

February 13, 2012

DOL Finalizes ERISA Disclosure Requirements for Retirement Plan Service Providers

On February 2, 2012, the Department of Labor (DOL) published “[final final](#)” regulations on the new disclosure and related requirements under ERISA for certain service providers to retirement plans. The DOL previously issued “[interim](#)” [final regulations](#) on July 16, 2010, which were [proposed in December 2007](#).



The following chart summarizes the new disclosure requirements and highlights changes from the interim final regulations.

Disclosure Requirements for Retirement Plan Service Providers							
Effective Date	First day of first plan year beginning on or after 11/1/2011						
	11/1/11	1/1/12	4/1/12	7/1/12	10/1/12		
Service provider disclosure	7/1/12					←	The effective date for the plan-level service provider disclosure was delayed three months, resulting in a correlative delay for the new participant-level disclosures.
Initial participant disclosure	8/30/12			11/30/12			
First quarterly participant disclosure	11/14/12			2/14/13			
Who is Affected	<p>As described more fully below, the following service providers to covered retirement plans must provide the specified disclosures to responsible fiduciaries for covered plans:</p> <ul style="list-style-type: none"> ▪ ERISA fiduciaries, and investment advisers registered under either the Investment Advisers Act of 1940 or any state law, that provide services directly to certain types of retirement plans. ▪ ERISA fiduciaries that provide services to “plan asset” vehicles in which a covered plan holds a direct equity interest. ▪ Recordkeepers and brokers for participant-directed individual account plans, if one or more designated investment alternatives will be made available in connection with those services. ▪ Service providers that do or may receive “indirect compensation or fees” in connection with enumerated types of services provided to a covered plan. <p>Exception: Unless the reasonably expected compensation for services is less than \$1,000.</p>						
Types of Covered Plans	<ul style="list-style-type: none"> ▪ Service arrangements with 401(a)/401(k) retirement plans and certain 403(b) plans subject to ERISA except for: <ul style="list-style-type: none"> ○ Annuity contracts and custodial accounts under 403(b) plans which were issued to affected employees before January 1, 2009, where the sponsoring employer ceased making contributions, where rights or benefits of the individual owners of the contracts or accounts are enforceable against the issuer or custodian without employer involvement, and where such individual owners are fully vested in benefits provided under the contract or account. 					←	DOL added an exception for “frozen” 403(b) plans because plan sponsors and fiduciaries often have no dealings with the relevant service providers.

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	<ul style="list-style-type: none"> Service arrangements with the following plans are not covered: IRAs, SEPs, simple retirement accounts, and other plans not subject to Title I of ERISA. Also, these rules do not apply to welfare plans like group life insurance and health plans; instead, a portion of the regulation has been reserved to provide future guidance on disclosure obligations with respect to welfare plans. 	 <p>Particularly in the micro 401(a) and the 403(b) plan markets, tracking when a plan is or is not subject to ERISA presents a serious compliance challenge.</p>
<p>Category A of Covered Service Providers: ERISA Fiduciaries and Registered Investment Advisers</p>	<p>Includes a fiduciary under ERISA or an investment adviser registered under either the Investment Advisers Act of 1940 or any state law. This category includes:</p> <ul style="list-style-type: none"> ERISA fiduciaries and/or registered investment advisers providing services directly to the covered plan, and ERISA fiduciaries providing services to an investment contract, product or entity that holds “plan assets” (within the meaning of the usual ERISA definition) and in which the covered plan has a direct equity investment (“Investment Vehicle Covered Providers”). <p>The following service providers to investment vehicles are <i>not</i> covered service providers:</p> <ul style="list-style-type: none"> Non-fiduciary service providers to investment vehicles, regardless of whether such vehicles hold plan assets within the meaning of ERISA §§ 3(42) and 401 and DOL Reg. § 2510.3-101; Service providers to non-plan asset vehicles (e.g., mutual funds, real estate operating companies, venture capital operating companies and funds in which benefit plan investors own less than 25% of each class of equity interests); and Service providers to investment vehicles, including plan asset vehicles, if the covered plan holds only an indirect equity interest in the vehicle. Like the interim final regulation, the final final regulation thus distinguishes between the investment vehicle in which a covered plan directly invests and any underlying investments. <p>Comment: Other than as described above, affiliates or subcontractors of covered service providers are not themselves covered service providers, nor are service providers to investment vehicles.</p>	
<p>Category B of Covered Service Providers: Recordkeepers and Brokers for Individuals for Individual Account Plans</p>	<p>Providers of recordkeeping (defined in the regulation) or brokerage (undefined) services to a covered, participant-directed individual account plan (e.g., most 401(k) plans) are treated as covered service providers if they offer, as part of their agreement or arrangement with the plan, one or more designated investment alternatives, such as a platform of investment options (“Recordkeeper/Broker Covered Providers”).</p>	 <p>The preamble specifies that covered service providers include recordkeepers for “off-platform” investments which are separately selected by the plan fiduciary.</p>
<p>Category C of Covered Service Providers: Certain Service Providers Receiving Indirect Compensation</p>	<p>Covered service providers include any service provider that (itself or an affiliate or a subcontractor) does or reasonably expects to receive indirect compensation in connection with accounting, auditing, actuarial, appraisal, banking, consulting (related to the development or implementation of investment policies or the selection or monitoring of service providers or plan investments), custodial, insurance, investment advisory (plan or participant), legal, recordkeeping, securities or other investment brokerage, third-party administration, and/or valuation services. The preamble clarifies that investment advisers thus may be covered service providers under either Category A (registered investment advisers receiving direct or indirect compensation) or Category C (investment advisers, whether or not registered, that reasonably expect to receive compensation that is indirect or paid from related parties).</p>	

