DOL Publishes Interim Final ERISA Regulation on Service Provider Disclosure Obligations

July 21, 2010

On July 16, the long-awaited interim final regulation from the U.S. Department of Labor (DOL) on employee benefit plan service provider disclosure obligations under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), appeared in the *Federal Register*.

Effective in one year—on July 16, 2011—the new rules will require certain service providers to employee benefit plans to disclose detailed information to independent plan fiduciaries regarding their services and the direct and indirect compensation they receive in connection with providing services to the plans, or otherwise lose the protection of an exemption from the ERISA prohibited transaction rules. These changes will have important implications for those service providers who will be obligated to provide these disclosures, as well as for the plan fiduciaries and plan sponsors who will be receiving these disclosures, because the failure to comply can expose both to liability for engaging in a nonexempt prohibited transaction.

This LawFlash first provides background on the evolution of the new disclosure rules, then a detailed review of the new rules and the significant changes from the proposal, and finally, it discusses the significance of the new rules and the effect on service providers, plan fiduciaries, and plan sponsors.

Background

Retirement plan fees and fee disclosure have been of significant interest to Congress, regulatory agencies and potential litigants alike in recent years. Beginning in late 2006, several class action lawsuits were filed claiming breaches of fiduciary duty under ERISA for, among other things, paying excessive fees from, and the failure to fully disclose fees charged to, 401(k) plans and plan participants. Shortly thereafter, bills were introduced in Congress to address defined contribution plan fee disclosure and conflict of interest issues. At the same time, DOL was working on a number of regulatory projects aimed at enhancing service provider fee disclosure for ERISA plans.

The DOL initiative consists of three parts. The first is a series of modifications to the service provider fee reporting on Schedule C to the Form 5500, which were published in final form in November 2007 and went into effect for 2009 plan year Form 5500 annual reports. The second part, which was proposed in December 2007 and has now been finalized by this interim final regulation, is a set of rules designed to make compliance with section 408(b)(2) of ERISA, the statutory exemption that permits a party in interest to provide services to an ERISA plan, contingent on the satisfaction of fee disclosure requirements. The third part, which remains pending with action expected later this year, would enhance the information plan administrators must furnish to participants and beneficiaries of a participant-directed individual account plan.

ERISA Section 408(b)(2) Prohibited Transaction Exemption

Section 406(a)(1)(C) of ERISA broadly prohibits the furnishing of goods, services, or facilities between a plan and a party in interest to the plan. As a party in interest is defined under ERISA to include a service provider to a plan, any service arrangement between a plan and a service provider, even if necessary and beneficial to the plan, would, absent an exemption, violate section 406(a)(1)(C). Section 408(b)(2) of ERISA provides a statutory exemption to this prohibition where the contractual arrangement between the plan and the party in interest is (1) "reasonable," (2) necessary for the establishment or operation of the plan, and (3) for no more than reasonable compensation. There is a corresponding prohibition and a corresponding exemption in the parallel prohibited transaction excise tax rules in section 4975 of the Internal Revenue Code of 1986, as amended (the Code).

DOL adopted a regulation under section 408(b)(2) in 1977. On the requirement that the arrangement be "reasonable," the regulation provided only that a fiduciary must be able to cancel the contract on "reasonably short notice" and without penalty.

DOL has indicated in the past that full disclosure regarding fees may be necessary for a service provider to avoid violating the prohibition against fiduciary self-dealing, and also has emphasized the need for plan fiduciaries to obtain sufficient information to make informed decisions in retaining and monitoring service providers, to be able to meet their fiduciary duties of loyalty and prudence. Nevertheless, prior to the issuance of the interim final regulation, a service provider was not required to supply any particular disclosures or other information to plan fiduciaries.

This would change under the interim final regulation. Expanding on section 408(b)(2)'s reasonable arrangement condition, the regulation requires that to meet this condition, a service provider must provide advance disclosure of certain types of information regarding its services and fees.

New Disclosure Rules

In General

At the outset, DOL noted that recent changes in the way services are provided to plans, and in the manner in which service providers are compensated, had made it difficult for plan sponsors and fiduciaries to understand what service providers are actually paid for their services. The new rules are designed to assist plan sponsors and fiduciaries in obtaining the information they need from service providers, in order to assess the reasonableness of the compensation paid for services, and to satisfy their ERISA reporting and disclosure obligations.

The regulation notes that these disclosure requirements are independent of ERISA's general fiduciary obligations. According to DOL, those fiduciary responsibilities obligate plan fiduciaries to obtain and carefully consider information necessary to assess the services to be provided to the plan, the reasonableness of fees and expenses being paid for such services, and potential conflicts of interest that might affect the quality of the provided services.

