

Finally the Final ... 408(b)(2) Regulation

By Fred Reish and Bruce Ashton

The Department of Labor (DOL) has issued the long-anticipated final service provider fee disclosure regulation (the "408(b)(2) regulation"). (A complete copy of the final regulation and its preamble is at <http://www.drinkerbiddle.com/files/ftpupload/pdf/408b2reg.pdf>) In this Alert, we describe what the amendment says; in a subsequent piece, we will explain the impact on various service providers.

We think the most important changes are the following:

- > The extension of the compliance date from April 1, 2012 to July 1, 2012
- > The fact that service providers are not required to provide a summary of the disclosures, though the DOL provided a sample "guide" that is not mandatory
- > The addition of the requirement to describe the arrangement between the service provider and the payer of indirect compensation
- > Limited relief for disclosures for brokerage accounts and similar arrangements
- > Clarification that electronic disclosure of the disclosures is permitted
- > Relief from the disclosure requirements for "frozen" 403(b) contracts
- > The requirement that plan sponsors terminate the relationship with a service provider who fails or refuses to provide information on request

Background

The 408(b)(2) regulation requires most service providers to retirement plans – including pension, profit sharing, 401(k) and 403(b) plans subject to ERISA – to make written disclosure of their services, fiduciary and/or RIA status and total compensation. The regulation was first proposed in 2007, was issued as an "interim final" regulation in July 2010 and has now been finalized with today's release.

In light of its "interim final" status, it had been widely anticipated that amendments to the regulation would be issued; and the DOL invited comments on several issues in the 2010 release. In August of this year, the DOL publicly announced that it was working on an amendment and as a result extended the compliance date. Now, in issuing the final rule, the compliance date has once again been extended, though for only three months (i.e., July 1, 2012). Given the scope of some of the changes, this may not be sufficient time for covered service providers to develop and disseminate the required information on an orderly basis...which could result in errors.

Because of the delayed compliance date, some service providers have deferred starting the process of preparing the forms and creating the systems needed to comply with the disclosure requirements. Some did so to avoid having to make changes and others may have hoped for a more extended delay. That is not going to happen, and service providers should circle July 1, 2012 (barely five months away) on their calendars to make sure they are in full compliance by that date for existing clients and that they are prepared to comply with advance disclosures for any new clients.

The Final Regulation

The most important changes in the newly released amendment are:

1. *Covered Plan* - The definition of covered plan now excludes annuity contracts and custodial accounts in 403(b) plans that were issued to employees before January 1, 2009, where no additional contributions have been made and the contract is fully vested and enforceable by the employee.
2. *Indirect Compensation* - The final regulation has made a fairly significant change in the disclosure of indirect compensation (that is, compensation received from a source other than the plan or plan sponsor). The disclosure must now include both identification of the payer and a description of the arrangement between the payer and the covered service provider, affiliate or subcontractor pursuant to which the indirect compensation is paid. There is limited relief for disclosures related to brokerage accounts and similar arrangements.
3. *Investment Information* - The regulation modifies the information that must be provided by recordkeepers and others to better track the disclosures required in the participant disclosure regulation. It also adds a requirement to disclose information that is within the control of (or reasonably available to) the covered service provider and that is required for the plan administrator to comply with the participant disclosure regulation.
4. *Form of Disclosure* - There was speculation that the DOL would require service providers to include a summary of the disclosures and a "roadmap" for finding the disclosures in the documents provided. It did not do so and has indicated that it will be issuing a proposed rule regarding a summary or roadmap (now referred to as a "guide") requirement in the future. In the meantime, the DOL did provide a sample guide that may, but is not required, to be used. That said, in the preamble, the DOL states, "Similarly, to the extent a responsible plan fiduciary experiences difficulty finding and reviewing the required disclosures in lengthy, technical, or multiple disclosure documents received from a covered service provider pursuant to the requirements of the final rule, the fiduciary should consider requesting assistance from the covered service provider, for example, discussing with the covered service provider the feasibility and cost of using the attached sample guide."
5. *Manner of Delivery* - The final regulation clarifies that nothing in the regulation limits the ability to use electronic media.

6. *Change Notice* - The interim final regulation required that changes in the information previously provided had to be given to the responsible plan fiduciary not later than 60 days after the service provider becomes aware of it. This “update requirement” applied to all disclosures, including investment-related information. The final rule changes this requirement to say that the deadline for disclosure of investment-related information is “at least annually.” In other words, for this type of information, the updating requirement is now annual.
7. *Reporting and Disclosure Response* - The interim final rule required a service provider to give information necessary for a plan administrator to comply with the plan’s reporting and disclosure requirements under ERISA within 60 days after a written request. This has been changed to say that the information must be provided (in response to a written request) reasonably in advance of when the plan administrator must comply with its reporting obligation.
8. *Compensation Definition* - The final regulation amends the definition of compensation to permit a service provider to provide a “reasonable and good faith” estimate of compensation if it is not otherwise readily able to describe its compensation, though the covered service provider in this case is also required to explain the methods and assumptions used for the estimate.
9. *Plan Fiduciary Relief* - The regulation provides an exemption for plan fiduciaries if the service provider fails to provide required disclosures so long as various requirements are met. The exemption originally stated that if the service provider failed to provide the information upon request, the plan fiduciary was required to consider whether to continue the relationship with the service provider. The final rule now requires the plan fiduciary to terminate the relationship if the service provider fails to provide requested information relating to future services.

Finally, the compliance effective date for the participant disclosures has also been pushed back. For calendar year plans, the initial disclosures of plan and investment information must be provided by August 30, 2012, and the first quarterly expense statement is required by November 14, 2012 (covering the third quarter).

We will be discussing the impact of the changes and the compliance issues in a month or so in another, more detailed bulletin. However, we wanted to get this information to you as quickly as possible.

Employee Benefits & Executive Compensation Practice Group

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