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<p>Disclosure Requirements</p>	<p>Under the final final regulation, a covered service provider to a covered plan must include the following information in a written disclosure to responsible plan fiduciaries:</p> <ul style="list-style-type: none"> ▪ A description of all of the services provided by a covered service provider (although apparently, not including non-fiduciary services to investment vehicles) to be provided to the plan. The level of detail required to satisfy this obligation will depend on the nature of the services and the individual needs of the responsible plan fiduciaries. ▪ The compensation reasonably expected to be received by the covered service provider, its affiliate or a subcontractor for each service. “Compensation” is defined broadly to include money or any other thing of monetary value. The covered service provider may express compensation as a formula, asset charge, or per capita charge so long as the description permits the plan fiduciary to evaluate the reasonableness of the compensation. The final final regulation identifies four categories of compensation that must be disclosed: <ul style="list-style-type: none"> ○ Direct compensation, expressed either by service or in the aggregate (except for recordkeeping services, as provided below); ○ Indirect compensation, including identification of the services for which the indirect compensation will be received by the covered service provider (or its affiliate or subcontractor), identification of the payer and the services for which that indirect compensation is received, and a description of the arrangement between the payer and the covered service provider (or its affiliate or subcontractor) pursuant to which such indirect compensation is paid; ○ Compensation that will be paid among the covered service provider, an affiliate, or a subcontractor if such compensation is set on a transaction basis (e.g., commissions, soft dollars, finder’s fees) or is charged directly against the plan’s investment and reflected in the net value of the investment (e.g., 12b-1 fees). The service provider must identify the services for which such compensation will be paid, as well as the payers and recipients of such compensation; and ○ Compensation that the covered service provider, an affiliate or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination. ▪ If recordkeeping services are bundled with other services, a separate description of the cost of the recordkeeping services. This is the only “unbundling” requirement in the final final regulation; ▪ The manner of receipt of compensation, e.g., direct billing, deduction from plan accounts, or charge against plan investments; and ▪ If applicable, a statement that the service provider (or affiliate or 	<div data-bbox="1227 470 1528 590" style="border: 1px solid black; padding: 5px; margin-bottom: 20px;"> <p>The final final regulation requires disclosure of all services provided, not just covered services.</p> </div> <div data-bbox="1239 716 1539 856" style="border: 1px solid black; padding: 5px; margin-bottom: 20px;"> <p>A reasonable and good faith estimate is permitted if the compensation or cost cannot be otherwise readily described.</p> </div> <div data-bbox="1239 1024 1539 1236" style="border: 1px solid black; padding: 5px;"> <p>The description of the indirect compensation arrangement was expanded to help the plan fiduciary analyze why the payer is compensating the covered service provider and to evaluate conflicts.</p> </div>
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	<p>subcontractor) will or reasonably expects to provide services as a fiduciary within the meaning of ERISA and/or as a registered investment adviser under the Advisers Act or any state law.</p> <p>Additionally, an Investment Vehicle Covered Provider must disclose the following compensation information with respect to the investments for which they provide services (unless otherwise disclosed by a Recordkeeper/Broker Covered Provider as described below):</p> <ul style="list-style-type: none"> ▪ All sales loads, redemption fees and other compensation that will be charged directly against the plan's investment in connection with the acquisition or withdrawal of interests from the investment vehicle; ▪ The annual operating expenses of the investment vehicle and any ongoing expenses in addition to the annual operating expenses (such as wrap 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 calculation in accordance with Reg. § 2550.404a-5(h)(5); and ▪ For an investment contract, product, or entity that is a designated investment alternative, 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 covered plan administrator to comply with the disclosure obligations in Reg. § 2550.404a-5(d)(1). <p>A Recordkeeper/Broker Covered Provider has a comparable obligation for each designated investment option included in its service arrangement, but can satisfy that obligation (without liability for any errors) by providing the current disclosure materials of the investment issuer so long as:</p> <ul style="list-style-type: none"> ▪ The issuer is not an affiliate; ▪ The issuer is a registered investment company, and insurance company qualified to do business in any state, an issuer of a publicly traded security, or a financial institution supervised by a state or federal agency; and ▪ The covered provider, acting in good faith, does not know that the materials are incomplete or inaccurate and provides a statement that it makes no representations as to the completeness or accuracy of such materials. 	<p>These disclosures were revised to better conform to the investment-related information required pursuant to the participant-level disclosure regulation. This means, for example, that gross rather than net expense ratios must be provided.</p> <p>The disclosure materials of an affiliated issuer may be used to meet this requirement, but the covered service provider is responsible for their accuracy.</p> <p>DOL focuses on the issuer rather than requiring that disclosure materials be subject to federal or state regulation.</p> <p>The statement may be provided once in the service contract or arrangement, along with a description of the materials to which the statement applies.</p>
<p>Form of Disclosure</p>	<p>The final regulation reserves a place for future development of provisions that would require the covered service provider to separately furnish a guide or similar tool designated to enable the fiduciary to locate compensation information disclosed through multiple or complex documents. The preamble provided that DOL intends to publish a Notice of Proposed Rulemaking on the matter.</p>	<p>The final regulation includes a sample guide.</p>
<p>Timing of Disclosure</p>	<p>In the case of existing arrangements, disclosure must be provided by the July 1, 2012, effective date. Starting on that date, the required disclosures must be made reasonably in advance of the date that the service arrangement is entered into or renewed. For a new investment option, the information must be disclosed before the</p>	

