Department of Labor Issues Guidance on New ERISA Fee-Transparency Rules

by Gary S. Young on May 29, 2012

July 1, 2012 is a significant date for Plan Sponsors and other Plan Fiduciaries. By that date, they should have received – and will need to begin evaluating – information received from "Plan Service Providers" under a newly effective, U.S. Department of Labor (DOL) Final Regulations. The "408(b)(2) Final Regulations" require Plan Service Providers to make disclosures – among other things, about their services, compensation and fiduciary status – to their clients (the responsible Plan Fiduciary) by the July 1st deadline. As a result, starting right now, Plan Sponsors face heightened expectations and legal responsibilities.

The 408(b)(2) Final Regulations appear to impose obligations only on Plan Service Providers to make required written disclosures. However, as explained in the preamble to the Final Regulations, under the general fiduciary rules of the Employee Retirement Income Security Act (ERISA), once the responsible Plan Fiduciaries receive the information, they will have a duty to evaluate the received information. (More accurately, fiduciaries have always had that obligation under ERISA; however, now that the disclosures must be made by Plan Service Providers, the importance of fiduciary compliance is highlighted.)

On October 20, 2010, the DOL also issued ERISA Section 404(a)(5) Final Regulations concerning disclosure of plan fee and expense information by Plan Sponsors to participants in a self-directed, individual account plan ("participant-level fee disclosure"). The ERISA Section 404(a)(5) Final Regulations require Plan Fiduciaries to give:

- Quarterly statements of plan fees and expenses deducted from accounts.
- Cost and other information about investments available under their plan.
- Access to supplemental investment information.

This participant-level fee disclosure requirement is intended to ensure that workers receive core investment information in a format that enables them to meaningfully compare their plan's investment options. Disclosures must use uniform methods to calculate expense and return information and present such information in a format that makes it easier for workers to comparison shop. The first compliance deadline for disclosures under the 404(a)(5) Final Regulations will be August 31, 2012.

On May 7, 2012, the DOL's Employee Benefits Security Administration issued guidance aimed to help covered entities ensure legal compliance with the new ERISA requirements. The guidance—Field Assistance Bulletin No. 2012-02—includes a set of frequently asked questions and answers to help explain the new requirements. Two example questions and answers are provided below:

Question: A plan has both participant-directed and trustee-directed investments. Participants have the right to make investment decisions with respect to the portion of their accounts attributable to employee contributions. The plan's trustee directs the investment of the remainder of their accounts (e.g., employer contributions). Is this plan covered by the regulation?

Answer: Yes, this plan is a "covered individual account plan" under paragraph (b)(2) of the regulation. This means the plan administrator must comply with the plan-related disclosures in paragraph (c) and the investment-related disclosures in paragraph (d). However, the plan administrator is not required to provide the investment-related information required under paragraph (d) of the regulation for the trustee-directed investments. Rather, the plan administrator's obligation under paragraph (d) is limited to the plan's designated investment alternatives.

Question: If a plan administrator furnishes plan-related and investment-related information together in a single document, must the plan administrator separately "identify" any designated investment alternatives (as required by paragraph (c)(1)(i)(D)) and also "name" each designated investment alternative (as required by paragraph (d)(1)(i)(A))?

Answer: No. The rule does not require that the same information be disclosed twice when plan-related and investment-related disclosures are furnished in a single document. A plan administrator may disclose plan-related information separately from investment-related information, in which case the designated investment alternatives would have to be identified (as required by paragraph (c)(1)(i)(D)) and named (as required by paragraph (d)(1)(i)(A)) in each respective disclosure document. The Department wants to ensure that, regardless of how the disclosures are furnished, participants and beneficiaries obtain the information necessary to make informed decisions related to their plan accounts. However, the Department does not intend that plan administrators provide unnecessarily duplicative information when disclosures are furnished in a single document.

As important deadlines near, we encourage plan sponsors, administrators and service providers to read the guidance in its entirety to fully understand all new compliance obligations. If you have any questions or concerns about this or any other ERISA issue, please contact Gary S. Young (201.806.3383) or any other member of Scarinci Hollenbeck's Labor and Employment Law Group at 201.896.4100.