

DOL Issues Interim Final Regulations For Fee Disclosure By Pension Plan Service Providers

The standoff between Congress and the Department of Labor is over. The DOL has refrained for 2 ½ years from finalizing regulations for disclosure of compensation arrangements by pension plan service providers, in deference to the various legislative proposals percolating in Congress throughout that period. Apparently the Department could wait no longer. It has published interim final regulations that will become effective as of July 16, 2011 and will apply to both new and existing service provider arrangements at that time. In the meantime, the DOL has requested public comment on a variety of specific issues either addressed or left open by the regulation.

The new compensation disclosure requirements are woven into ERISA's prohibited transaction rules. Specifically, payment of compensation to, or receipt of compensation by, a pension plan service provider is a prohibited transaction under ERISA (i.e., the compensation is deemed not to be reasonable) unless the service provider has furnished the plan fiduciary with the required information. The regulation includes an exemption for plan fiduciaries that request the required information and otherwise act in good faith, in the event that service providers fail to meet their obligations, so long as the plan fiduciaries report such failures to the DOL within a specified time. Thus, the new requirements are unlikely to impose significant new burdens or liabilities on plan fiduciaries. The regulation also includes relief for service providers that discover and correct their own errors or omissions, or that correct errors or omissions within a specified time period after identification to them by plan fiduciaries. The regulation makes clear, however, that service providers failing to correct errors or omissions identified to them by plan fiduciaries will be subject to statutory excise taxes under the Internal Revenue Code.

The DOL initially proposed regulations in December 2007 for compensation disclosures by plan service providers. You can read our summary of that proposal by clicking on the following link. [DOL Proposes Regulations For Disclosure Of Fees And Conflicts Of Interest By Plan Service Providers](#). The final regulation differs from the proposal in the following material respects.

- The final regulation requires compensation disclosures to be made in writing but does not require any formal written contract or other arrangement outlining the disclosure requirements.
- The final regulation treats pension and welfare plans separately, and reserves welfare plan requirements for future guidance. The regulation also clarifies that it does not apply to various individual retirement arrangements.
- The final regulation modifies the categories of service providers that are subject to the new disclosure requirements. They are:
 - Fiduciaries or registered investment advisers that provide services directly to pension plans, or fiduciaries that provides services to an investment vehicle that hold plan assets and in which the pension plan has a direct equity investment.
 - Recordkeepers or brokers that make one or more designated investment alternatives available to an individual account plan that permits participant directed investments.
 - Providers of other specified services (i.e., accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services) for which the service provider or an affiliate or subcontractor receives either indirect compensation (generally from sources other than the plan or plan sponsor) or certain other types of payments from affiliates or subcontractors.
- The final regulation includes a new \$1,000 threshold, so that a service provider not expecting to receive at least \$1,000 in total direct or indirect compensation is not subject to the disclosure requirements.
- The new requirements do not include a specific narrative conflict of interest disclosure. Instead, the regulation relies on full disclosure of the circumstances under which the service provider will receive compensation from parties other than the plan or plan sponsor, the identification of those parties, and the

compensation that is expected to be received. This will allow plan fiduciaries to determine for themselves any potential conflicts of interest among these parties.

- Generally, a provider of multiple services can disclose compensation either in the aggregate or on an item-by-item basis. The notable exception is compensation for recordkeeping services, which must be disclosed separately. If the service arrangement does not determine a specific cost for recordkeeping, the service provider must reasonably estimate that cost and disclose it to the plan fiduciary.

Apart from material differences from the proposed regulation, here are a few other highlights from the final regulation.

- An initial disclosure must be made reasonably in advance of the date a service provider arrangement is entered, extended or renewed. If any of the information required to be disclosed subsequently changes, the service provider must disclose the change as soon as practicable but no later than 60 days after the date the provider has been informed of the change.
- Non-monetary compensation valued at \$250.00 or less in the aggregate need not be disclosed.
- A service provider subject to disclosure requirements must also provide, upon request, any other information needed by the pension plan to comply with ERISA reporting and disclosure requirements.
- Recordkeepers or brokers that make designated investment alternatives available to an individual account plan that permits participant directed investments must provide basic fee information for each designated investment alternative. This includes expense ratios, transaction fees, and any other ongoing fees (e.g., wrap fees, mortality and expense fees). For this purpose, a designated investment alternative does not include a brokerage window.
- Affiliates or subcontractors of a service provider that is subject to disclosure requirements are not themselves subject to those disclosure requirements. The service provider must disclose any compensation paid among such related parties, however, if that compensation is set on a transaction basis (e.g., commissions or soft dollars) or is charged directly against the pension plan's investment and reflected in the net value of that investment (e.g., Rule 12b-1 fees).
- Disclosure of indirect compensation (i.e., amounts paid by parties other than the plan, plan sponsor or affiliates or subcontractors of the service provider) paid to the service provider or its affiliates or subcontractors must include a description of the indirect compensation, identification of the service for which indirect compensation will be paid, and identification of the payor.

If you have questions or would like additional information about the new compensation disclosure requirements for pension plan service providers, please feel free to contact Brian Dougherty at (215) 587-5919 or bdougherty@postschell.com.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments or enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. In addition, we do not impose on any person or entity to whom this is addressed any limitation on disclosure of the tax treatment or tax structure of any transaction discussed herein (including in any attachments or enclosures).

Disclaimer: this E-Flash does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this E-Flash without first seeking the advice of counsel.

© Copyright 2010 Post & Schell, P.C. All rights reserved
"POST & SCHELL" and the Post & Schell Logo are registered trademarks of Post & Schell, P.C.
[About Us](#) | [Our Attorneys](#) | [Practice Areas](#) | [Publications](#) | [Offices](#)