

Washington Pulse



EBSA Issues Final Regulations on Required Fee Disclosure to Plan Fiduciaries

On February 3, 2012, the Department of Labor's Employee Benefits Security Administration (EBSA) published final regulations on required service provider fee disclosures to retirement plan fiduciaries. These regulations replace interim final regulations published on July 16, 2010. The regulations are intended to help retirement plan fiduciaries assess the reasonableness of the compensation paid for services, and the conflicts of interest that may affect a service provider's performance of services. Following is an overview of the changes the final fee disclosure regulations made to the interim regulations. The final regulations become effective July 1, 2012.

Covered Service Provider (CSP)

A CSP is a service provider that enters into an arrangement with the covered plan and reasonably expects to receive at least \$1,000 in compensation for its services. The EBSA clarifies in the preamble to the final rule that the \$1,000 service arrangement threshold focuses on whether the \$1,000 is expected to be received in connection with providing the services specified in the contract, regardless of whether the compensation is received in a particular calendar year, plan year, or stated term of the contract.

Covered Plan

The final regulations exclude certain annuity contracts and custodial contracts described in IRC Section 403(b) from the types of retirement plans covered by the rule. The excluded contracts and accounts are those issued to employees before January 1, 2009, where

- the employer ceased making contributions,
- the rights or benefits of individual owners of the contract or account are enforceable against the insurer or custodian without employer involvement, and
- the individual owners are fully vested in the contract or account.

Initial Disclosure Requirements – Indirect Compensation

A CSP's disclosure of "indirect compensation" must now include a description of the arrangement between the payer and the CSP receiving the indirect compensation. The EBSA believes the description will help the plan fiduciary understand why the payer is compensating the CSP in connection with services provided to the plan.

Investment Disclosure – Fiduciary Services

The final rule adds to the disclosure requirements provided in the previously published interim final regulations relating to annual operating expenses. Specifically, the final rule requires disclosure of the total annual operating expenses of a designated investment alternative (DIA) expressed as a percentage and calculated in accordance with the EBSA's final participant fee disclosure regulations. In addition, a CSP must disclose any other information or data about the DIA that is within the control of, or reasonably available to, the CSP and that will assist the plan fiduciary in disclosing investment-related information to participants under the participant fee disclosure regulations.

Investment Disclosure – Recordkeeping and Brokerage Services

Under the final regulations, a CSP disclosing investment-related information to plan fiduciaries may comply by providing the DIA issuer's current disclosure materials, or by providing information replicated from the issuer's materials. The final regulations focus on whether the institution issuing the materials, not the materials themselves, is regulated. As a result, the DIA issuer must be

- a registered investment company (e.g., mutual fund),
- an insurance company qualified to do business in a state,
- an issuer of a publicly traded security, or
- a financial institution supervised by a state or federal agency.

In addition, the CSP must act in good faith, must not know that the materials disclosed are incomplete or inaccurate, and must provide the plan fiduciary with a statement that the CSP is not making a representation as to the accuracy of the materials.

Guide to Initial Disclosures

The EBSA has chosen to reserve a place in the final regulations for future guidance that would require a CSP to provide a guide or similar tool to assist plan fiduciaries in locating the compensation information disclosed through multiple or complex documents. Until then, the EBSA has included a Sample Guide in the appendix of the final regulations to encourage CSPs to help plan fiduciaries review the disclosures.

Timing of Initial Disclosures – Changes

Under the final rule, a CSP must notify a plan fiduciary of changes to investment-related information at least annually. The 60-day deadline (required under the interim final regulations) remains for changes to all other information that a CSP previously disclosed.

Reporting and Disclosure Information – Timing

A CSP must provide any additional information that is requested to comply with a plan's reporting and disclosure requirements under Title 1 of ERISA "reasonably in advance of the date upon which" the plan fiduciary indicates that it must comply with the applicable reporting and disclosure requirements. Under the interim final regulations, the requested information had to be disclosed within 30 days.

Disclosure Errors

The final rule clarifies that disclosures relating to changes to information previously provided to plan fiduciaries are covered by the "error disclosure" provision, and therefore, can be corrected. Corrections must occur as soon as practicable and in no event later than 30 days from the date the CSP knows of the error or omission.

Definitions – Compensation

The final regulation adds to and clarifies the definition of compensation. Specifically, it provides that descriptions of compensation or cost may be expressed as monetary amounts, formulas, percentages of plan assets, per capita charges for participants or beneficiaries, or using any other reasonable method. In addition, the definition now permits "reasonable and good faith" estimates of compensation or cost, as long as the CSP explains the methodology and assumptions used to prepare the estimate.

Exemption for Responsible Plan Fiduciary

Under the final rule, a plan fiduciary seeking relief under the class exemption must determine whether to terminate or continue its service arrangement with a CSP if the plan fiduciary has requested information and that information is not disclosed within 90 days of written request. If the request relates to future services and the CSP fails to disclose promptly after the 90-day period, the fiduciary must terminate the service arrangement "as expeditiously as possible." The EBSA believes the change highlights the importance of prompt decision-making by a plan fiduciary regarding the termination of a contract with a CSP when disclosure failures have occurred.