

ERISA Rule 408b-2 & Fee Disclosure

The U.S. Department of Labor (the “DOL”) has promulgated new Rule 408b-2, which provides that in the case of some but not all ERISA plans (“Covered Plans”), fiduciaries and specified non-fiduciary service providers to those plans (“Covered Service Providers”) must disclose to a responsible plan fiduciary all direct and indirect compensation to be received in connection with their services, if the aggregate amount of such compensation will be \$1,000 or more under the contract. If they do not do so, the contract will be deemed not to be reasonable. This is not a safe harbor exemption. Failure by a Covered Service Provider to provide the requisite disclosure would trigger the prohibited transaction rules and could cause its fees to be disallowed.

What are Covered Plans?

The primary groups of Covered Plans are defined benefit plans (such as traditional corporate pension plans) and defined contribution plans (such as 401(k) plans). Not included are IRAs and welfare plans (such as a health plan). Because state and local government pension plans fall outside of ERISA, they would also not be Covered Plans. This means that investment advisers do not have to make the new fee disclosure to IRA clients, health and welfare plan clients, or government plan clients.

Who are Covered Service Providers?

There are five basic categories:

1. Fiduciaries providing services directly to a Covered Plan.
2. Fiduciaries providing services to a contract, product or entity that holds “plan assets” and in which the Covered Plan has a direct equity investment (this picks up subadvisers to some pooled investment vehicles that have plan investors).
3. All registered investment advisers (SEC or state) providing services directly to a Covered Plan, whether or not they are acting in a fiduciary capacity.
4. Recordkeeping or brokerage services provided to an individual account plan (like a 401(k) plan), where participants have investment choices on a platform connected with those recordkeeping or brokerage services.
5. Legal, accounting, consulting (in the development of policies or the selecting of advisers), and other specified services if they are provided to a Covered Plan and the service provider expects to receive any compensation from a payer other than the plan (“indirect compensation”).

What must be disclosed?

There are several items of required disclosure:

1. A description of the services to be provided.
2. If applicable, a statement that the Covered Service Provider will provide the services as a fiduciary; and also if applicable, that the Covered Service Provider will provide the services as an investment adviser registered under the Investment Advisers Act or state law.
3. A description of all direct compensation (that is, to be paid by the plan), either in the aggregate or by service, that the Covered Service Provider expects to receive in connection with the services.
4. A description of all indirect compensation that the Covered Service Provider expects to receive in connection with the services, including identification of the service for which the indirect compensation will be paid and the payer of the indirect compensation.

5. A description of any compensation that will be paid among the Covered Service Provider, affiliates and subcontractors, including identification of the services, payers and recipients.
6. A description of any compensation that will be received upon termination of the contract.
7. If multiple services (including recordkeeping) are to be provided, some specified disclosures as to the methodology and assumptions underlying cost allocation.
8. A description of the manner in which compensation will be received, such as whether the plan will be billed or the fees will be deducted directly from plan accounts or investments.
9. In the case of a fiduciary to a pooled vehicle (see category 2 above), some specified disclosures as to sales loads, redemption fees, etc.
10. In the case of platform recordkeepers or brokers for individual account plans (see category 4 above), either a breakdown of costs for each investment alternative or a copy of current disclosure materials provided to plan participants.

When are these disclosures due?

All Covered Service Providers must deliver an initial disclosure statement in writing to a responsible plan fiduciary, for each Covered Plan for which they provide services, **no later than July 1, 2012**. After that date, Covered Service Providers will be required to deliver initial disclosure statements reasonably in advance of the date a service contract or arrangement is entered into. There are provisions for extending that deadline under certain limited circumstances (for example, if a non-plan asset fund later determines that it holds plan assets, its subadvisers and other Covered Service Providers have 30 days after being informed of such fact in which to deliver disclosure statements). Thereafter, Covered Service Providers must disclose a change to the initial information as soon as practicable, but no later than 60 days from the date on which the Covered Service Provider is informed of such change.

Is any particular format required for the disclosures?

The DOL decided against requiring any particular format for the basic descriptions of services and fees. The disclosures may even be made in more than one document, as long as they are all made in writing. There is no requirement that the service provider's contract reference the disclosure obligation, as long as the disclosures are in fact timely made. If a service provider only provides services as an affiliate or subcontractor to the primary Covered Service Provider, it has no independent obligation to make the disclosures. Conversely, a Covered Service Provider must provide the necessary descriptions even as to services that it has delegated to an affiliate or subcontracted to another party.

We recommend that advisers to Covered Plans begin now to gather the required fee information and prepare disclosure statements for delivery before the **July 1, 2012 deadline**. Advisor Solutions Group, Inc. can assist advisers with development and completion of fee disclosure statements in compliance with Rule 408b-2.

Please feel free to contact us at:

Advisor Solutions Group, Inc.
949.250.1855
info@advisorsolutionsgroup.com

1300 Bristol Street North | Suite 100 | Newport Beach, CA 92660 | 949.250.1855

www.advisorsolutionsgroup.com