DOL said that it viewed disclosures concerning investment-related compensation on plan investments and investment options, such as investment management fees charged against investment returns, as particularly significant. Such fees typically constitute a large portion of total plan expenses, and may directly affect the cost of plan services as a result of revenue sharing and similar arrangements with recordkeepers and other intermediaries who provide services to participant-directed individual account plans. These DOL views underlie the special rules in the regulation for disclosures by "plan asset fiduciaries" and in connection with recordkeeping and brokerage services provided to participant-directed plans.

The regulation specifies that it also applies to the parallel prohibited transaction provisions in section 4975 of the Code, so that a failure to comply would trigger not just personal liability for the plan fiduciaries under ERISA, but also section 4975 prohibited transaction excise taxes for the noncomplying service provider.

Covered Plans

Unlike the proposal, the interim final disclosure requirements apply only to ERISA-governed pension plans (both defined benefit and defined contribution plans), with a separate subsection reserved to deal with welfare plans in future guidance. DOL was persuaded by the comments that there are significant differences in service and compensation arrangements between pension and welfare plans, such that welfare plans should be subject to separate, more specifically tailored provisions.

Coverage is limited to those pension plans that are normally subject to ERISA. "Simplified employee pension" plans, "simple retirement accounts," individual retirement accounts, and individual retirement annuities (collectively, IRAs), which are subject to the parallel prohibited transaction rules in section 4975 of the Code but may not be subject to ERISA, are excluded. DOL acknowledged that the new rules were designed with employee benefit plan fiduciaries rather than IRA accountholders in mind, and said that IRA accountholders, who are responsible only for their own individual plans, should not be held to the same fiduciary duties to scrutinize and monitor plan service providers.

Covered Service Providers

Consistent with the proposal (although revised in several respects), the interim final regulation only applies to certain "covered" service providers, reaching those service arrangements that DOL believes most likely to give rise to conflicts of interest. The term "covered service provider" is defined as a service provider that enters into a contract or arrangement with a covered plan to provide any of the following:

1) Services as an ERISA fiduciary—including as a fiduciary to an investment contract, product or entity that holds plan assets in which the covered plan has a direct equity investment (a plan asset fiduciary)[1]—or as a registered investment adviser (whether under federal or state law).

   The "direct equity investment" language is intended to exclude coverage of entities in which a plan asset entity may invest, even if those downstream investments may themselves be considered plan asset entities. In addition, these categories entirely exclude nonfiduciary services provided to any entity in which the covered plan invests, whether or not a plan asset entity. As a result, services to an entity in which a plan invests are covered only if those services are fiduciary services to a plan asset entity in which the plan is a direct investor.

[1] A DOL regulation treats certain entities in which benefit plans maintain equity investments as holding "plan assets" subject to the ERISA fiduciary rules and the prohibited transaction rules of section 4975 of the Code (a plan asset entity). Plan asset entities include bank collective investment funds, insurance company separate accounts, and investment funds in which benefit plan investors hold 25% or more of any class of equity interests.

2) Recordkeeping or brokerage services to a covered plan that is an individual account plan that permits participant investment direction, where designated investment alternatives will be made available in connection with the recordkeeping or brokerage services. A "designated investment alternative" is any investment alternative designated by a fiduciary into which participants may direct the investment of assets held in, or contributed to, their individual accounts. It does not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants to select investments beyond those specifically designated.

   This category is intended to cover recordkeepers and brokers that offer a platform of investment options to participant-directed individual account plans.

3) Other services, such as accounting, auditing, investment advisory (for plans or participants), recordkeeping, brokerage and consulting, for which the covered service provider, an affiliate of the service provider or a subcontractor reasonably expects to receive either (i) "indirect" compensation (that is, compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, an affiliate, or a subcontractor) or (ii) "compensation received among related parties" (that is, transaction-based compensation or charges against the net value of a plan's investment (such as 12b-1 fees) as part of a bundled services arrangement).

Under the regulation, the concept of a covered service provider captures only the party directly responsible to the covered plan for the provision of the services, even where some or all of the services may be performed by an affiliate or subcontractor of that party.

In addition, to be "covered," the service provider must reasonably expect to receive $1,000 or more in compensation, direct or indirect, in connection with providing one or more of the covered types of services. It does not matter for this purpose whether the services will be performed, or the compensation received, by the covered service provider or by an affiliate or subcontractor of the covered service provider. "Compensation" is anything of monetary value, such as money, gifts, awards, and trips. However, consistent with DOL's nonenforcement policy on *de minimis* gifts and gratuities, compensation does not include nonmonetary compensation valued at $250 or less, in the aggregate, during the term of the contract or arrangement.

DOL noted that the parties reported as service providers for Form 5500 Schedule C purposes will not necessarily be the same as those covered by the new disclosure rules.

Initial Disclosure Requirements

A series of disclosures must be provided by the covered service provider to a "responsible plan fiduciary," who is a plan fiduciary with the authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement for the services. The required disclosures include certain information regarding the services to be provided and a description of the service provider's expected compensation. Additional information is required for plan asset fiduciaries, bundled service arrangements, recordkeeping services, and brokerage services that are in connection with participant-directed plans.

Services

The disclosures must describe the services to be provided to the covered plan pursuant to the contract or arrangement. According to DOL, the level of detail required to adequately describe the services may vary depending on the needs of the responsible plan fiduciary, who must decide whether it has enough information. If a particular description lacks sufficient detail to enable the responsible plan fiduciary to determine whether the compensation is reasonable, that fiduciary would be obligated to request additional information. If applicable, the description must also include a statement that the covered service provider, or its affiliate or subcontractor, will provide, or reasonably expects to provide, services either (i) directly to the covered plan as a fiduciary, (ii) as a plan asset fiduciary, and/or (iii) directly to the covered plan as a registered investment adviser.

Compensation

The compensation disclosures must describe the covered service provider's (or its affiliate's or subcontractor's) "direct" compensation—that is, compensation received directly from the covered plan (but not from a plan asset vehicle)—and its "indirect" compensation. In both cases, this should include the amount the covered service provider (or its affiliate or subcontractor) reasonably expects to receive, either in the aggregate or by service, in connection with the described services.[2]

A description or estimate of compensation may be expressed as a monetary amount, formula, percentage of the covered plan's assets, or per capita charge for each participant or beneficiary. (DOL noted that it did not intend to restrict the use of formulas, percentages, and per capita charges to where it is not possible to disclose a monetary amount, as some may have assumed from the Form 5500 Schedule C reporting rules.) If the compensation cannot reasonably be expressed in such terms, it may be described by any other reasonable method, although DOL discouraged reliance on this alternative approach. Under either approach, the description or estimate must contain sufficient information to permit evaluation of the reasonableness of the compensation. For indirect compensation, the disclosure must also identify the services covered and the payer.

The definition of "direct compensation" in the proposal had included compensation received from the plan sponsor. In response to comments, DOL deleted the reference to plan sponsors, to avoid subjecting payments solely from plan sponsors to coverage under section 408(b)(2). As payments from plan sponsors also are excluded from "indirect compensation," the result is that no compensation payable by plan sponsors is disclosable under the new rules, although disclosures would still be required about the covered services for which the sponsor is paying.

The information on compensation must describe the manner in which the compensation will be received, such as whether the covered plan will be billed or the compensation will be deducted directly from the covered plan's account(s) or investments. In addition, it must include a description of any compensation that the covered service provider, affiliate, or subcontractor reasonably expects to receive in connection with the termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

A plan asset fiduciary must include additional information for each affected plan asset vehicle in which the covered plan has a direct equity investment (unless it is a designated investment option covered by the special rule for recordkeeping and brokerage for participant-directed plans, as described below). The additional information consists of descriptions of (1) any compensation that will be charged directly against the amount invested in connection with the acquisition, sale,

[2] DOL stated that, as a general matter, a fiduciary who understands the services being provided and their aggregate cost is in a position to compare services and costs consistent with its fiduciary responsibilities, and to determine the reasonableness of the aggregate compensation paid. The only exception DOL made in this regard was with recordkeeping services, discussed below.

transfer of, or withdrawal from the plan asset vehicle; (2) the vehicle's annual operating expenses if the return is not fixed; and (3) any ongoing expenses in addition to annual operating expenses (for example, wrap fees, mortality and expense fees).

Bundled service arrangements, under which a plan enters into a single contract and may pay a single fee for multiple services provided by multiple parties, are addressed by a special rule for "compensation paid among related parties" (that is, compensation shared among the service providers within the "bundle"). The types of compensation that must be disclosed under this rule, regardless of whether they are also disclosed under other parts of the regulation, are those that are either:

(a) Set on a transaction basis (for example, commissions, soft dollars, finder's fees, or other similar incentive compensation based on business placed or retained); or

(b) Charged directly against the covered plan's investment and reflected in the net value of the investment (for example, