

employee benefits update

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DOL issues regulations for service providers' disclosures

The Department of Labor (DOL) has issued regulations that require specific disclosure by companies providing services to qualified plans. The regulations go into effect Jan. 1, 2012. Plans affected include defined contribution plans, defined benefit plans and ERISA 403(b) arrangements. The regulations don't apply to Section 457 government plans, nonelecting church plans, Simplified Employee Pension plans, SIMPLE IRAs, IRAs and nonERISA 403(b)s. The regulations also currently don't cover welfare plans.



Service providers not in compliance will be subject to prohibited transactions rules and IRS penalties. As a plan sponsor, two questions that likely come to mind

are: Who is responsible for ensuring compliance and what do the regulations mean for you?

A few definitions

The regulations' purpose is to give plan sponsors a clear understanding of the fees associated with their plan so they can make informed decisions. Generally, a plan sponsor is the plan fiduciary and has the authority to bind the plan through contracts with service providers.

A covered service provider is a vendor to the plan, such as an attorney, actuary or investment advisor. The provider must disclose fees if it enters into a contract and expects to receive \$1,000 or more in compensation directly or indirectly from the plan. This can include recordkeeping services related to plan administration, such as retirement plan calculations, discrimination, and distribution and loan processing.

Compensation includes remuneration for monetary value during the contract term of \$250 or more. Compensation can be direct or indirect, and there are specific qualifications for each of these areas. Service providers receive direct compensation from the plan in the form of fees, commissions and directly related investment expenses. Providers receive indirect compensation from any source other than the plan, plan sponsor or service provider. This may include miscellaneous advisor and investment fees or fees paid directly to the service provider from one of their own vendors.

Compensation may be expressed in monetary terms, a formula, a percentage of plan assets or a per capita charge for each participant. The provider must issue a description of the estimate that contains sufficient information, and the estimate must be reasonable.

Required disclosures

As a result of the regulations, covered service providers must disclose certain information to plan fiduciaries in writing. This includes a description of services provided to the plan under any contract or arrangement, including the provider's expected compensation.

Covered service providers must also disclose:

- › Any compensation that will be charged directly against a participant's investment,
- › Annual operating expenses, and
- › Ongoing operating expenses, such as wrap fees and expense fees.

Providers must disclose these amounts reasonably in advance of the date the arrangement is entered into, extended or renewed, but no later than

30 days from the date on which the covered service provider enters the contract. And they must disclose changes as soon as practicable, not later than 60 days from the date the provider knows of the changes.

The next steps

It's up to plan sponsors to ensure they're receiving these new required disclosures from contract service providers. Thus, review your service providers' material, as you may need to amend existing contracts to define the service providers' disclosure obligations and any liability for failure to provide the required disclosures.

It's helpful to have a system to review your service providers' arrangements to ensure the contract furnishes the required disclosures in sufficient detail so that you can determine the reasonableness of the providers' compensation. If one of your service providers fails to comply with the disclosure requirements, you must notify the provider and the DOL.

Seeking advice

Seek the advice of a seasoned retirement benefits advisor to determine if your service providers' fees and other disclosures meet your understanding and expectations. Proper planning can help you meet your fiduciary responsibilities. 🕒

Who's preparing your tax return and Form 5500?

The IRS issued new requirements regarding tax return preparers this year. Under the new rules, tax preparers must have a Preparer Tax Identification Number (PTIN), regardless of whether they sign the return.

Only individuals authorized to practice before the IRS, such as attorneys, CPAs, enrolled agents, actuaries and retirement plan agents, can obtain a PTIN. The IRS intends to add registered tax return preparers (RTRPs) even though they're generally not authorized to practice before the IRS. However, an individual must pass an exam to become an RTRP, and the IRS has no immediate plans to issue this test.



The IRS also released a notice that includes three situations in which a tax return preparer can receive a provisional PTIN even if he or she isn't an RTRP or able to practice in front of the IRS:

1. Until the IRS issues an RTRP exam, a noncredentialed preparer can obtain a provisional PTIN. He or she won't need to be an RTRP until 2014.
2. Individuals who are at least 18 years old can obtain a PTIN if they're supervised by a person with IRS credentials, the supervising person signs the return and the individual is employed by the same firm that employs the supervisor.
3. The individual confirms that he or she didn't prepare any 1040 series forms.

