

# **401(k) Fee Disclosure Deadlines Extended Three Months; Other Changes Made in Final Regulations Under ERISA 408(b)(2) February 3, 2012**

On February 2, 2012 the Department of Labor issued a [final rule](#) under ERISA Section 408(b)(2), governing disclosures that plan service providers must make to plan fiduciaries to allow them to confirm that the providers receive only “reasonable” amounts of compensation from plan assets in exchange for their services. The types of providers affected include Registered Investment Advisors, certain broker-dealers, third party administrators, and other service providers receiving \$1,000 or more in direct or indirect compensation from plan assets. The rule extends the deadline for the initial disclosure three months, from April 1, 2012 to July 1, 2012.

The plan-level fee disclosure rules originally issued in July 2010 with a one-year deadline for implementation deadline, but that deadline was extended to April 1, 2012 last July. This is probably the last such extension (though anything is possible in an election year).

There is no prescribed manner of providing the required disclosures other than that it is in writing. Because compensation information may be conveyed through multiple or complex documents, the final rule includes a placeholder for rules on a “guide or similar tool” that would help fiduciaries locate information in disparate sources. An appendix to the final rule also includes a Sample Guide to get service providers working towards a disclosure roadmap.

Another significant change in the final rule is that it carves out, from plans that are covered by the disclosure rule, “pre-2009” 403(b) annuity contracts or custodial accounts that meet all the requirements set forth in DOL Field Assistance Bulletins [2009-02](#) and [2010-1](#) providing limited relief from Form 5500 reporting duties. More information on how to identify a pre-2009 contract or account is found in the FABs.

Failure to comply with the fee disclosure requirements constitutes a prohibited transaction (PT) for the responsible fiduciary, whereas compliance qualifies the fiduciary for a PT exemption. The final rule changes one of the conditions for the PT exemption when a service provider has failed to provide compensation information and also has not responded to the fiduciary’s written request for the information within 90 days. If the information relates to futures services and is not disclosed promptly after the 90-day period, the final rule requires the fiduciary to terminate the service arrangement “as expeditiously as possible.”

The final rule cuts service providers some slack, however, allowing them to provide “reasonable and good faith estimates” of compensation or cost amounts that are difficult to itemize, so long as the service provider explains the methods and assumptions it used to arrive at the estimate.

Additionally, disclosures of indirect compensation paid by third parties to the service provider must be accompanied by a description of the arrangement between the service provider and the third party pursuant to whom the payments are made.

The three-month extension of the plan-level fee disclosure rule triggers an equal extension of the participant-level fee disclosure rules under ERISA Section 404(a)(2). Technically plan sponsors (employers) must make these disclosures to plan participants, but for practical purposes institutional investment providers will provide most of the content. The deadline to distribute the initial written disclosure has moved from May 31, 2012 to August 30, 2012, and the deadline to distribute the first quarterly statement under the rule has moved from August 14, 2012 to November 14, 2012.

<http://www.dol.gov/ebsa/pdf/2012-02262-PI1.pdf>

<http://www.dol.gov/ebsa/regs/fab2009-2.html>