

ERISA Fiduciary Responsibility and Disclosure Issues for 2011: Regulatory, Compliance, and Legislative Outlook

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This past year was an active year for developments in the fiduciary responsibility and disclosure areas of the Employee Retirement Income Security Act of 1974, as amended (ERISA). This LawFlash reviews the new and proposed regulations issued by the U.S. Department of Labor (DOL) during 2010 that will require plan sponsors and service providers to take action during 2011, as well as ongoing developments from 2010 that merit monitoring during 2011.

Regulatory Developments and Compliance Issues

The key regulatory and compliance issues are:

- **Service provider disclosure:** The effective date for compliance with the new service provider disclosure rules under Section 408(b)(2) of ERISA is July 16, 2011. By that date, service providers must provide the required disclosures to plan sponsors for all their covered service arrangements. In addition, plan sponsors should have in place a process for tracking and monitoring receipt of these disclosures. This will help plan sponsors demonstrate that they are acting in a prudent manner in monitoring service providers and preserve their eligibility for special relief in the event a service provider does not provide them with the necessary disclosures. See our July 21, 2010 LawFlash on this issue, “DOL Publishes Interim Final ERISA Regulation on Service Provider Disclosure Obligations,” available at http://www.morganlewis.com/pubs/EB-LF_DOL-InterimFinalReg-ServiceProviderDisclosureObligations_21july10.pdf.

The regulation was issued in “interim final” form. DOL plans to issue a final (noninterim) version of the regulation in April 2011 and, given the time frame involved, may provide additional time beyond the 2011 effective date to meet any new requirements that appear in the final regulation (although the staff has not committed to doing so).

The current rules are limited to pension plans. DOL held a hearing on service provider disclosure for welfare plans in December 2010, and expects to propose welfare plan service provider disclosure rules in the latter part of 2011.

- **Participant-directed plan disclosures to plan participants:** The effective date for compliance with these new disclosure rules is the first plan year beginning on or after November 1, 2011. Even though that will not be until 2012 for calendar-year plans, plan administrators should begin assembling information and coordinating with the plan’s service providers and investment providers prior to the effective date to ensure that compliant disclosure materials can be furnished to plan participants in a timely manner. See our October 26, 2010 LawFlash on this issue, “DOL Releases Final Disclosure Regulations for Participant-Directed Individual Account Plans,” available at http://www.morganlewis.com/pubs/EB_LF_FinalDisclosureIndividualAccountPlans_26oct10.pdf.
 - *Related disclosure matters.* DOL is planning to issue guidance on the participant statement requirements that were added to the law by the Pension Protection Act of 2006, to supplement and codify its prior guidance. Also, DOL expects to issue shortly a request for information on issues related to the use of electronic media to furnish required disclosures to plan participants, and to provide guidance on electronic disclosure prior to the effective date of the new disclosure rules.

- **Target date fund and QDIA disclosure:** DOL has proposed changes to the disclosure rules for target date funds and qualified default investment alternatives (QDIAs), in part to conform to the new participant-directed plan disclosure rules. The comment period on these changes closed on January 14, 2011. Since this rule is not particularly controversial, it may be finalized by the end of 2011.

- **Fiduciary status through providing “investment advice”:** DOL has proposed significant changes to its regulation defining the concept of “investment advice” for purposes of ERISA fiduciary status. The proposed changes are controversial, and DOL has scheduled a public hearing on them for early March. Given the number of issues being raised, we think it is unlikely that the changes will be finalized in 2011. There is speculation that Congress could become involved in the process by submitting comments or even holding hearings. Depending on the nature of the final rule, it may require significant changes to the way firms do business. See our November 1, 2010 LawFlash on this issue, “DOL Proposes Significant Changes to “Investment Advice” Fiduciary Status Definition,” available at http://www.morganlewis.com/pubs/EB_LF_SignificantChangesStatusDefinition_1_01nov20101.pdf.

- **Participant investment advice exemption:** During 2010, DOL re-proposed rules to implement the prohibited transaction exemption added to ERISA by the Pension Protection Act of 2006 for computer model and other plan participant advisory programs. DOL expects to issue a final regulation in May 2011.

- **Lifetime income options:** Following up on a joint DOL and Treasury Department hearing on lifetime income options held in September 2010, the Obama administration is examining whether to take action in this area. While this is a long-term project, it is possible that some proposals may emerge during 2011. There are a number of fiduciary responsibility and disclosure issues related to lifetime income options, including how such options are to be selected for inclusion in a defined contribution plan and how the availability of these options would be disclosed to plan participants.

Another area that could affect fiduciary responsibility and disclosure obligations under ERISA is the development of regulations to implement last year's financial reform legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

Congress and Legislation

The general expectation is that there will not be much legislative activity in the fiduciary responsibility and disclosure areas during 2011, due to the division of control between the Republicans in the House and the Democrats in the Senate. The bills that had been proposed to add fee disclosure requirements to the statute and to revise the participant investment advice exemption that is the subject of a pending DOL regulation are not likely to see further action. The principal proponent of those bills in the House is now in the minority and no longer a committee chair, and the bills lacked strong support in the Senate.

One area that may receive attention during 2011 is the concept of "auto-IRAs"—a program under which employers would be required to contribute employee payroll deductions to IRAs automatically set up for their employees, unless the employees choose to opt out. The Obama administration has been promoting this concept, and there is some support in Congress. There are still some issues being worked out as to how the fiduciary responsibility rules would apply to these IRAs, including the scope of permissible investments. If there is a consensus between the Treasury Department and congressional staff on those issues, legislation may be introduced this year.

More broadly, the federal tax exclusions for retirement and other employee benefits may, based on reports issued in late 2010, be subject to scrutiny in 2011 in the context of options for deficit reduction. (There is ample historical precedent for this, going back to the 1980s.) There may be implications for the fiduciary responsibility and disclosure rules for plans that provide these benefits, depending on the nature of the tax changes that are made.

In sum, there are many steps to take during 2011 to comply with new rules issued during 2010, and several pending matters that could result in additional changes to the ERISA regulatory framework. Many of these issues warrant current review. We look forward to assisting our clients and friends in these areas.

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