

## ERISA Alert

Deadlines Approaching for Retirement Plan Sponsors Under New Fee Disclosure Regulations

May 22, 2012

Two deadlines for new rules affecting employee benefit plan fiduciaries and administrators are fast approaching:

- First, Department of Labor (DOL) regulations requiring plan fiduciaries to receive comprehensive information from their service providers about the services provided and all direct and indirect compensation received for such services are effective on July 1, 2012.
- Second, DOL regulations requiring plan administrators to provide fee and investment performance disclosures to participants and beneficiaries in participant-directed individual account plans are effective on August 30, 2012.

The DOL recently released [Field Assistance Bulletin 2012-02](#), which provides guidance on the new disclosure requirements in the form of frequently asked questions (FAQs) focusing mainly on the participant disclosure rules.

The information in this Alert is intended for retirement plan sponsors, administrators and fiduciaries. If you provide services to a retirement plan or to a plan asset fund or account subject to ERISA, please contact us for additional information.

### Service Provider Fee Disclosures

Section 408(b)(2) of ERISA provides a prohibited transaction exemption for reasonable contracts and arrangements with a party in interest for services necessary for the establishment or operation of a retirement plan, if no more than reasonable compensation is paid by the plan. The DOL final regulations provide that for a services contract or arrangement (or its extension or renewal) between a covered plan and a covered service provider to be considered a “reasonable contract or arrangement,” the covered service provider must disclose specified information to the “responsible plan fiduciary,” meaning the plan fiduciary with authority to cause the covered plan to enter into the contract or arrangement.

For this purpose, a “covered plan” is any pension benefit plan covered by Title I of ERISA. This definition covers qualified or nonqualified defined benefit or defined contribution retirement plans, but does not include simplified employee pensions (SEPs), simple retirement accounts, individual retirement accounts or annuities (IRAs), Section 403(b) annuity contracts and custodial accounts that were issued and frozen before January 1, 2009, governmental plans, church plans and unfunded excess benefit plans.

A “covered service provider” is any provider of services as a fiduciary or registered investment adviser, recordkeeping or brokerage services, or listed services for which the service provider, an affiliate or subcontractor reasonably expects to receive either indirect compensation or compensation paid among related parties. Listed services include accounting, auditing, appraisal, banking, consulting (related to the selection or monitoring of service providers or plan investments), custodial, insurance, investment advisory (for the plan or participants), legal, recordkeeping, securities or other investment brokerage, third party administration or valuation services. Small service provider arrangements are



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exempt from these rules if the compensation or fees reasonably expected to be received by the service provider are less than \$1,000.

Covered service providers must disclose the following information in writing to the responsible plan fiduciary:

- A breakdown of services to be provided to the plan.
- Whether the service provider reasonably expects to provide the services as a plan fiduciary or a registered investment adviser.
- Descriptions of all direct and indirect compensation, compensation to be paid among related parties, and compensation for terminating the contract or arrangement.
- If recordkeeping services are being provided, descriptions of all direct and indirect compensation reasonably expected to be received in connection with those services and, if bundled or offset, a reasonable and good faith estimate of the cost to the plan of those services.
- A description of how the compensation for services will be received (e.g., billed to the plan or deducted from accounts or investments).
- For fiduciary services provided to any investment contracts or for recordkeeping or brokerage services, for each investment service or designated investment alternative, as appropriate, descriptions of any compensation that will be charged directly against the amount invested, any annual operating expenses if the return is not fixed and any ongoing expenses (such as wrap fees).

Initial disclosures to responsible plan fiduciaries by covered service providers are required by July 1, 2012, and thereafter “reasonably in advance” of entering into, extending, or renewing a service contract or arrangement. Subsequent disclosures are required at least annually for material changes to information regarding investment disclosures and recordkeeping and brokerage services. Material changes to any other information must be disclosed as soon as possible, but no later than 60 days, after the covered service provider learns of the change. A covered service provider also must disclose any “good faith” error or omission as soon as possible, but no later than 30 days, after the service provider learns of the error.

Finally, upon written request by a responsible plan fiduciary or plan administrator, a covered service provider must furnish all other information related to compensation under the contract or arrangement needed for the plan to comply with ERISA’s Title I reporting and disclosure requirements by using Form 5500. Such information must be provided reasonably in advance of the date stated in the request for the plan to comply with the reporting or disclosure requirement.

The responsible plan fiduciary is expected to use the various disclosures to fulfill its duties in the selection and monitoring of service providers, especially if it is delegating fiduciary responsibilities to the third party consultant, advisor or administrator. If a particular description of services provided by a covered service provider lacks sufficient detail to enable the fiduciary to fulfill its duties, the fiduciary must request additional information concerning those services. If the responsible plan fiduciary needs assistance in understanding any information provided by a service provider, the fiduciary should request assistance from either the service provider or elsewhere.

## **Participant Fee and Investment Disclosures**

In addition to the service provider disclosures to plan fiduciaries described above, final DOL regulations require plan administrators of participant-directed individual account plans, such as 401(k) plans, to provide annual written notice to participants and beneficiaries disclosing plan investment fees and expenses and any other plan-related information

regarding administrative and individual expenses. For most plans, including calendar year plans, the initial notice must be furnished to participants and beneficiaries no later than August 30, 2012.

The participant notice generally must include:

- an explanation of any general plan administrative fees and expenses that may be charged against participants' and beneficiaries' accounts, and the basis for allocating such charges
- individual fees and expenses (such as for processing plan loans or qualified domestic relations orders, brokerage windows or investment advice)
- disclosure of investment-related information, including for each designated investment alternative:
- performance data (multiple-year average annual return) and benchmark return information
- individual fee and expense information
- any restriction or limitation on transfer or withdrawal.

The participant fee and investment disclosure requirement is satisfied through the use of one or more comparative charts outlining the information for each designated investment alternative available under the plan. In addition to the annual disclosure requirement, beginning no later than November 14, 2012, plan administrators must furnish quarterly statements to participants and beneficiaries detailing the actual fees and expenses charged during the preceding quarter to their individual accounts and the services to which the charges relate. Finally, plan administrators must ensure that participants and beneficiaries have access to an Internet website address that provides investor information regarding each designated investment alternative.

If you are a responsible plan fiduciary, you should take the following actions in preparation for the new disclosure rules:

- Identify covered service providers who will be required to provide disclosures.
- Confirm with the covered service providers that they will make the required disclosures and will provide the disclosures in a timely manner.
- Specify any preferred formats for receiving information to assist in providing participant disclosure and disclosure on Schedule C to Form 5500.

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## CONTACT INFORMATION

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