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**The Department of Labor's Recent
Flurry of Fiduciary Regulations:
New Obligations for Plan Fiduciaries and Plan
Service Providers**

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Introduction

- New Disclosure Obligations
 - Service Provider Disclosures
 - *Final Interim Regulations under Section 408(b)(2) of ERISA*
 - *Reasonable compensation for necessary services prohibited transaction exemption*
 - *Effective July 11, 2011*
 - Disclosures for Participant-Directed Individual Account Plans
 - *Final Regulation under Section 404(a)(1) of ERISA*
 - *Mandatory disclosure rules replace and expand upon voluntary disclosure rules under Section 404(c) of ERISA*
 - *Effective for plan years beginning on or after November 1, 2011 (January 1, 2012 for calendar year plans)*

Introduction

- Fiduciary Status
 - Proposed regulation to the definition of "Fiduciary" under ERISA Section 3(21)
 - Revamps and expands Investment Advice Fiduciary definition
 - Likely to have far-reaching impact on the way retirement plan services are delivered
- New disclosure rules will impact both service providers and plan sponsor fiduciaries
 - Service Provider regulations obligation of service providers, but plan sponsor fiduciaries must ensure appropriate disclosures and determine whether compensation is reasonable
 - Participant-directed plan disclosures are obligation of plan fiduciaries, but service providers will generate and/or coordinate compilation and distribution of disclosure materials

Service Provider Disclosure Requirements under Section 408(b)(2)

- Background
 - Statutory Exemption for Services
 - *Requires that the services are necessary and are provided under a reasonable contract or arrangement, and that no more than reasonable compensation is paid for the services*
 - *Amended regulation adds disclosure requirements to the “reasonable contract or arrangement” condition*
 - Penalties for Violation

Service Provider Disclosure Requirements under Section 408(b)(2)

- Covered Plans
 - Retirement plans (DB and DC) subject to ERISA
 - Does not apply to IRAs, IRA annuities, SEPs, and SIMPLEs
 - Separate subsection reserved to deal with welfare plans in future guidance

Service Provider Disclosure Requirements under Section 408(b)(2)

- Covered Service Providers
 - ERISA Fiduciaries
 - *Includes a fiduciary to a “plan asset” entity in which a plan has a direct equity investment, but not downstream plan asset entitie*
 - Registered Investment Advisors
 - *Under federal or state law*
 - Recordkeeping or Brokerage Services - to a participant directed individual account plan, where designated investment alternatives are made available in connection with the recordkeeping or brokerage services
 - Other Enumerated Services – such as accounting, auditing, investment advisory, recordkeeping, brokerage and consulting for which the service provider, its affiliate or subcontractor reasonably expects to receive “indirect” compensation or certain types of bundled service compensation

Service Provider Disclosure Requirements under Section 408(b)(2)

- Compensation Threshold
- Covered service provider reasonably expects to receive \$1,000 or more in direct and indirect compensation
 - *De minimis exclusion for non-monetary compensation valued at \$250 or less*

Service Provider Disclosure Requirements under Section 408(b)(2)

- Initial Disclosure
 - Must be made to a “responsible plan fiduciary”
 1. *Description of the Services*
 2. *Description of the Covered Service Provider’s Direct and Indirect Compensation*
 - Goal – sufficient information to permit evaluation of the reasonableness of the compensation

Service Provider Disclosure Requirements under Section 408(b)(2)

3. *Additional disclosures for plan asset funds*

- Charges in connection with acquisition, sale, transfer or withdrawal
- Annual operating expenses
- Other ongoing expenses

4. *Bundled Service Arrangements*

- Charges set on a transaction basis
- Charges directly against the covered plan's investment

Service Provider Disclosure Requirements under Section 408(b)(2)

5. *Special Rule for Recordkeeping Services*
 - If no explicit charge, then must include a reasonable good faith estimate of stand-alone costs
6. *Additional Disclosures for Recordkeeping and Brokerage Arrangements Tied to Designated Investment Alternatives*
 - Charges in connection with acquisition, sale, transfer or withdrawal
 - Annual operating expenses
 - Other ongoing expenses

Can be met by using the disclosure materials of the issuer under certain circumstances

Service Provider Disclosure Requirements under Section 408(b)(2)

7. *Timing of Disclosure*

- Initial Disclosure
 - Reasonably in advance of the date of the contract (special 30 day rule when non-plan asset entity becomes a plan asset entity)
- Changes
 - As soon as practicable, but not later than 60 days after the service provider learns of the change

Service Provider Disclosure Requirements under Section 408(b)(2)

