

Regulatory Update

On July 13, 2011, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) pushed back the applicability dates for fee disclosure rules. The extension gives covered service providers and plan fiduciaries additional time to prepare fee and investment-related information required for disclosure to employees.

The following update summarizes the rules and addresses frequently asked questions that may assist you in preparing for:

FEE DISCLOSURE UNDER 408(B)(2)

In July 2010, the DOL published interim final rule 408(b)(2) requiring service providers to disclose information about their fees and any potential conflicts of interest to plan fiduciaries. The intent of the rule was to help plan sponsors better evaluate the reasonableness of plan costs in light of services provided, which is a primary fiduciary responsibility.

How does the July 2011 proposal differ from the original?

In the original proposal, the new requirements would have taken effect on July 16, 2011, for both existing and new service arrangements. The revised proposal postpones the effective date until April 1, 2012. **(Please note:** The July proposal also looks to amend and align the effective dates for new fee disclosures from plan sponsors to plan participants. See section 2 in Fee Transparency Provisions.)

The final rule has not been delivered to the Office of Management and Budget for review. Once a final rule has been issued, and if significant changes are made to the requirements, another postponement, beyond April 1, 2012, may be needed.

Regardless of the effective date, what fee information must providers disclose to plan sponsors?

All service providers, including recordkeepers, administrators, and advisors, who expect to receive at least \$1,000 in direct or indirect compensation will have to disclose their compensation to plan sponsors *before delivering any services or upon entering into a service arrangement.* The disclosure must contain:

- A description of services provided
- The compensation (both direct and indirect) that the service provider expects to receive from the arrangement
- Whether the service provider will serve as an ERISA fiduciary or a Registered Investment Adviser
- The manner in which compensation will be received—for example, whether the plan will be billed for services or compensation will be deducted directly from plan assets

Please note: Any changes to initial disclosures must be provided to the plan sponsor within 60 days.

What am I required to do with the disclosure information when I receive it?

As the plan sponsor, you have a fiduciary responsibility to ensure that fees and expenses are reasonable in light of the level and quality of services provided. To accomplish this, you must obtain sufficient information for making an informed evaluation about the reasonableness of the costs associated with plan services.

Preparing for the new fee disclosure rules

As previously noted, the new fee disclosure rules are designed to help plan sponsors understand the true costs of their plans and the fees paid to service providers. As a plan fiduciary, you should become familiar with the requirement and review the fees and compensation paid to service providers to determine whether they are reasonable.

FEE TRANSPARENCY PROVISIONS FOR PLAN PARTICIPANTS

In October 2010, the DOL finalized a separate set of new regulations regarding fee- and investment-related disclosures that must be provided to participants in 401(k) plans and other defined-contribution plans with participant-directed accounts. The disclosures should detail information about the plan, including how it operates, fees that participants might pay, and investment choices that participants will be offered.

The deadline for providing disclosures to participants under 404(a)(5) is no earlier than 60 days from April 1. For calendar year plans, this means that plan sponsors have until May 31, 2012, to provide the initial disclosures to eligible employees.

What information must be disclosed to plan participants?

The new regulations require that the following be provided to eligible employees:

Plan-related information

- General information about the plan annually, including an explanation of how participants may give investment allocation instructions and information concerning the plan's investment menu
- An annual explanation of the general administrative service fees that may be charged against their accounts, as well as any individual expenses charged for individualized services (e.g., plan loan processing fee)

Investment-related information

- Fee- and performance-related information relating to the plan's various investment options presented in a comparative format, such as the operating expenses of each investment, shareholder fees, and performance relative to a benchmark
- A website where participants can obtain more information

The disclosures must be provided to all eligible employees on the first day of eligibility for direct investment in the plan and annually thereafter. At least quarterly, participants must also receive information about any participant-level fees actually charged to their accounts.

Preparing for the new participant disclosures rules

As noted above, the new participant disclosure regulation requires you to provide participants with plan, investment, and fee information to help them make informed decisions.

- Familiarize yourself with the new rules.
- Contact your plan service provider to learn what materials they will make available.
- Consider sending a notice to your employees sometime before year-end 2011 to make them aware that changes are coming to their 401(k)s in 2012.

REDEFINING THE DEFINITION OF FIDUCIARY

In October 2010, the DOL also released proposed regulations that would broaden the definition of a fiduciary by lessening the requirements for being considered one.

In response to criticism from the financial services industry and Congress, DOL announced on September 19 that it would withdraw and re-propose the rule. The DOL's decision stems from requests by members of Congress and the public to have more time to provide input. Specifically, the agency anticipates revising provisions of the rule, including, but not restricted to:

- Clarifying that fiduciary advice is limited to individualized advice directed to specific parties
- Responding to concerns about the application of the regulation to routine appraisals

- Clarifying the continued applicability of exemptions that allow brokers to receive commissions in connection with mutual funds, stocks, and insurance products

The agency said it would carefully craft new or amended exemptions that can best preserve beneficial fee practices while at the same time protecting plan participants and individual retirement account owners from abusive practices and conflicted advice.

The new proposed rule is expected to be issued in early 2012.

WE CAN HELP

Our firm is ready to help you navigate the ever-changing legislative environment. Whether you have questions about interpreting disclosure documents or are looking for guidance on talking with plan participants, we're here to assist you.

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