

# NEWS & Highlights

## SERVICE PROVIDER DISCLOSURE - FACT SHEET *WHAT PLAN SPONSORS NEED TO KNOW*

**I**NTAC has been a proactive proponent of ERISA Regulation 408(b)(2) legislation for years. This fee disclosure requirement, effective July 1, 2012, requires full transparency on fees associated with employer pension programs. This latest edition of INTAC's News & Highlights provides a comprehensive fact sheet on what plan sponsors need to know.

### INTRODUCTION

The Department of Labor issued interim final regulations regarding Section 408(b)(2) of ERISA, which will become effective July 1, 2012. These regulations pertain to retirement plan fee disclosure and are designed to ensure that sponsors of retirement plans receive complete information about fees associated with their plans. This allows a complete fulfillment of fiduciary responsibility to plan participants.

The 408(b)(2) regulations, issued on July 15, 2010 became effective on July 16, 2011. These regulations were issued in the form of interim final regulations in order to allow for possible changes after the date they were effective. On February 2, 2012, the regulations were amended and the revised effective date was extended to July 1, 2012 when all CSPs (Covered Service Providers) will be required to give their first set of initial disclosures.

### WHO ARE COVERED SERVICE PROVIDERS?

- 1. Fiduciary/Registered Investment Advisor.** Any service provider acting as an ERISA fiduciary to a plan, a fiduciary to an investment product that holds plan assets, or a Registered Investment Advisor (RIA).
- 2. Platform recordkeeping or brokerage service provider.** Any service provider providing recordkeeping services or brokerage services to an individual-account plan.

- 3. Specified indirect compensation recipients.** Those who provide at least one of the following services expect to receive some indirect or related party compensation for those services: accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services.

### COVERED PLAN

Under the regulations, **all** employee pension benefit plans subject to Title I of ERISA are subject to the disclosure requirements. The following plans **are not** subject to Title I and therefore not covered plans:

- ❖ Simplified Employee Pension (SEP)
- ❖ Simple Retirement Account (SIMPLE IRA)
- ❖ Individual Retirement Account (IRA)
- ❖ Frozen 403(b) contracts
- ❖ Plans with owners and spouses of owners only

### PLAN FIDUCIARY

The Plan Fiduciary is the primary individual or group that has the authority to enter into contracts with a CSP. If an employer is not certain who the Plan Fiduciary is, the employer should review any CSP agreements and any related corporate actions to determine who signed these contracts or service agreements.

## WHAT MUST BE DISCLOSED?

1. **Description of the services to be provided.** The description of services should be clear and understandable. The disclosure should describe all of the services provided for the fees charged and should present sufficient detail to the fiduciary, allowing them to make an informed judgment and to identify any potential conflicts of interest.

2. **Status as a Fiduciary.** The status of a service provider is determined by the actual functions, authority, and responsibilities they perform for the plan. Notwithstanding their actual status, the service provider must state, affirmatively, in writing, whether or not they will be performing services as an ERISA fiduciary or a Registered Investment Advisor.

3. **Disclosure of all direct or indirect compensation received.** A CSP is required to disclose comprehensive information about direct and indirect compensation that it is expected to receive for services provided to the plan. The regulations also require an explanation regarding the manner in which the compensation will be received; that is, whether the plan will be billed or the compensation will be deducted directly from the plan's accounts.

- ❖ Direct compensation is compensation received directly from the covered plan or directly from participant accounts. This includes compensation that is initially paid by the sponsor and reimbursed by the plan later.
- ❖ Indirect compensation is compensation received from any source other than the covered plan, plan sponsor, the CSP, or an affiliate. The CSP must also identify the services being provided in exchange for the compensation. In addition, the CSP must identify the arrangement between the payer of the compensation and the CSP. By analyzing this information, the Plan Fiduciary should be able to identify any conflicts of interest.

4. **Any related party compensation** if set on a transaction basis, or charged directly against plan's investment and reflected in net value of investment.

5. **Any termination compensation, including how any prepaid amounts will be calculated or refunded.** If, for instance, the service provider charges in advance of the period of service, the method used to calculate a refund, if any, must be described.

