

DOL Implements New Retirement Plan Service Provider Disclosures

Article By:

Brian J. Lake

Michael G. Paton

John C. Smarrella

The Department of Labor (DOL) recently implemented new fee disclosure rules for pension benefit plans covered by Title I of the Employee Retirement Income Security Act (ERISA). By July 1, 2012, employers should have received an explanation of the fees charged directly or indirectly in connection with their retirement plans from service providers.

This alert is intended to give you a brief overview of what actions you should be taking once you receive this information – which, we understand, can be quite confusing. Here is a list of the required action steps:

ACTION PLAN

STEP ONE: Identify your plan(s) covered by the fee disclosure rules. These include defined benefit plans, 401(k) plans, profit sharing plans, money purchase plans and 403(b) plans. Traditional Roth IRAs, SEP IRAs, SIMPLE IRAs and 457(b) plans of tax exempt employers are not subject to the rules.

STEP TWO: Identify all the service providers that should have provided fee disclosures to you for your plan(s). These typically include persons or entities serving as fiduciaries to a plan, registered investment advisors (RIAs), investment managers, record keepers, brokers, and certain administrative and consulting entities or individuals.

STEP THREE: Confirm that each service provider has provided all fee related and other information to you as required under the DOL regulations for each plan.

STEP FOUR: Thoroughly review all the information provided to you regarding fees to insure that your plan(s) is/are not being overcharged for any services.

STEP FIVE: Document! Document! Document! the processes you used to perform Steps One, Two,

Three and Four.

To help you through the required action steps, you need to be aware of the following:

WHAT INFORMATION MUST EACH DISCLOSURE FROM EACH SERVICE PROVIDER INCLUDE?

The following information must be provided to the responsible “plan fiduciaries” for your plan(s) by each service provider identified in Step Two of the Action Plan:

Services: A description of the services that will be provided to each plan identified under Step One under the contract or arrangement with the particular service provider.

Fiduciary Status: A statement, if applicable, that the service provider will provide or reasonably expects to provide services for the plan as a “fiduciary” or as an “investment advisor” to the plan.

Compensation: A description of the compensation the service provider expects to receive under any contract or arrangement with your plan. This compensation specifically includes direct and indirect compensation, compensation paid among related parties, and compensation that you will be required to pay to the service provider should the contract or arrangement for a plan terminate.

If the service provider receives indirect compensation, it must also disclose the services for which the indirect compensation is received and the payer of the indirect compensation. Compensation includes anything of monetary value, such as money, gifts, or trips, but does not include non-monetary compensation valued at \$250 or less during the term of the contract or arrangement. The term “indirect compensation” means compensation from a source other than the plan, plan sponsor, the service provider, an affiliate or subcontractor.

Recordkeeping: A description of all direct and indirect compensation the service provider expects to receive for recordkeeping services. In addition, if the service provider expects to provide recordkeeping services without receiving explicit compensation for those services or if compensation for these services is offset or rebated, the service provider must give you an estimate of the cost to the plan of the recordkeeping services.

Manner of Payment: A description of the manner in which the service provider expects to receive payment for its services, including whether your plan will be billed directly or whether the compensation will be deducted directly from the plan participants’ accounts or investments.

Investments (Registered Investment Advisor Fiduciary Services): RIAs must also provide a description of (i) any compensation charged directly against investments (i.e., commissions, sales loads, redemption fees, account fees, etc.) that are not included in the annual operating expenses of the investment; (ii) annual operating expenses; and (iii) any additional ongoing expenses. Additional disclosure rules apply with respect to designated investment alternatives (i.e., investment options into which participants and beneficiaries may direct the investment of their plan accounts).

Investments (Recordkeeping or Brokerage Services): A service provider that provides recordkeeping or brokerage services must also provide a description of the following with respect to each designated investment alternative: (i) any compensation charged directly against investments (i.e., commissions, sales loads, redemption fees, account fees, etc.) that are not included in the annual operating expenses of the investment; (ii) annual operating expenses; and (iii) any additional

ongoing expenses. However, in many instances, the service provider may comply with this requirement by providing the disclosure materials of the issuer of the designated investment alternative that includes the required information.

WHAT HAPPENS IF THE SERVICE PROVIDER DOES NOT PROVIDE ALL OF THE REQUIRED DISCLOSURES?

If a service provider does not provide you with all of the information summarized above, the contract or other arrangement the plan has with the service provider will be considered a “prohibited transaction” under ERISA, unless the following conditions are met:

You, as the plan fiduciary, were unaware of the failure and reasonably believed the service provider had met the disclosure requirements; or

If you, as the plan fiduciary, discover a failure, you make a written request to the service provider to provide the missing information. If the service provider does not reply to your written request within 90 days, you must notify the DOL of the specific failure and consider terminating the contract or arrangement. If the requested information pertains to future services, you must terminate the contract or arrangement as soon as possible.

If you, as the fiduciary for a plan, do not satisfy the conditions described above, the contract or arrangement with the service provider will be deemed a non-exempt prohibited transaction subject to civil penalties under ERISA and excise taxes under the Internal Revenue Code.

DUTY TO DETERMINE THE REASONABLNESS OF ALL DIRECT AND INDIRECT COMPENSATION PAID TO A SERVICE PROVIDER

Once you confirm that you have, in fact, received all required disclosures from the service providers for plan, as the plan fiduciary, you must determine whether your plan pays reasonable compensation to its service providers when compared to compensation paid by other similar plans for similar services. If you do not have the internal resources or experience necessary to perform Step Three of the Action Plan, it would be prudent for you to discuss performance of this step with the plan’s legal advisors or other independent consultant.

In any case, you should create a record of your deliberate review and consideration of fees paid by your plan (as compared to similarly situated plans) in the form of meeting minutes or an internal memorandum, showing that you, as the plan’s fiduciary, reviewed the service provider disclosures, deliberately considered and determined whether the compensation was reasonable and took any appropriate actions based on your determinations.

Finally, you should be prudent when selecting new service providers and should regularly monitor compensation paid to your existing providers. Your record of this due diligence process will be extremely helpful if employees or the DOL express concerns regarding the reasonableness of service provider fees paid by your plan.

Source URL: <https://natlawreview.com/article/dol-implements-new-retirement-plan-service-provider-disclosures>