

As of 3/8/2012

## Service Provider Fee Disclosure Requirements

### Final Regulation Under ERISA § 408(b)(2)

**Effective Date: July 1, 2012 (for both existing and new plans)**

The Employee Retirement Income Security Act (ERISA) protects the assets of tax-qualified retirement plans by defining a fiduciary as anyone exercising discretionary control or authority over plan management or plan assets.

A primary responsibility of a fiduciary is to run the plan solely in the interest of its participants and their beneficiaries. A fiduciary must administer a plan for the exclusive purpose of providing benefits and paying plan expenses. This includes ensuring that the plan pays only “reasonable” expenses for administering the plan and investing its assets. In the past, there was little guidance on how fiduciaries should determine if fees were reasonable.

On July 15, 2010, the Department of Labor (DOL) issued an “interim final regulation” under ERISA § 408(b)(2) in an effort to assist fiduciaries of “covered plans” in determining the reasonableness of fees. The regulation was deemed an “interim final regulation” due to the potential for revisions. Because the regulation contained substantial changes from the proposed regulation published in 2007, the DOL requested comments. The DOL considered those comments in drafting the final regulation, which was released on February 1, 2012.

The regulation is effective July 1, 2012, and will apply to existing service arrangements as well as service arrangements entered into on or after that date. Accordingly, for those service arrangements in place on the effective date, the required disclosures must be made by July 1, 2012.

### Service Provider Fee Disclosure

The final regulation provides:

“No contract or arrangement for services between a ‘covered plan’ and a ‘covered service provider,’ nor any extension or renewal, is reasonable within the meaning of

section 408(b)(2) unless certain disclosures are made to the responsible plan fiduciary.”

“Covered plans” include defined contribution (DC) and defined benefit (DB) tax-qualified retirement plans subject to ERISA. The regulation does not include SEP IRAs, SIMPLE IRAs, IRAs or any other non-ERISA tax-qualified plan, such as an individual 401(k) plan.

A “covered service provider” is a person or entity that enters into a contract or arrangement with a “covered plan,” and reasonably expects to receive \$1,000 or more in direct or indirect compensation during the term of the arrangement.

### “Covered Service Provider” Categories

There are three categories of services that cause a service provider to be considered a “covered service provider.”

#### 1. Fiduciary services, including:

- Services provided directly to a plan as a fiduciary under ERISA Section 3(21)
- Services provided directly to a plan as an investment advisor registered under either the Investment Advisers Act of 1940 or under state law (this includes services provided by Registered Investment Advisors, who are not automatically fiduciaries under ERISA, but are fiduciaries under securities law)
- Services provided as an ERISA fiduciary to an investment contract, product or entity that holds plan assets and in which the plan has a direct equity investment

#### 2. Recordkeeping services or brokerage services, but only when such services are provided to a participant-directed individual account plan, and when the plan makes one or more designated investment alternatives available.

3. Other services for which the provider receives indirect compensation, including, but not limited to:

- Consulting services
- Third-party administrator services

## Required Disclosures

Under the regulation, written disclosures must be provided to the plan for the following:

- **Services** – a description of the Covered Service Provider’s services that will be provided to the plan.
- **Status** – if applicable, a statement describing services to the plan as an ERISA fiduciary and/or services to the plan as an investment advisor.
- **Compensation** – the service provider must describe all compensation it expects to receive, including:
  - Direct compensation
  - Indirect compensation
  - Compensation paid among related parties
  - Compensation for termination of the arrangement
- **Investment Disclosure** – for certain fiduciary services or recordkeeping and brokerage services:
  - Compensation that may be directly charged against assets, such as sales loads or redemption fees
  - Annual operating expenses, if the investment returns are not fixed
  - Ongoing expenses, such as wrap, mortality or expense fees
- **Recordkeeping Services** – compensation associated with recordkeeping services or, in certain cases, an estimate of cost for recordkeeping services. Any offsets in compensation due to other sources of revenue, such as revenue sharing, must be included.
- **Manner of Receipt** – a description of how compensation will be received, such as billed or deducted from plan assets.

## Timing of Disclosure Requirements

### *Initial disclosure requirements*

The information listed above must be provided “reasonably in advance” of the date of the arrangement. While the timing is not clear, it would be prudent to provide notices so the responsible plan fiduciary has a realistic opportunity to review the materials in advance and seek advice, as needed.

### *Changes*

A service provider must report changes in its disclosures as soon as practical, but not later than 60 days from the date the service provider is aware of the changes. However, a

service provider need only report changes in investment-related information annually.

### *Existing clients*

In addition to the initial disclosure requirements for new clients, service providers also must provide existing clients with the information outlined above.

### *Ongoing disclosure requirements*

Following the initial disclosures, service providers must provide information within 30 days following receipt of a written request.

The burden of proof for providing appropriate disclosure rests with the service provider.

## Format of Disclosures

Service providers may select the manner and format of the disclosure, as long as it meets the regulatory time frames.

Currently, there is no requirement for a summary road map or guide for finding the disclosures within the documents provided. However, the DOL strongly suggested that service providers provide a guide and announced that it intends to publish a notice of proposed rulemaking in the near future that would require service providers to furnish a guide. The DOL included a sample guide with the regulation that may, but is not required to be used.

## What’s Next

Mutual of Omaha and its affiliates have reviewed all compensation, relationships and existing disclosures to ensure that they meet the disclosure requirements of the regulation under ERISA § 408(b)(2) .

Our review indicates that the proposal process will be affected. Fees are currently disclosed through various mechanisms; however, the format, detail and timing of disclosure required by the final regulation will require that information be consolidated and reflected in a different manner. Accordingly, we are currently updating our fee disclosure document in light of the final regulation.

Mechanisms to meet the requirements for disclosing changes to fees, such as notification of changes to the expense ratios of mutual funds, are in development.