

DOL Releases Final 408(b)(2) Disclosure Regulation

Final regulation on required disclosures by plan service providers extends deadline for disclosures to July 1, 2012.

February 2, 2012

The Department of Labor (DOL) has now released the “final” version of its 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). It replaces the interim final regulation that was published in July 2010.¹

The deadline for providing the required disclosures was extended by three months to July 1, 2012. This will provide needed time for service providers to complete their disclosure documents in a form consistent with the finalized regulation, which differs in several respects from the interim final regulation. Because the date by which the participant-level disclosures for participant-directed plans must be provided is tied to the Section 408(b)(2) disclosure effective date, that date is now extended to August 30, 2012, with the first quarterly statements under the rules for calendar-year plans due by November 14, 2012.

One of the issues left open after the release of the interim final regulation was whether DOL would require a specific format for the disclosure. The final regulation reserves a place for the future development of such provisions, which are now the subject of a separate proposed rulemaking that DOL anticipates will come out this summer. DOL did include with the final regulation an appendix with a form of a “sample guide to initial disclosures,” which DOL is encouraging service providers to use to assist plan fiduciaries with their review of the required disclosures.

We are planning to issue a second LawFlash on the final regulation that provides a more detailed analysis of the changes from the interim final regulation.

Service providers to “covered” plans—such as investment advisers, broker-dealers, banks, insurance companies, and recordkeepers—now have just under five months to determine whether they need to provide additional disclosures to their existing clients and, if so, to get those disclosures to their clients. They also will need to develop procedures to ensure that new clients receive the necessary disclosures, and that clients are updated on any changes to previously provided information. “Responsible” plan

1. See “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.

fiduciaries, such as plan committees and plan sponsors, should aim to develop, by July 1, processes and procedures for reviewing the disclosures that are received.

Morgan Lewis’s Employee Benefits and Executive Compensation and Investment Management Practices have been actively assisting clients on compliance issues under the new DOL disclosure rules, and have issued prior LawFlashes on both the ERISA Section 408(b)(2) and participant disclosure regulations.²

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2. 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” (Oct. 26, 2010), available online at http://www.morganlewis.com/pubs/EB_LF_FinalDisclosureIndividualAccountPlans_26oct10.pdf; “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; and “Service Providers to ERISA Plans: DOL’s New Disclosure Regulations Are Imminent—Are You Ready?” (Nov. 8, 2011), available online at http://www.morganlewis.com/pubs/EB_LF_ServiceProviderstoERISAPlans_08nov11.pdf.

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