related Disclosures*

###### *(A) Automatic Disclosures*

Plan administrators also are required to automatically provide certain information to participants before they are permitted to direct their investments and at least annually thereafter. The required information includes information identifying the designated investment alternatives, performance data, benchmarking information and fee and expense information. The **Participant Disclosure Regulations Checklist** provides additional detail regarding the required disclosures.

The investment disclosures must be provided in a comparative format, such as a chart or similar format to facilitate a comparison of each investment alternative. The Department of Labor has provided a model chart that is available on its website.

###### *(B) Information Provided Subsequent to Investment*

The plan administrator must furnish certain information to each investing participant or beneficiary subsequent to an investment in a designated investment alternative. The required disclosures include any materials provided to the plan relating to the exercise of voting, tender and similar rights, to the extent such rights are passed through to such participant or beneficiary under the terms of the plan.

###### *(C) Information to be Provided Upon Request*

As detailed on the **Participant Disclosure Regulations Checklist**, certain additional information also must be provided on request.

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