Of particular interest to plan sponsors: the notice that includes a list of forms *not* considered returns. Among these are Forms 5500, 5500-EZ, and 5558 (extensions of time to file), along with numerous determination letter forms. Thus, your Form 5500 preparer isn't required to have a PTIN.



Upcoming compliance deadlines:

- 8/1*** Form 5500 is due or a request for an extension on Form 5558
- 8/1** Form 5330 to report excise tax on prohibited transactions
- 8/1** Summary of material modifications due

**The first business day after the normal July 31 deadline.*

Controlled by the IRS

WHAT YOU NEED TO KNOW ABOUT CONTROLLED GROUPS

Do you know how a “controlled group” affects your qualified plan? To deter attempts to use multiple businesses to evade IRS requirements, such as discriminating in favor of highly compensated employees, ERISA requires plan sponsors to identify all participating employers. Plans must account for all employees in a controlled group to pass certain discrimination and participation tests.



Definition of controlled groups

Generally, the Internal Revenue Code (IRC) considers a single employer to be a controlled group for purposes of a qualified plan. In addition, all employees of commonly controlled corporations or businesses are treated as employees of a single corporation or business.

So if your company owns part of two or more businesses, you’ll have to determine whether the businesses are part of a controlled group before you set up or amend your retirement plan. If the businesses are considered to be a part of a controlled group, you must include the eligible employees of both companies in the coverage and participation tests for retirement plans.

3 controlled group types

Controlled groups exist in one of three forms:

- 1. Parent-subsidary.** The parent-subsidary controlled group exists when one organization owns 80% or more of another organization’s stock.

Included in the definition of “organization” is a corporation, partnership, sole proprietorship, or trust or estate.

2. Brother-sister. A brother-sister controlled group exists when five or fewer individuals own 80% or more of the company (controlling interest) and the same individuals own 50% or more of the company’s stock, but only to the extent that the ownership is identical with respect to such corporation (effective control).

3. Combination of parent-subsidiary and brother-sister. A combined group consists of three or more companies if each is a member of either a parent-subsidiary or a brother-sister group, and at least one company is the common parent of a parent-subsidiary and is also a member of a brother-sister controlled group.

The IRC provides ownership tests (26 U.S.C.A. §1563) to determine if a controlled group situation exists.

Effect of controlled groups

If two or more organizations are part of a controlled group of businesses, the retirement plan of any member of the controlled group must take into account all the employees of the controlled group in applying many plan provisions. This includes eligibility, coverage and vesting. And controlled groups are used by the IRS when determining nondiscrimination, minimum participation and contribution-limit testing, dollar limits on compensation, and top-heavy rules.

If a member of a controlled group adopts a plan, the IRS will consider all the businesses when determining employer deductions, minimum funding rules and excise taxes.

Possible consequences

If you fail to comply with the controlled group rules, the IRS may require your plan to expand coverage or to be “aggregated” with another for testing purposes so that the combined plan is

nondiscriminatory. If you don’t offer plan benefits to part of a controlled group and fail the required nondiscrimination tests, the IRS will require you to pay mandatory contributions for the excluded employees. Failure to do so may lead to plan disqualification. [🔗](#)

In other IRS news

The IRS recently set the due date for the 2009 and 2010 Form 8955-SSA, “Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits.” The former Schedule SSA was removed from Form 5500 filing — plan sponsors must now file it directly with the IRS using the new Form 8955-SSA. According to an IRS release in early March, Form 8955-SSA for the 2009 plan year was expected to be available for filing by plan administrators shortly. Form 8955-SSA for the 2010 plan year was being developed and is expected to be available for filing later this year.

To provide plan administrators with additional time to complete and file Form 8955-SSA, the IRS set the due date for filing the 2009 and 2010 plan year Form 8955-SSA as the later of 1) the due date that generally applies for filing the Form 8955-SSA for the 2010 plan year, or 2) Aug. 1, 2011. For example, in the case of a 2009 plan year or a short 2010 plan year, Form 8955-SSA isn’t required to be filed before Aug. 1, 2011.

Plan administrators are permitted to report information that would otherwise be required to be reported on the 2010 Form 8955-SSA using a 2009 Form 8955-SSA. The IRS has also developed a voluntary electronic filing system for filing Form 8955-SSA for the 2009 plan year and subsequent plan years. This system is ready to accept filings of Form 8955-SSA when the form becomes available for filing.

