

Compliance Refresher: Fee Disclosures and Comparative Charts

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Since July 2012, service providers to retirement plans have been required to disclose to plan sponsors the compensation they receive for their services. Now is a good time to review the timing of these disclosures, especially if any information originally required to be disclosed has changed. In addition to provider-level fee disclosures, plans with participant-directed accounts have been required to disclose detailed investment-related information in a comparative chart format to participants since August 2012. This article also will review the deadlines and the extensions granted by the Department of Labor for the annual comparative chart.

Plan-Level 408(b)(2) Disclosures. The 408(b)(2) regulations provide detailed disclosure requirements relating to services to be performed and the compensation to be received by covered service providers and went into effect on July 1, 2012. Covered service providers were obligated to provide the required disclosures to existing plan sponsor clients by this date. After the effective date, a covered service provider who enters into a new contract or arrangement with a plan sponsor client must provide the required 408(b)(2) disclosures “reasonably in advance” of the commencement of services. Section 408(b)(2) disclosures also are required anytime an arrangement or contract is extended or renewed.

Updates or changes to the information originally furnished by a service provider are required to be disclosed as soon as practicable, but not later than 60 days from the date on which the service provider is informed of the change, unless extraordinary circumstances beyond the service provider’s control makes

this impossible, in which case, the new information is to be disclosed as soon as practicable. If the service provider discovers that the information it originally disclosed is inaccurate, whether through error or omission, then the service provider must act in good faith and with reasonable diligence to correct the information within 30 days of the date that it becomes aware of the error. Thus, in the absence of a change in or a correction to the required information, updated 408(b)(2) disclosures need only be provided to an existing plan sponsor client if the contract or arrangement is extended or renewed. A clause in a contract that allows it to remain in effect until it is affirmatively terminated avoids the need to provide a 408(b)(2) disclosure upon each renewal.

The 408(b)(2) regulations contain an exception to the 60-day deadline for updated disclosures that applies only to providers who provide recordkeeping services in connection with the investment options available under the plan. Disclosure of any updates or changes to the information required of a recordkeeper (which includes fee and expense information concerning the plan’s investment options) is to be made “at least annually,” thereby relaxing the 60-day rule. This eliminates the need for recordkeepers to make frequent, or even nonstop, notifications with regard to minor modifications of investment information relating to a plan’s designated investment alternatives and other investment products.

Proposed Amendment to 408(b)(2) Regulations. On March 12, 2014, the DOL published a proposed amendment to the 408(b)(2) regulations that would require covered service providers to furnish a separate

“roadmap” guide if its 408(b)(2) disclosures are not in the form of a single document or exceed a maximum page length (which length is not specified in the proposal). As proposed, the guide must identify all applicable documents as well as the specific page number or section where the relevant fee information can be found. Any changes to the information provided in the guide would have to be furnished only annually. The proposal is open for public comment and, according to the preamble, it would become effective 12 months after the publication of a final rule.

Participant-Level 404a-5 Disclosures. In October 2010, the DOL published final regulations requiring detailed disclosures regarding designated investment alternatives in participant-directed individual account plans, known as the “404a-5 regulations.” These regulations require plan sponsors to provide participants with a comparative chart summarizing the plan’s investment options on an annual basis. For plans with a plan year that begins on or after November 1, 2011, through July 1, 2012 (which includes all calendar year plans), the initial comparative chart was due by August 30, 2012. For plans with a plan year that begins after July 1, 2012, but before November 1, 2012, the initial comparative chart was due 60 days following the first day of the 2012 plan year. Under the 404a-5 regulations, comparative charts must be provided on an annual basis, which in turn is defined as meaning at least once in any 12-month period. Thus, if the initial comparative chart was provided to participants in August 2012, the next comparative chart would have been due by August 2013.

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After providing the initial chart, many plan sponsors expressed concern to the DOL regarding the timing of future comparative charts. The 404a-5 regulations specifically permit the comparative chart to be distributed along with other annual participant disclosures such as safe harbor and automatic enrollment annual notices. However, the original deadline of August 30, 2012, was established in reference to the effective date of the 408(b)(2) regulations, not in reference to the timing for other participant disclosures. Plan sponsors pointed out that, as a result, they would be forced to do a separate mailing for the comparative charts because the original August deadline has no correlation to the timing of other required annual participant disclosures. In response to these concerns, the DOL issued Field Assistance Bulletin 2013-02 on July 22, 2013, which extended the deadline for distributing the comparative charts.

Specifically, Field Assistance Bulletin 2013-02 gives plan sponsors an additional six-month grace period for the 2013 comparative chart so that the annual deadline for furnishing comparative charts can be aligned with the furnishing of other participant notices and disclosures. For calendar year plans

that provided a comparative chart in August 2012, this means that the deadline for the comparative chart for the 2013 plan year was extended from August 2013 to February 2014. For example, if a plan sponsor provided the first comparative chart on August 25, 2012, the deadline for the 2013 comparative chart is extended to February 25, 2014. Many plans took advantage of this grace period so that they could “reset” the annual timing of their comparative charts and many plans issued their 2013 comparative chart in either January or February 2014.

Those plan sponsors who, prior to the issuance of the Field Assistance Bulletin, had already taken steps or incurred administrative costs in order to furnish the 2013 comparative chart by the original deadline of August 2013 were given a similar six-month grace period for the 2014 comparative chart. In the case of a plan sponsor who furnished the initial comparative chart on August 25, 2012, and who furnished the second comparative chart on August 25, 2013, the 2014 comparative chart (*i.e.*, the third comparative chart) is due no later than February 25, 2015. This will afford these plan sponsors the same opportunity for a one-time reset of the timing for their annual comparative chart.

Recap of Fee Disclosure Deadlines. In summary, plan sponsors can

expect to receive 408(b)(2) disclosures from covered service providers in four instances: (1) when a provider is first hired; (2) when an existing provider has changes or corrections to its previous disclosures; (3) when an existing provider whose contract or arrangement is extended or renewed; and (4) when the plan’s recordkeeper has updated fee and expense information for the plan’s investment options, but only on an annual basis.

Field Assistance Bulletin 2013-02 provided plan sponsors of participant-directed plans with a one-time reset of the timing for their annual comparative chart so that the distribution of the annual required comparative chart could be coordinated with other participant disclosures. Many plans have taken advantage of the six-month grace period and have distributed the 2013 comparative chart. Plans that were in the process of providing the comparative charts when the Field Assistance Bulletin was issued continue to have the opportunity to align the timing of the distribution of the comparative chart with other participant disclosures by delaying the 2014 disclosure until as late as February 2015. ♦

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