

Service Providers to ERISA Plans: DOL's New Disclosure Regulations Are Imminent—Are You Ready?

November 8, 2011

According to Department of Labor (DOL) officials, the agency will soon publish a “final” final regulation on required disclosures by plan service providers under the statutory prohibited transaction exemption provided by Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). This makes it a good time for plan service providers (such as investment advisers, broker-dealers, banks, insurance companies, and recordkeepers) and plan fiduciaries to assess where they are in their efforts to comply with the new disclosure rules. The new rules are currently scheduled to become effective on April 1, 2012.

These new rules have been added as a condition to an exemption from the ERISA prohibited transaction rules that, absent other exemptive relief, is necessary for firms to provide such basic services as recordkeeping and investment management to ERISA plan clients. By their terms, the rules apply to ERISA-covered retirement plans, mainly corporate tax-qualified plans such as defined benefit and defined contribution retirement plans (including 401(k) plans), but not to welfare plans such as health plans and life insurance plans (although DOL is considering extending the rules to such plans) or individual retirement accounts (IRAs) (including IRAs that are part of “Simple” or “SEP” arrangements).

“Covered service providers” under the new rules include plan fiduciaries, 401(k) plan recordkeepers, and the providers of certain other services that expect to receive “indirect” compensation (i.e., compensation from sources other than the plan or plan sponsor) under their arrangements with covered plans. The rules require detailed disclosure of both the direct and indirect compensation that a covered service provider anticipates receiving in connection with the services it provides to a plan, as well as a description of the services provided for that compensation.

DOL published an “interim” final regulation on these rules in July 2010, with an effective date in July 2011. Because of delays in publishing a “final” final regulation, the compliance date was subsequently postponed, first to January 1, 2012 and later to April 1, 2012.

According to recent reports, the “final” final regulation has received partial clearance from the Office of Management and Budget (OMB), and is awaiting one further clearance from OMB under the Paperwork Reduction Act. Once the regulation receives that clearance, possibly within the next few weeks, it should be ready to move forward. While this leaves at the most a little more than four months until the compliance date, there are no indications at this time that DOL will further extend that date.

During the past year, service providers have been assessing how the new disclosure rules will apply to their business units, and have begun developing programs and protocols to comply with the rules by the effective date. Some of the large recordkeeping firms have already provided sample disclosure materials to their clients. However, there remain many open issues. This is particularly the case for financial services firms, such as brokerage firms, that provide different levels of services to retirement plans and receive various streams of revenues, direct and indirect, in connection with those services.

The “final” final regulation is expected to address at least some of the open issues, which should simplify compliance. However, it may also contain additional requirements, such as a mandated format for the required disclosures. Service providers should be prepared to review the new regulation when it is released to determine whether their compliance programs are on track for the applicable compliance date, and whether additional steps will need to be taken.

In addition, the compliance date for the new participant disclosure requirements for participant-directed plans (DOL Regulation section 2550.404a-5) is 60 days after the compliance date for the service provider disclosure rules. This means that participant-directed plan recordkeepers and plan sponsors will also want to determine if they are on track to comply with those rules.

Morgan Lewis’s Employee Benefits and Executive Compensation Practice has been actively assisting its clients on compliance issues under these rules, and has issued prior LawFlashes on ERISA Section 408(b)(2) regulations. (See “Extension of Applicability Dates for New ERISA Disclosure Rules” (July 18, 2011), *available online at* http://www.morganlewis.com/pubs/EB_LF_ExtensionOfApplicabilityDatesERISARules_18july11.pdf; “DOL Releases Final Disclosure Regulations for Participant-Directed Individual Account Plans” (October 26, 2010), *available online at* http://www.morganlewis.com/pubs/EB_LF_FinalDisclosureIndividualAccountPlans_26oct10.pdf; and “DOL Publishes Interim Final ERISA Regulation on Service Provider Disclosure Obligations” (July 21, 2010), *available online at* http://www.morganlewis.com/pubs/EB-LF_DOL-InterimFinalReg-ServiceProviderDisclosureObligations_21july10.pdf.)

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