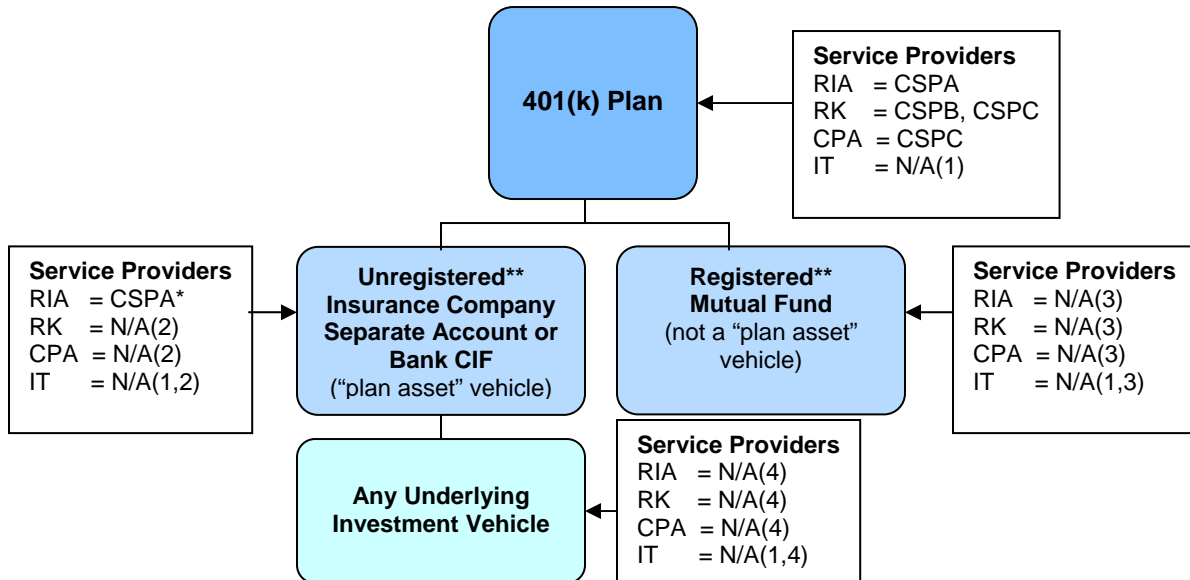
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	<p>investment is added to the plan. Two exceptions apply:</p> <ul style="list-style-type: none"> ▪ If an investment vehicle is a non-plan asset vehicle at the time the covered plan invests, but later becomes a plan asset vehicle while the plan still owns a direct equity interest, the Investment Vehicle Covered Provider must furnish the disclosure as soon as practicable but no more than 30 days after the date that it knows that the investment vehicle has become a plan asset vehicle. ▪ If an investment alternative is not a designated option at the time an arrangement with a participant-directed plan is entered into, a Recordkeeper/Broker Covered Provider must provide the required disclosure as soon as practicable but not later than the date the investment alternative is designated by the responsible plan fiduciary. <p>The covered service provider must disclose a change of investment-related information at least annually. Changes to other required information contained in the prior disclosure must be to a responsible plan fiduciary as soon as practicable, but generally no later than 60 days after acquiring knowledge of the change.</p>	<p>Changes to investment-related information now must be disclosed only annually, but all other changes, e.g., in indirect compensation arrangements, must be updated on a rolling 60-day basis. Consideration might be given to drafting disclosure, within the parameters of the rule, to minimize the circumstances in which updates are required.</p>
<p>Form 5500 Information</p>	<p>A covered service provider must provide all information related to the arrangement and compensation received thereunder that is requested by the responsible plan fiduciary or plan administrator to comply with ERISA reporting or disclosure requirements, reasonably in advance of the date upon which the responsible plan fiduciary or plan administrator states that it must comply with the applicable reporting or disclosure requirement. Among other things, this requirement closes the loop for the Schedule C initiative.</p>	<p>Previously, information was required to be provided within 30 days of receipt of the request; the change is intended to align the timing with existing reporting and disclosure standards rather than on the time that the responsible plan fiduciary requests the information.</p>
<p>Inadvertent Disclosure Errors</p>	<p>The final regulation provides that a contract or arrangement will not fail to qualify for § 408(b)(2) relief due to a covered service provider's error or omission in disclosing required information, so long as the covered service provider (i) acted in good faith and with reasonable diligence; and (ii) disclosed the correct information as soon as practicable, but no later than 30 days after it knew of such error or omission.</p>	<p>The final final regulation makes clear that disclosure of "changes" to information previously disclosed is covered by this "error disclosure" provision.</p>
