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Deadlines Approaching for Fee Disclosures under ERISA, and DOL Issues Guidance on Participant-Level Fee Disclosures

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Pursuant to the DOL's disclosure regulations issued under ERISA section 408(b)(2), employers sponsoring ERISA benefit plans should be receiving fee disclosures from the plans' covered service providers regarding the service provider's direct and indirect compensation. Service providers must make these disclosures to the appropriate plan fiduciaries on or before July 1, 2012. The purpose of the disclosure is twofold – (i) to assist plan fiduciaries in assessing the reasonableness of the service providers' compensation, and (ii) to assist plan fiduciaries and administrators of certain self-directed retirement plans in obtaining the information they need to satisfy their new reporting and disclosure obligations to participants.

It is important not to overlook the plan fiduciaries' obligations upon receipt of the service provider's fee disclosures. First, plan fiduciaries must evaluate whether the fees disclosed are "reasonable" for the services being provided. Although ERISA has always prohibited fiduciaries from paying more than reasonable fees for plan services, fiduciaries must now formally evaluate those fees and document their review of the compensation arrangements in light of the recent regulatory focus on retirement plan fees, and the new obligations imposed on plan fiduciaries to both report covered service providers who fail to timely satisfy these comprehensive disclosure obligations to the DOL, and terminate the plan's relationship with a non-compliant service provider.

Second, based in part on the information received from their service providers, plan administrators of participant-directed individual account plans must then provide fee and performance disclosures about those investment options made available under the plan (the "designated investment options") to allow participants to make informed investment choices. These are the participant-level disclosures required under ERISA section 404(a). Plan fiduciaries generally must make these initial participant-level disclosures on or before August 30, 2012 (and on or before November 14, 2012 with respect to quarterly statement disclosures).

On May 7, 2012, the DOL issued Field Assistance Bulletin 2012-02. Although the FAB indicates that it provides guidance on both the 408(b)(2) and 404(a) regulations, it primarily focuses on frequently asked questions relating to the participant-level fee disclosures, a few of which are summarized below:

- *403(b) Plans.* The FAB clarifies that the participant-level fee disclosure regulations apply to ERISA-covered 403(b) plans, except where it is impractical to obtain the necessary information for certain 403(b) annuity contracts or custodial accounts to which employer contributions ceased before January 1, 2009. Certain other conditions apply to this exception.

- *Plans That Have Both Participant- and Trustee-Directed Investments.* Regarding plans that have both participant-directed and trustee-directed investments, the plan administrator is not required to provide investment-related information for the trustee-directed portion of the plan. However, the plan-related disclosures must still be made with respect to the trustee-directed portion.

- *Disclosure of Administrative Expenses.* The FAB provides a general description of the level of detail that must be disclosed regarding plan administrative expenses, both known and unknown. As to known expenses, the explanation must clearly identify the service provided (e.g., recordkeeping), the cost of the service (e.g., 0.12 percent of the participant's account balance); and the allocation method (e.g., pro rata). As for unknown expenses at the time of disclosure, the plan administrator must take into account the known facts. For example, if an administrator expects to incur legal fees, but does not know the precise amount of the fees, an identification of the expected services (e.g., legal services) and the allocation method (e.g., pro rata) would be sufficient.

- *Revenue Sharing Arrangements.* The FAB addresses a number of disclosure issues raised with respect to revenue sharing arrangements. For example, the DOL clarifies that, where applicable, an explanation that some or all of a plan's administrative fees may be offset by investment-related charges must be included – even where no expenses are expressly allocated to participant accounts – in order to alert participants to the fact that such expenses exist but are being paid through revenue payments.

- *Brokerage Windows.* The FAB clarifies the extent to which brokerage windows are covered by the regulation (i.e., the window itself (as a plan feature) as distinguished from

the investments made through the window), and specifies what information plans that utilize a brokerage window must disclose.

- *Provision of Multiple Comparative Charts.* The FAB clarifies that comparative charts provided by separate service providers may be "stapled together" – that is, they need not be combined into one chart – and provided to participants as long as they are provided at the same time and in a manner that facilitates comparison between investment options.

- *Model Portfolios.* The FAB clarifies that model portfolios comprised of investment options available under the plan that are not separate investments (that is, the model is simply made available for participants to use or not use in making their own investment elections) are not "designated investment alternatives" subject to the disclosure rules.

Above is just a sampling of the guidance provided by FAB 2012-02. The FAB extensively addresses many of the issues raised by the participant-level fee disclosure regulations and provides extensive guidance as to whether and how such disclosures should be made. Look for a more comprehensive treatment of the FAB in a future Reed Smith alert.

Important Dates to Remember

July 1, 2012 – Deadline for plan service providers to provide disclosures to plan fiduciaries under ERISA 408(b)(2)

August 30, 2012 – Deadline for most plan administrators to provide initial participant-level disclosures under ERISA 404(a)

November 14, 2012 – Deadline for most plan administrators to provide initial quarterly statement disclosures under ERISA 404(a)

Good Faith Relief

Although the DOL has determined not to extend these deadlines, it did acknowledge that some providers/plan administrators may not be able to incorporate all the changes reflected in the FAB and/or may have already made "early" disclosures based on the existing regulations. For these providers/plan administrators, the DOL indicated it would "generally be unnecessary" for the

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DOL to take enforcement action where the providers' actions were based on a reasonable good-faith interpretation of the new regulations.

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