

CHECKLIST FOR RETIREMENT PLAN SPONSORS IN REVIEWING FEE DISCLOSURES FROM SERVICE PROVIDERS

As we have previously alerted you in our [June 2012 Alert](#), the U.S. Department of Labor's ("DOL's") so-called "Service Provider Fee Disclosure Regulations" took effect on July 1, 2012, and requires certain service providers (e.g., investment advisors, recordkeepers and others)¹ to retirement plans that are covered by the Employee Retirement Income Security Act ("ERISA") to disclose compensation and fee information to fiduciaries of such plans in writing. Generally, covered service providers should have already provided such disclosures to retirement plans by [July 1, 2012](#).

In their position on the receiving-end of such disclosures, responsible retirement plan fiduciaries—i.e., those who have decision-making authority over the retirement plan—are required to take affirmative actions when they receive such disclosures in order to avoid penalties and civil actions under ERISA. Such affirmative actions are two-fold:

1. confirm receipt of required disclosures and review content for completeness, and
2. use the disclosures to assess whether fees being charged to the plan are "reasonable."

While the DOL has not yet issued meaningful guidance as to what specific actions are required by responsible plan fiduciaries with respect to these obligations (especially with respect to the assessment of whether fees are reasonable), we provide the attached Checklist as a practical guide for responsible plan fiduciaries to address their initial obligation when they receive the relevant disclosures from service providers—to review the disclosures made by the service provider and confirm that there are no obvious errors or omissions so as to be able to form a reasonable belief that the required disclosures have been made.

We envision that responsible plan fiduciaries can complete a separate Checklist for each covered service provider to each covered retirement plan (the first part of the Checklist that follows will assist in determining whether the service provider is covered by the disclosure rules). Notably, the Service Provider Fee Disclosure Regulations only apply with respect to ERISA-covered employee pension benefit plans—e.g., defined benefit plans, 401(k) plans, profit sharing plans, money purchase plans and most 403(b) plans. If an employer sponsors SEP IRAs, SIMPLE IRAs, certain Code Section 403(b) plans that were frozen before January 1, 2009, church plans (unless elected to be covered by ERISA), governmental plans, health and other welfare plans, non-qualified deferred compensation plans (including Code Section 457(b) plans, Code Section 457(f) plans, unfunded excess benefit plans, etc.), such plans are out of the reach of the Service Provider Fee Disclosure Regulations and so completion of the Checklist with respect to these types of plans is not required.

While the requirements of the Service Provider Fee Disclosure Regulations are technical and tedious, we hope that the Checklist will enable responsible plan fiduciaries to navigate the fee disclosures received to determine whether the disclosures are complete, and can give plan fiduciaries a formal outline with which to document their review process.

¹ Some service providers (e.g., actuaries, accountants, attorneys and consultants) are only covered by the Service Provider Fee Disclosure Regulations if they reasonably expect to receive indirect compensation (e.g., compensation received from a source other than the covered plan or plan sponsor).

Some service providers provide a guide with their disclosures so that responsible plan fiduciaries can easily find the information (the DOL published a sample guide for covered service providers to use to indicate to clients where specific disclosure information can be found). No particular form for such disclosures is required other than that they must be in writing, and it does appear that service providers are able to cross-reference to existing documents and/or disclosures (e.g., provider contracts, Form ADV, offering agreements, etc.).

We recommend that responsible plan fiduciaries address each item in the Checklist in a linear manner, make notations as they consider each inquiry (either directly on the Checklist itself or in notes to be attached and filed with the Checklist) and, if they have questions for the service provider about where or how the necessary disclosures have been made (or, if a particular disclosure has not been provided, why it was not), note such questions and any notes from discussions with the service provider in writing so as to create a record of the review process.

If a responsible plan fiduciary discovers that a service provider failed to disclose the required information, the DOL rules indicate that the plan fiduciary must request the missing information from the service provider in writing and, as discussed in our prior Alert, has affirmative obligations if the service provider does not provide the requested information within 90 days. As an update to our prior Alert, the DOL's on-line filing system for responsible plan fiduciaries to notify the DOL within certain time periods of a service provider's failure to provide the required information is now available and can be accessed by [clicking here](#).

While the DOL has not set a specific deadline by which responsible plan fiduciaries must review the disclosures, standards of prudence would indicate that plan fiduciaries should do so as soon as possible.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

David M. Glaser	212.336.2624	dmglaser@pbwt.com
Bernard F. O'Hare	212.336.2613	bfohare@pbwt.com
Bruce L. Wolff	212.336.2959	blwolff@pbwt.com
Jessica S. Carter	212.336.2885	jcarter@pbwt.com
Carrie L. Mitnick	212.336.2415	cmitnick@pbwt.com
Meridith Bogart Krell	212.336.2361	mkrell@pbwt.com

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Service Provider Fee Disclosure Review

Plan Name: _____

Service Provider Name: _____

Date(s) of Review of Information: _____

Responsible Plan Fiduciary(ies) Conducting the Review: _____

STEP 1: Determine if the service provider is a “covered service provider”.