<p>Class Exemption: Protection for Plan Fiduciaries</p>	<p>If the service provider does not comply with the disclosure requirements of the final regulation – thereby potentially creating personal legal exposure for the plan fiduciary responsible for that service arrangement, who is also relying on § 408(b)(2) for relief – the class exemption provides prohibited transaction relief for that fiduciary if:</p> <ul style="list-style-type: none"> ▪ The plan fiduciary did not know that the covered service provider failed or would fail to make the required disclosures, and reasonably believed that the covered service provider complied with its disclosure obligations; ▪ The plan fiduciary, upon discovering the failure, requests in writing that the service provider furnish the required information, if the plan fiduciary has not already received such information; ▪ The plan fiduciary notifies DOL if the service provider does not comply with the written request within 90 days. The interim final regulations provided a model form for this notification; and ▪ The plan fiduciary, upon discovery of the failure, makes a 	<p>The required termination after the 90-day period is new. The modifications are intended to emphasize that this area is governed by the § 404 prudence provisions.</p>

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	determination whether to terminate or continue the service arrangement. If the information relates to future services and is not disclosed promptly after the 90-day period, the plan fiduciary must terminate the service arrangement as expeditiously as possible.	
IRC § 4975	The final regulation clarifies that it applies, with respect to covered plans, for purposes of the parallel prohibited transaction rules under IRC § 4975. Thus, a covered service provider that fails to comply with the final regulation may be subject to applicable excise taxes under the Internal Revenue Code.	

Example of Covered Service Provider: By way of example, consider the differing status under the regulation of firms providing registered investment adviser (RIA), non-fiduciary recordkeeping (RK), non-fiduciary accounting (CPA) and non-fiduciary technology support (IT) services, depending, in part, on where they provide their services within the plan's investment structure.



* If a fiduciary **Under the Investment Company Act of 1940

CSPA	Category A covered service provider
CSPB	Category B covered service provider, if designated investment options are offered with the services
CSPC	Category C covered service provider, if indirect compensation is received
N/A	Service provider not required to provide disclosure
	(1) Not a covered service category
	(2) Services, while a covered category, are non-fiduciary and are not provided at the plan level
	(3) While a direct investment vehicle, treated as not holding "plan assets"
	(4) Not a direct investment vehicle



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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