
Service Provider Disclosure Rules Take Effect July 1, 2012

By Stephanie L. Hicks / May 29, 2014

Earlier this year, the Department of Labor issued regulations that detail new disclosure rules under ERISA regarding service provider fees. These new regulations will become effective July 1, 2012. This E-Alert reviews these new disclosure rules and reminds ERISA plan fiduciaries they only have a short time to comply.

Service Provider Disclosure Rules

I. Background

Any payment by an ERISA governed plan for a service is a "prohibited transaction," unless the arrangement and fee paid for the service is "reasonable." Unless the new service provider disclosure rules are met, the plan will automatically fail the "reasonable" requirement and a prohibited transaction will occur. Additionally, a plan fiduciary has a duty under ERISA to determine whether a contract or arrangement with a service provider is prudent. The new service provider disclosure rules are designed to help plan fiduciaries carry out this duty.

II. Effective Date

The service provider disclosure rules become effective July 1, 2012. For contracts or arrangements entered into prior to July 1, 2012, the information required to be disclosed under the rules must be furnished no later than that date.

III. Complying with the Service Provider Disclosure Rules

A. Information to be disclosed

The service provider disclosure rules generally require a "covered service provider" to make disclosures to that plan fiduciary with the authority to cause the "covered plan" to enter into service provider contracts and arrangements (likely the plan administrator).

A "covered plan" is generally any ERISA-governed plan that pays retirement income or defers income until employment termination or beyond.

A "covered service provider" is a service provider that enters into a contract or arrangement with a covered plan and reasonably expects \$1,000 or more in compensation to be paid from the plan (or from plan participants' accounts) in connection with providing covered services to the plan. "Covered services" are (1) services provided directly to the covered plan as a fiduciary; (2) recordkeeping services or brokerage services provided to a covered plan that is an individual account plan that permits participants to self-direct the investment of their plan account balances; or (3) third-party services provided to a covered plan such as accounting, actuarial, auditing, appraisal, banking, consulting, custodial, legal, insurance, investment advisory, recordkeeping, securities brokerage, third-party administrator or valuation services for which the covered service provider expects indirect compensation or compensation via affiliates.

The following information must be furnished by the covered service provider, in writing:

1. A description of the services to be provided;
2. A statement, if applicable, that the services will be provided by a fiduciary or as a registered investment advisor;
3. A description of "direct" and "indirect" compensation reasonably expected to be received by the covered service provider, an affiliate, or subcontractor;
4. A description of the manner in which the compensation will be received;
5. A reasonable and good-faith estimate of the cost to the plan for recordkeeping services to be provided without explicit compensation or when the compensation for recordkeeping services is offset or rebated based on other compensation; and
6. With respect to a fiduciary that manages plan assets held by an investment vehicle or in the case of a provider of recordkeeping or brokerage services, certain information regarding compensation and expenses of each designated investment alternative.

B. Timing Rules

The required disclosures must be furnished by the covered service provider reasonably in advance of the date the contract or arrangement is entered into, renewed or extended. Any change in the information disclosed must be furnished to the plan administrator as soon as practical, but in any event, within 60 days after the service provider becomes aware of the change.

C. Service Provider's Failure to Disclose - Prohibited Transaction Exemption

As stated above, a prohibited transaction occurs if the new service provider disclosure rules are not met. In situations where a covered service provider fails to make the required disclosures, however, a prohibited transaction will not result, with respect to a plan administrator, so long as:

1. The plan administrator did not know about the failure and reasonably believed that the required disclosure was made;
2. Upon discovering the failure, the plan administrator requests in writing that the covered service provider furnish the non-disclosed information;

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3. If the covered service provider fails to comply with the plan administrator's written request within 90 days, the plan administrator notifies the Department of Labor of the failure; and
 4. If the covered service provider fails to comply within 90 days of the plan administrator's written request, the plan administrator must determine whether to terminate or continue the contract or arrangement with the service provider. However, if the requested information relates to future services and is not disclosed within the 90 day period, then the plan administrator is required to terminate the contract or arrangement as soon as possible.

IV. Preparing for the Service Provider Disclosure Rules

1. Become familiar with the service provider disclosure rules.
2. Identify all covered plans and covered service providers being paid directly or indirectly by the plan.
3. Contact the covered service providers and request that they provide the information required to be disclosed.
4. Once disclosed information is received, use it to determine whether the plan's contracts or arrangements are reasonable, and whether the services provided are helpful or appropriate.
5. Develop procedures for documenting service provider disclosures and any decisions made concerning covered services providers.

If you have any questions about the new service provider disclosure rules and how it impacts your business, please contact Ed Hammond at (248) 988-1821 or ehammond@clarkhill.com ; Kristi Gauthier at (248) 988-5854, or kgauthier@clarkhill.com ; or Stephanie Hicks at (248) 988-5893 or shicks@clarkhill.com .