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LEGISLATIVE UPDATE

## Eye on Washington



# RETIREMENT PLAN COMPLIANCE UPDATE: INCREASING RESPONSIBILITY FOR BOTH SERVICE PROVIDERS AND PLAN SPONSORS

*On July 1, 2012, final regulations requiring disclosure of fees paid to certain service providers by retirement plans will go into effect. Service providers subject to the regulations must provide retirement plan sponsors with detailed descriptions of direct and indirect compensation that the service provider receives for services provided to the plan. Sponsors of retirement plans must then use this information to evaluate whether the fees are reasonable, as required by the Employee Retirement Income Security Act of 1974 (ERISA). The regulation applies to most employer-sponsored retirement plans.<sup>1</sup> In order to properly comply with the regulations it is important to understand which service providers are considered covered service providers and therefore, subject to the disclosure requirements.*

### Who Must Disclose?

In order to be considered a covered service provider under the regulation, the service provider must have a contract or arrangement with the covered retirement plan and reasonably expect to receive \$1,000 or more in direct or indirect compensation for providing one of the following services, even if the services are performed by a subcontractor or affiliate of the service provider:

- Services as a fiduciary or investment advisor including:
  - o Fiduciaries providing direct services to the plan (e.g. investment managers for separately managed accounts and investment consultants who have agreed to be fiduciaries to the plan);
  - o Registered (state or federal) investment advisors providing investment advice to the plan; or
  - o Fiduciaries providing services to an investment contract or product that holds plan assets and in which the plan has a direct equity investment. (Investment managers of mutual funds are not included.);

- Recordkeeping or brokerage services to the extent that designated investment options are made available to participants of the plan;
- Other services for indirect compensation which may include accounting, auditing, actuarial, appraisal, banking, consulting related to investment or oversight policies, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, third party administration or valuation services. The provider of these services must reasonably expect to receive indirect compensation.

Once it is determined that a service provider must disclose fee information, it is important to make sure that the plan's fiduciary receives and evaluates the required information.

<sup>1</sup>Exemptions from this regulation include a Section 408(k) simplified employee pension plan, a Section 408(p) simplified retirement account, a Section 408(a) individual retirement account (IRA), a Section 408(b) individual retirement annuity, and certain Section 403(b) annuity contracts and custodial accounts issued before January 1, 2009.



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### What Must Be Disclosed?

- Services provided or expected to be provided to the plan, except for those non-fiduciary services specifically excluded;
- Compensation that is reasonably expected to be paid by the plan to the service provider:
  - o Direct compensation – Compensation received directly from the plan. The description may be made in the aggregate or itemized by service provided.
  - o Indirect compensation - Compensation received from any source other than the plan, the plan sponsor, the covered service provider, or an affiliate. The description must identify the services for which indirect compensation will be received, the payer of the indirect compensation, and a description of the arrangement between the payer and the recipient.
  - o Other compensation – Compensation paid among the service provider, an affiliate, or a subcontractor, but only if the compensation is set on a transaction basis (e.g., commissions) or is charged directly against the plan's investment (e.g., Rule 12b-1 fees). The description must identify the services for which compensation will be paid and the payers and recipients of the compensation.
  - o Termination fees – Compensation that the service provider, an affiliate, or a subcontractor expects to receive in connection with termination of the contract or arrangement. The description must include how any prepaid amounts will be calculated and refunded upon termination.
- If applicable, a statement that the service provider expects to provide services as a fiduciary or as an investment advisor.

### Next Steps

Employers that sponsor retirement plans may wish to compile a list of service providers and inquire as to the nature of the services and whether the service provider is subject to disclosure. Responses should be documented. Response dates, additional correspondence in the event of incomplete or failure to respond and other pertinent information should be documented on the list as well for ease of reference. For those who must disclose, the disclosures should be evaluated to determine whether the compensation is reasonable. Plan fiduciaries may want to contact outside counsel for assistance in evaluating whether compensation for covered service providers is reasonable. If a covered service provider fails or refuses to respond, the sponsor should send a written notice to the vendor requesting the information. If the covered service provider does not provide the required information within 90 days following the request, the plan fiduciary must timely notify the U.S. Department of Labor. If the information is not provided, the contract must be terminated as expeditiously as possible. Disclosures should be requested for current contracts, as well as before contracts are extended or renewed.

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