Just don't do it

PROHIBITED TRANSACTIONS IN QUALIFIED PLANS CAN AFFECT PLAN PARTICIPANTS

The IRS prohibits certain transactions between a retirement plan and a disqualified person. Why do you need to know this? Because these unlawful actions could potentially have adverse effects on your plan and plan participants.

What are prohibited transactions?

Under the Internal Revenue Code (IRC) definition, “disqualified person” encompasses many different types of individuals. Employers, fiduciaries and those providing services to the plan (such as an accountant or attorney) are a few examples. However, some individuals whose relationship to the plan isn't as obvious may also be disqualified persons, such as a service provider or organization.

If this is the case, you'll need to determine if the person in question exercises any discretionary authority over the plan and its assets, has any control in managing the plan, or provides any investment advice with regard to the plan's assets.

A disqualified person cannot enter into a prohibited transaction or allow a plan to enter into a prohibited transaction regardless of their motives.

Examples of prohibited transactions include a disqualified person's transfer or use of plan income or assets for his or her benefit. In addition, the IRS prohibits fiduciaries from using plan income or assets for their own interest, or receiving consideration for their own account in a transaction that involves plan income or assets from any party dealing with the plan.

Other examples of prohibited transactions include the sale, exchange or lease of any property between a plan and a disqualified person; the lending of money or extending of credit between a plan and a disqualified person; and furnishing goods, services or facilities between a plan and a disqualified person.



Are there exemptions?

The law does exempt some transactions from being prohibited transactions. For example, the IRC permits loans to plan participants and beneficiaries who are disqualified persons if the loan meets certain criteria. Specifically, the plan must adequately secure each loan and make loans available on a reasonably equivalent basis to all plan participants or beneficiaries.

Plans can't make loans available to highly compensated employees in amounts greater than other employees receive. Plan loans must have a reasonable interest rate and be made according to the plan provisions.

In addition, if a disqualified person receives a benefit that he or she is entitled to as a plan participant, the IRS doesn't consider it a prohibited transaction. However, the plan must make the benefit on the same terms as it does for all other plan participants.

What are the consequences?

A disqualified person cannot enter into a prohibited transaction or allow a plan to enter into a prohibited transaction regardless of their motives. Taking part in a prohibited transaction, whether intentional or unintentional, has consequences.

A disqualified person who takes part in a prohibited transaction must correct the transaction and pay a nondeductible excise tax. The excise tax is based on the amount involved in the prohibited transaction — the money given or received for any property, or the property's fair market value, whichever is greater.

The IRS assesses an excise tax on any disqualified person who participated in the transaction annually for each year that the prohibited transaction is outstanding. The initial tax on a prohibited transaction is 15% of the amount involved for each year (or part of a year) in the taxable period.

Timeliness matters

Failure to make timely deposits of employee contributions is one of the most common prohibited transactions in qualified plans. In fact, it's become so common that the Department of Labor (DOL) began actively investigating 401(k) plans and plan sponsors for compliance with these requirements as part of the DOL's National Enforcement Project.

The safe-harbor period for small plans (fewer than 100 participants as of the beginning of the plan year) is no later than the seventh business day following the date the amounts would have been otherwise paid to employees. Large plans (100 or more participants) must make deposits as soon as administratively feasible.

Many employers may not be operating in accordance with current regulations. Review the timeliness of your deposits prior to a DOL audit. If you determine that you're not in compliance with current regulations, consider reimbursing plan participants for the lost earnings by way of the DOL's Voluntary Fiduciary Correction Program.

The disqualified person must report this using Form 5330. If he or she doesn't correct the transaction within the taxable period, there's an additional tax of 100% of the amount involved.

If more than one person takes part in the prohibited transaction, each person can be jointly and severally liable for the entire tax. The taxable period begins with the transaction date and ends on the earliest of the day the IRS issues a deficiency notice for the tax, the day the IRS assesses the tax, or the day each person corrects the prohibited transaction.

Better safe than sorry

Regardless of the reason, prohibited transactions are unlawful and plan sponsors should make sure they don't take part in them. Employers should also make sure they have appropriate fiduciary liability insurance or ERISA bond coverage. When in doubt, refer to your benefits specialist for more information on prohibited transactions. 🕒