8. *Disclosure Errors*

- No violation if service provider makes good faith error, if error is disclosed as soon as practicable, and no later than 30 days from discovery of the error

9. *Furnishing Information on Request to Comply with Reporting and Disclosure Obligations*

- Service provider must furnish any compensation-related information required for the plan to comply with ERISA reporting and disclosure requirements (including Form 5500 Schedule C)
- Must be provided within 30 days of the receipt of the request

Service Provider Disclosure Requirements under Section 408(b)(2)

- Class Exemption for Responsible Plan Fiduciaries
 - If covered service provider fails to make required disclosure, plan fiduciary can be exempt from liability, provided:
 - *The fiduciary did not know of the disclosure failure and reasonably believed that the required information was disclosed*
 - *Upon discovering the disclosure failure, the fiduciary requests the information*
 - *If service provider fails to comply, the fiduciary notifies DOL, not later than 30 days following the earlier of a) the service provider's refusal to furnish the requested information, or b) 90 days after the written request is made*

Service Provider Disclosure Requirements under Section 408(b)(2)

- Status of Regulation
 - Effective date - July 16, 2011
 - *Disclosure must be provided by that date for existing arrangements*
 - Finalization of regulation
 - *Regulation issued in "interim final" form*
 - *Subject to further revisions based on comments*

Participant Disclosure – Overview

- In October, Department of Labor (DOL) released final regulations that will impose new requirements for the disclosure of fee and investment information to participants and beneficiaries in participant-directed individual account plans
- Included a final amendment to the regulations under ERISA 404(c), which provides the safe harbor from fiduciary liability for participant-directed plans

Participant Disclosure – Overview

- Effective for plan years beginning on or after 11/1/2011 (i.e., for a calendar year plan 1/1/2012)
- Applies to all participant-directed individual account plans (e.g., 401(k))
- Does not apply to IRAs, IRA annuities, SEPs or SIMPLEs

Participant Disclosure – Plan-Related Information

- General Operational and Identification Information relating to:
 - How to give investment instructions
 - Limitations on investment instructions
 - Exercise of voting, tender and similar rights
 - Designated investment alternatives
 - Brokerage windows, self-directed brokerage accounts or similar arrangements
 - Associated fees or expenses

Participant Disclosure – Plan-Related Information

- Information on Administrative Expenses:
 - General explanation of fees for plan administrative services that may be charged to all participant accounts
 - Additional quarterly disclosure, including
 - *Plan-wide charges:*
 - a description of the services to which charges relate
 - explanation as to whether any of the plan’s administrative expenses for the preceding quarter were paid from the annual operating expenses of one or more of the plan’s designated investment alternatives
 - *Individual expenses charged to a participant’s account (dollar amount)*
 - e.g., for QDROs, loans or investment advice services

Participant Disclosure – Investment-Related Information

- Identifying Information – name and category of investment, along with an Internet address that will lead participants to supplemental information about the investment option
- Performance Data, including:
 - For designated investment alternatives where the rate of return is not fixed (such as typical mutual funds), disclose the average annual total percentage return of the investment for 1-year, 5-year, and 10-year periods (or, if shorter, life). Stable value funds and money market mutual funds fall under this category
 - For designated investment alternatives where the rate of return is fixed (such as GICs), disclose the current rate of return and the minimum rate guaranteed under the contract, and include a statement that the issuer may adjust the rate of return prospectively

Participant Disclosure – Investment-Related Information

- Special rules apply regarding -
 - Designated investment options that consist primarily of qualifying employer securities or that are used to purchase annuity benefits, in recognition of the different nature of such options
 - The DOL reserved a subsection to provide special disclosure rules for target-date or similar funds, which are the subject of a separate proposed regulation

Participant Disclosure – Investment-Related Information (continued)

- Benchmark Information must be provided for other than “fixed rate” investments --
 - Name and returns of appropriate broad based securities market index over the 1, 5, 10 year periods (or life, if shorter) comparable to the performance periods provided for plan funds
 - Benchmark cannot be administered by an affiliate of the investment issuer, its investment adviser or principal underwriter, unless the index is widely recognized and used
 - Plan Administrator may blend the returns of more than one broad based index w/r/t funds that are not benchmarked or that have a blend of asset classes

Participant Disclosure – Investment-Related Information

- Fee and Expense Information –
 - The amount and description of each shareholder-type fee
 - A description of any limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part
 - Total annual operating expenses of the investment expressed as a percentage AND as a dollar based example of the expense ratio
 - A statement that –
 - *fees are only one factor a participant should consider*
 - *the cumulative effect of fees and expenses can substantially reduce the growth of a participant's retirement account*
 - *participants can visit EBSA's website for information and an example demonstrating the long term effect of fees and expenses*

Participant Disclosure – Website

- Plan Administrator must make sure a website is available, including
 - Name of investment issuer
 - Objectives or goals in a manner consistent with SEC Form N-1A or N-3
 - Principal strategies and principal risks in a manner consistent with SEC Form N-1A or N-3
 - Portfolio turnover rate consistent with SEC Form N-1 or N-3
 - Performance data as described above, updated at least quarterly (or more frequently if required by other applicable law)
 - Fee and expense information
 - Information on how to request and obtain free of charge a paper copy of the information required to be maintained on the website

Participant Disclosure – Glossary

- Plan Administrator must provide a glossary of investment and financial terms, which may be included in the comparative document, on the website, or as a link to a website

Participant Disclosure – Chart

- Plan Administrator must provide the foregoing investment-related information in a chart or similar format that facilitates comparison of the information for each investment alternative
- Chart must include:
 - date compiled
 - name and address of Plan Administrator, and
 - how to obtain additional information.
- DOL has made available a model chart that can be accessed at <http://www.dol.gov/ebsa/participantfeerulemodelchart.doc>

Participant Disclosure – Timing

- Generally, both plan-related and investment-related information must be provided on or before the date the individual can first direct investments, and at least annually thereafter
- Information about actual charges must be disclosed quarterly
- Except w/r/t actual charges, fees and expenses may be expressed as monetary amount, formula, percentage of assets or per capita charge
- Information about any changes in disclosures must be furnished at least 30 days but not more than 90 days in advance of the effective date of the change (or as soon as reasonably practicable if circumstances do not allow for 30 days)

Participant Disclosure – Method

- Plan-related information may be provided in SPDs or on quarterly statements
- Expense information may be included in quarterly statements
- DOL reserved the issue of use of electronic media for these disclosures

Participant Disclosure – Final Amendment to 404(c)

- Integrates the disclosure requirements described above into the section 404(c) regulation
- Many of the requirements in the final regulations are duplicative of the existing 404(c) disclosure requirements
- Some, such as the requirement to send participants prospectuses relating to investment options, have been supplanted and are no longer applicable (prospectuses still must be provided on request)
- DOL takes the position that 404(c) does not relieve a plan fiduciary of its duty to prudently select and monitor the plan's service providers and designated investment alternatives

Definition of the Term “Fiduciary”

- Proposed – October 22, 2010
 - 90-day comment period
 - Effective 180 days after publication of final regulation
- Applies to both ERISA plans and plans under Section 4975 of IRC (includes IRAs)
- Revises the established five-part test for investment advice
- Overrules a 1976 Advisory Opinion holding that valuations are not “investment advice”

Definition of the Term “Fiduciary”

- Revises the five-part test for investment advice
 - *Advice/recommendation regarding securities or other property (include value)*
 - *Regular basis*
 - *Mutual agreement*
 - *Primary basis for investment decisions*
 - *Advice is individualized to particular needs of the plan*

Definition of the Term “Fiduciary”

- New rule
 - Clarifies that manager searches are covered
 - Valuations, appraisals, and fairness opinions are covered
 - Removes the regular basis requirement
 - *Removes the free “first bite”*
 - Changes “mutual” agreement to just an agreement
 - *Shifts burden of proof*
 - Changes the application on Registered Investment Advisers and those parties who acknowledge fiduciary status or who are otherwise fiduciaries to the plan
 - *Removes individualized investment advice requirement*

Definition of the Term “Fiduciary”

- Special rules
 - Sales exception/disclaimer
 - *Issues for broker-dealers*
 - Platform providers
 - *Interpretive Bulletin 96-1 (Investment Education)*
 - Valuations for compliances with plan reporting (i.e., Form 5500)
 - *Issues for hard-to-value assets*

Target Date Fund Disclosure

- Proposed November 30, 2010
 - Comments due by January 14, 2011
 - Effective 90 days after publication of final rule
- Amends QDIA and participant disclosure rules for issues relating to the design of target date funds (TDFs)
- Intent is to ensure consistent information regarding TDFs for both participants who choose to invest in TDFs and those who are defaulted into TDFs

Target Date Fund Disclosure

- Special disclosure requirements
 - An explanation of the assets allocation/glide path
 - *Include a chart, table or graphical representation that illustrates how the asset allocation will change over time*
 - If the TDF's name includes a date (i.e., 2030 fund), include:
 - *an explanation of the age group for whom the fund is designed,*
 - *the relevance of the date, and*
 - *any assumptions about a participant's contribution or withdrawal intentions*
 - A statement about the risk of losing money, including losses near or following retirement

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Questions?

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