

## DOL Releases Final Fee Disclosure Regulation

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On July 16, 2010, the DOL released an “interim final regulation” under ERISA Section 408(b)(2) related to the disclosure of fees by service providers. Covered service providers will need to comply with the regulation by July 16, 2011, for all contracts or arrangements, regardless of whether they were entered into before the effective date.

Keep in mind that the new regulation amends a prohibited transaction rule under ERISA and the Internal Revenue Code. That rule says that it is a prohibited transaction for a plan to enter into an arrangement with a service provider unless the “arrangement” is reasonable and the compensation being received by the service provider is reasonable. The new regulation adds disclosure requirements for determining whether a service provider arrangement is reasonable.

The new rule finalizes the regulation originally proposed in 2007, and differs from the proposed rule in a number of respects, some of which are fairly significant. The following chart reflects these differences – the right hand column shows what the new requirement will be:

Proposed Requirement	Final Requirement
Required that there be a formal written contract or arrangement that described and included the mandated disclosures.	A formal written contract is no longer required. However, the disclosures must still be made in writing (presumably through a written notice). As a matter of risk management, we assume that most service providers will still do a written contract, at least with new clients.
Applied to new contracts (and extensions and renewals) entered into after the effective date.	Applies to all contracts after the July 16, 2011 effective date, including those entered into prior to that date. In other words, covered service providers will need to make the required disclosures even if they are not entering into a new contract or extending or renewing that contract.
Appeared to apply to all types of plans covered by ERISA. Unclear whether it applied to non-ERISA plans subject to the prohibited transaction rules under the Internal Revenue Code.	The rule applies <i>only</i> to pension plans, not welfare benefit plans. Parts of the rule apply only to participant-directed individual account plans, <i>i.e.</i> , 401(k) and ERISA 403(b) plans. It does not apply to IRAs, Simple IRAs or SEP IRAS.
Applied, with minor exceptions, to virtually all service providers to plans. There was no threshold dollar amount specified.	Applies to “covered service providers.” The service provider must reasonably expect to receive \$1,000 or more of compensation, direct or indirect, for providing covered services. Note that this applies even if the services or compensation will be received by an affiliate or subcontractor. The covered services are listed after this table.
Applied to all compensation, direct or indirect.	This hasn’t changed. What has changed, however, is that for indirect compensation, the service provider must disclose the services to which the compensation applies and the payer of the indirect compensation.
Required disclosure of conflicts of interest, including referral relationships.	The separate requirement for disclosure of conflicts of interest is eliminated. Instead, the DOL says it is relying on the full disclosure requirement related to compensation to address these issues. Thus, for example, referral relationships that do not entail direct or indirect compensation do not need to be disclosed.

Proposed Requirement	Final Requirement
Permitted providers of multiple services (“bundled providers”) to disclose the overall compensation without breaking out individual items, with exceptions related to investments.	The regulation does not include a rule similar to the proposal’s bundled provider exception. Indeed, under the new rule, providers of multiple services will be required to separately disclose the cost of recordkeeping services.
Unclear whether the proposal would also amend the parallel regulation under Code section 4975.	The final regulation amends the 4975 regulation. This makes it clear that the excise tax for engaging in a prohibited transaction will apply to “covered plans.”
Contained no “good faith” exception.	The final regulation says there is no violation if the service provider makes an error or omission in disclosure, so long as (1) it acted in good faith and with reasonable diligence and (2) corrects the error within 30 days after discovering the error.

Covered services include the following:

1. Fiduciary services, including:
  - a. Services provided directly to a plan as a fiduciary. This would include services as a functional fiduciary.
  - b. Services provided as an investment adviser registered under the Investment Advisers Act of 1940 or comparable state law.
  - c. Services provided as a fiduciary to an investment contract, product or entity that holds plan assets and in which the plan has a direct equity investment (note that this would *not* include managers of mutual funds). This is a new category of covered service.
2. Recordkeeping or brokerage services provided to a participant-directed individual account plan, *i.e.*, a 401(k) or ERISA 403(b) plan, if the plan makes one or more designated investment alternatives available.
3. Other services for indirect compensation. This includes *indirect* compensation received by the provider of the service, as well as affiliates and subcontractors. The list of services is very broad and includes banking, consulting, custodial, insurance, investment advisory, recordkeeping, securities or other investment brokerage, third party administration and various professional services (accounting, actuarial, appraisal and legal). This means that:
  - a. Except for those described in item 2, providers of recordkeeping or brokerage services are not covered if they only receive direct compensation (*e.g.*, providers of brokerage services to a defined benefit pension plan);
  - b. Virtually *all* service providers are included if they, an affiliate or subcontractor receives indirect compensation.

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