## INFORMATION TO BE DISCLOSED BY RECORDKEEPERS

Along with the information provided above, Recordkeepers must also provide the following additional information:

1. **Description of all compensation for recordkeeping services.**

2. If no explicit compensation for recordkeeping services is disclosed, **a reasonable good faith estimate of recordkeeping service costs, along with a detailed description of the services**

**provided, and methodology and assumptions in preparing the cost estimate.** This rule was directed at bundled providers and is intended to help fiduciaries evaluate the cost of services being rendered to their plans when the cost has not otherwise been apparent.

3. **Description of manner of receipt (e.g., billed or deducted).**

## INVESTMENT DISCLOSURES

The CSP is required to provide the following detailed information for each Designated Investment Alternative available in the plan. It is anticipated that the platform recordkeeper will provide investment disclosures by passing on the required investment disclosures to the Plan Fiduciary.

The CSP is required to provide the Plan Fiduciary with a statement that the covered service provider is making no representations as to the completeness or accuracy of such materials. This will ensure that the Plan Fiduciary understands that these materials are merely being passed through and that the CSP is not vouching for their completeness or accuracy.

1. **Description of any compensation.** A description of any compensation that will be charged directly against an investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, accounts fees, and purchase fees; and that is not included in the annual operating expenses of the investment.

2. **Description of annual operating expenses.** The percentage charged and a description of the annual operating expenses (e.g. expense ratio) and any ongoing expenses in addition to annual operating expenses (e.g. wrap fees, mortality and expense fees).

3. **Description of any other ongoing expenses.** Any other information or data that is within the control of the CSP that is required for the plan administrator to comply with the participant disclosure regulations.

Once the disclosures have been made by the CSP, the burden of this regulation shifts to the Plan Fiduciary to evaluate the information and to make a determination as to whether or not the contract services and fees are fair and reasonable in light of the services rendered.

## CONSEQUENCES FOR NON-COMPLIANCE

Unless the disclosure requirements are complied with, the arrangements between the CSPs and the plans they service are treated as non-exempt prohibited transactions under ERISA and Section 4975 of the Code. This means that the arrangements may be rescinded, the compensation paid to the service provider in connection with the arrangement may be returned and excise taxes imposed on the parties involved in the arrangement.

## CONSEQUENCES FOR NOT PROVIDING TIMELY DISCLOSURE UPDATES

Any changes to information previously disclosed must be made as soon as possible, but not later than 60 days from the date the CSP knows of such changes. The DOL made an exception for changes to investment information, which is subject to an annual update. Other information needed by the Plan Fiduciary must be furnished reasonably in advance of the date upon, which such Plan Fiduciary or covered plan administrator states that it must comply with the applicable reporting or disclosure requirements.

If the required disclosures are not provided after requesting them in writing, the regulation mandates that the Plan Fiduciary notifies the DOL and terminate the services of the provider that does not make the disclosures.

## WHAT SHOULD YOU DO TO COMPLY WITH THE FEE DISCLOSURE REGULATIONS?

As a fiduciary for your plan, you will need to review and understand the disclosures you will receive. The regulations make it your responsibility to ascertain whether or not the fees and expenses that your plan is paying are fair and reasonable in light of the services you receive.

The following is a short list of items to consider when preparing for fee disclosure:

1. Determine who in your company is the Plan Fiduciary.
2. Determine which plans are covered plans as well as who are covered service providers for these plans.

3. Inventory any service agreements you have received. If you can't find them, you may want to ask now and not wait until after July 1, the effective date of the disclosure rules.

4. Establish procedures to track receipt of disclosures and evaluate the completeness of the information contained therein.

5. Establish processes to request additional information, if necessary.

6. Review your plan's investment line-up to be sure it is in good shape for participant disclosure that will occur in October 2012.

7. Determine how you will evaluate the information that will be disclosed. Many are considering benchmarking their plans. If you are concerned about your fees, you should engage your advisor to request alternative proposals.

8. Document, in writing, trustee meetings, benchmarking and provider reviews.

## PARTICIPANT DISCLOSURE

The Department of Labor has linked the effective date of these regulations to the regulations under section 404(a)(5) which require the disclosure of information to participants. The disclosures to participants are due 60 days from the date these disclosures are provided to employers. If you are a plan sponsor, you will be receiving multiple disclosures from various CSPs. If you have any questions, please feel free to contact our office so that we may be able to assist you in understanding these notifications.

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