



ATTORNEYS AT LAW

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UPDATE: SERVICE PROVIDER AND PARTICIPANT FEE DISCLOSURES
EXECUTIVE SUMMARY

In January of this year we provided you with a series of articles regarding the changing rules for retirement plan fee disclosures. These included what certain retirement plan service providers must disclose to retirement plan fiduciaries regarding their fees and services as well as what plan administrators must disclose to participants who are allowed to direct investments in their retirement plan. These articles are available on our website or, if you are reviewing this article electronically through these links: "[Participant Disclosure Regulations](#)"; "[The Obligations of Plan Sponsors and Plan Fiduciaries Under The Service Provider Disclosure Regulations](#)"; "[Electronic Delivery of Participant Disclosures](#)". Since we published those articles in January there have been additional developments and changes concerning these disclosure requirements. First, final regulations replaced the final interim regulations regarding service provider fee disclosures. Second, on May 7, 2012, the United States Department of Labor (DOL) issued a "Field Assistance Bulletin" (FAB) regarding disclosures to participants. At the same time we are publishing this Executive Summary we are also publishing a more detailed article concerning these changes.

The two most important points to remember from our prior articles are: 1) if the service provider disclosures are not made then the service provider and the responsible plan fiduciary will have committed a prohibited transaction under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code; and 2) if the participant disclosures are not made then the plan administrator (typically the employer sponsoring the plan) will have committed a fiduciary breach.

The biggest change to the information contained in our prior articles is that the deadlines for making the disclosures were extended but are now currently imminent.

The deadline for service provider disclosures is **July 1, 2012**.

The deadline for initial annual participant disclosures for calendar year plans is **August 30, 2012**. The first quarterly participant statement must be furnished no later than **November 14, 2012**. Non-calendar year plans with a plan year beginning in August through October will have a little more time to make the participant disclosures.

The changes made in the final regulations regarding service provider disclosure include:

- 1) The exemption of certain frozen 403(b) plans from the service provider disclosure rules.
- 2) Expansion of the use of estimates in detailing compensation received.
- 3) Confirmation regarding the ability to deliver disclosures electronically.
- 4) Enhanced rules for service providers requiring a description of any indirect compensation that they receive.
- 5) Revision of the disclosure requirements so that they will more closely mirror what plan administrators must disclose to participants who can direct their own investments.
- 6) Changes to the deadline for providing disclosures upon request as well as the deadline for providing disclosures of changes to investment related information.
- 7) Providing that responsible plan fiduciaries must "...as expeditiously as possible, consistent with its duty of prudence" terminate a service provider who refuses to make the required disclosures.

Important additional guidance was provided in the FAB regarding disclosures to participants including:

- 1) Guidance was provided on the plan related disclosure requirements for self-directed brokerage accounts/windows. All participants (not just the ones selecting the brokerage window) must be given annual plan related information regarding the brokerage window and quarterly statements regarding certain administrative costs associated with the brokerage window. The FAB states that "investment platforms" containing numerous mutual fund options (more than 25) and brokerage windows themselves, will not be treated as separate and distinct "designated investment alternatives" requiring disclosure in addition to the plan level disclosures. In a surprising and controversial move, DOL then stated that the investments purchased through the platform (and presumably through a brokerage window) may be treated as separate designated investment alternatives requiring additional investment related disclosures in certain circumstances. DOL stated that it would not treat those investments as separate designated investment alternatives if two conditions were met. First, there must be at least three other investments that are treated as designated investment alternatives for disclosure purposes and these alternatives must meet the "broad range of investments" standard contained in ERISA §404(c). Second, the FAB provides that plan administrators have a duty to then monitor the investment platform (and presumably brokerage window). Then, if at least five participants (or 1% of participants for plans with over 500 participants) elect the same investment through the platform/window on a date that is not more than 90 days preceding each annual disclosure date, the disclosures of those investments selected through the platform or window must be made as if they were designated investment alternatives.
- 2) Guidance was provided on the disclosures required when a plan provides "model portfolios" to participants using existing designated investment alternatives. Many plans assist participants by using existing investment options to construct

these model portfolios to take into account things like investment risk tolerance. DOL stated that portfolios constructed in this manner would not be designated investment alternatives.

- 3) DOL provided examples of acceptable plan related administrative fee disclosures where services and/or fees are known, where services and or fees are unknown, but can be projected, and where fees are to be offset by certain revenue sharing.
- 4) DOL confirmed that in certain circumstances where administrative expenses are paid solely through forfeitures and/or directly by the plan sponsor that administrative expense disclosure is not required.
- 5) Guidance was provided confirming that the “landing page” for the required website did not have to contain all requisite information as long as the participant can “click through” to obtain the other disclosures. DOL also provided direction on how often the website should be updated.
- 6) DOL provided relief relating to disclosures that have already been made that are not in complete compliance with the FAB as long as the plan administrator acted in good faith and on a reasonable interpretation of the regulations and as long as steps were being taken to comply with the FAB for future disclosures.

If you have not already received service provider disclosures from the investment professional servicing your plan, your third party administrator or your recordkeeper, should contact them to obtain these disclosures. You need to review these disclosures to make sure they conform to the regulations and to determine whether the compensation being paid to the service provider is reasonable. If disclosures are not provided, establish follow up procedures with the service provider.

If you have a plan with participant directed investments, contact your third party administrator to make sure that they are preparing the requisite disclosures to meet the August 30, 2012 deadline (for calendar year plans) as well as the November 14, 2012 quarterly disclosure deadline. You also should check any services agreement with that third party administrator to make sure that these required participant disclosures are part of the services they agreed to provide.

If you have any questions concerning the participant disclosure regulations or service provider disclosure regulations, please contact Kenneth Johnson at Tuggle Duggins & Meschan, P.A., 100 N. Greene Street, Suite 600, Greensboro, NC 27401, (336) 271-5264.

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