

AllianceBernstein Defined Contribution Investments DC Regulatory Update

DOL Releases Final Service Provider Fee Disclosure Rules

On February 2, 2012, the Department of Labor (DOL) released the final service provider fee disclosure rules—also known as the 408(b)(2) rules—which will become effective on July 1, 2012. Essentially, the rules will require certain service providers to ERISA plans, before entering into a contract with a plan, to give a written disclosure to the plan sponsor of all direct and indirect compensation that they expect to receive. For existing contracts, covered service providers must provide all of the required information to their ERISA plan clients by July 1, 2012.

Changes from “Interim Final” Rules and Some Noteworthy Clarifications Made by the DOL:

- **Effective Date.** Because the DOL has extended the effective date of these rules from April 1 to July 1, 2012, the deadline for providing participant fee and investment information in a chart format to participants under the new participant-level fee and investment disclosure rules (the 404a-5 rules) has been pushed back to August 30, 2012.
- **Summary Guide Not Required—for Now.** At this time, the DOL is not requiring service providers to furnish a summary guide or “roadmap” to help plan fiduciaries locate the specific disclosure items that might be found in lengthy documents such as service agreements and prospectuses. The DOL indicated that it intends to propose a rule later this year that would, if adopted, require such a guide. In the meantime, it is encouraging service providers to provide a guide or similar document. The DOL has included a sample guide as an appendix to the rule.
- **CIT Providers Must Furnish Additional Information.** Fiduciaries to plan asset vehicles—e.g., collective investment trusts (CITs)—that are investment options in participant-directed defined contribution plans will be required to furnish the information the plan will need to comply with the participant fee and investment disclosure rules. This information includes performance data, benchmarks, the category of the investment (e.g., international fund) and the expense ratio.
- **Additional Disclosure for Indirect Compensation.** Service providers who receive indirect compensation (e.g., a 401(k) plan recordkeeper that receives revenue sharing from a mutual fund provider) must not only identify the compensation rate and the payer, but also must describe the arrangement between the payer and the service provider.
- **Electronic Disclosure Permitted.** The required disclosures can be furnished electronically.
- **Owner-Only Plans Excluded.** Plans that cover only a business owner and his or her spouse need not receive 408(b)(2) disclosures.

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Summary of the Final Department of Labor Service Provider Fee Disclosure Rules

Who Must Disclose: The disclosure requirements apply to any “covered service provider” that enters into a contract or arrangement for services with an ERISA plan. A covered service provider is any of the following:

- An ERISA fiduciary (including fiduciaries to plan asset investment vehicles such as CITs)
- A registered investment adviser
- A recordkeeper or broker to a participant-directed defined contribution plan
- Certain recipients of indirect compensation, such as consultants

What Must Be Disclosed: The covered service provider must disclose—in writing—the following to the plan fiduciary who has the authority to hire the service provider:

- A description of the services to be provided
- The service provider’s status (i.e., whether the service provider is an ERISA fiduciary or RIA)
- A description of all direct and indirect compensation
 - For indirect compensation, the service provider must identify the payer and describe the arrangement between the payer and the service provider
 - The service provider must describe any termination fees
- Recordkeeping fees
 - If recordkeeping is provided as part of a package without explicit fees, or where fees are offset based on other compensation the recordkeeper receives (e.g., revenue sharing from mutual funds), the service provider must estimate the cost of the recordkeeping services
- The manner in which the fees will be paid (e.g., whether the plan will be billed directly or the fees will be deducted from plan investments)
- Fees related to plan investments
 - Transaction fees (e.g., sales loads, redemption fees, etc.)
 - Annual operating expenses (e.g., expense ratios)
 - Other ongoing expenses (e.g., wrap fees, etc.)

Timing of Disclosures

- Initial disclosures must be made “reasonably in advance of the date the contract or arrangement is entered into, and extended or renewed.”
- Any changes to the required disclosure information must be disclosed as soon as practicable but not later than 60 days after the service provider is informed of the change. However, changes to investment-related information must be made at least annually.
- If the plan makes a written request for compensation information needed, the service provider generally must furnish it reasonably in advance of the plan’s due date of that report.

Other Things to Note

- Failure to comply with the regulation will result in a prohibited transaction, which would be a breach of fiduciary responsibility. The covered service provider would be subject to an excise tax of 15% of the amount involved (potentially 100% in some cases).
- The regulation does not apply to Simplified Employee Pension plans, SIMPLEs, IRAs, plans that cover only business owners and their spouses, and certain 403(b) accounts where contributions ceased before January 1, 2009.

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