- A. Does the service provider provide any of the following services?
- (i) Fiduciary services.
 - (ii) Registered investment adviser services.
 - (iii) Recordkeeping or brokerage services (but only if the plan is an individual account plan that permits participants to direct the investment of their accounts and makes designated investment alternatives available through a platform or similar mechanism).
 - (iv) Other services, such as accounting, actuarial, appraisal, banking, custodial, insurance, investment advisory, legal, third-party administration, valuation, consulting, *but only if indirect compensation will be received* (e.g., received from a source other than the plan or the plan sponsor).
- B. Is the service provider expected to earn \$1,000 or more under the contact or arrangement with respect to any of the services described in A above?

If the answers A and B are “Yes”, then continue with the remainder of the checklist.

If the answer to A or B is “No”, then the service provider is likely not subject to the Service Provider Fee Disclosure Regulations with respect to the plan and there is no need to complete the remainder of this checklist. You should confirm this conclusion with the service provider, and make a notation of your inquiry and discussion with the service provider.

STEP 2: Confirm whether the following information has been received from the covered service provider or is not applicable.

<u>Received</u> (or indicate “Not Applicable”)	<u>Location</u> ¹	<u>Category</u>	<u>Questions/Notes</u>
<input type="checkbox"/>		<i>Description of Services.</i> An explanation of the services that the service provider will provide to the plan.	
<input type="checkbox"/>		<i>Statement of Status.</i> If fiduciary or registered investment adviser services will be provided, an express statement to indicate such services.	
<input type="checkbox"/>		<i>Direct Compensation.</i> A description of all compensation (either in aggregate or by service) that the service provider will receive from the plan.	
<input type="checkbox"/>		<i>Indirect Compensation.</i> A description of compensation from sources other than the plan or the plan sponsor that the service provider will receive in connection with the services to the plan. If there is such indirect compensation, the disclosure should also include:	
<input type="checkbox"/>		(i) identification of the services for which the indirect compensation will be received,	
<input type="checkbox"/>		(ii) identification of the payer of the indirect compensation, and	
<input type="checkbox"/>		(iii) a description of the arrangement between the payer and the service provider.	
<input type="checkbox"/>		<i>Compensation Among Related Parties.</i> A description of any compensation that will be paid among the service provider and related parties in connection with the services to the plan (e.g., commissions, soft dollars, finder’s fees, 12b-1 fees, etc.). If there is such compensation, the disclosure should also include:	
<input type="checkbox"/>		(i) identification of the services for which such compensation will be paid, and	
<input type="checkbox"/>		(ii) identification of the payers and recipients of such compensation.	

¹ An example of the location might be “Master Service Agreement, Section 2.4, p.1”.

<u>Received</u> (or indicate “Not Applicable”)	<u>Location</u> ¹	<u>Category</u>	<u>Questions/Notes</u>
<input type="checkbox"/>		<i>Compensation for Termination of the Arrangement.</i> A description of any compensation that the service provider will receive if the service arrangement is terminated (including how any pre-paid amounts will be calculated and refunded).	
<input type="checkbox"/>		<i>Cost for Recordkeeping Services.</i> If recordkeeping services will be provided to the plan:	
<input type="checkbox"/>		(i) a description of all direct and indirect compensation that the service provider will receive in connection with such recordkeeping services, and	
<input type="checkbox"/>		(ii) if there is no explicit charge for recordkeeping services, an estimate of the cost to the plan of such recordkeeping services must be included. The estimate must include:	
<input type="checkbox"/>		a. an explanation of the methodology and assumptions used to prepare the estimate, and	
<input type="checkbox"/>		b. a detailed explanation of the recordkeeping services that will be provided to the plan.	
<input type="checkbox"/>		<i>Fees and Expenses relating to Investment Options.</i> For each designated investment alternative:	
<input type="checkbox"/>		(i) A description of any compensation that will be charged directly against an investment (e.g., commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees); and	
<input type="checkbox"/>		(ii) A description of the annual operating expenses (e.g., expense ratio) and any other ongoing expenses (e.g., wrap fees, mortality and expense fees); and	
<input type="checkbox"/>		<i>Manner in which Compensation will be Received.</i> A description of the manner in which the service provider will receive compensation (e.g., will the plan be billed or will deductions be taken directly from the plan’s accounts or investment?).	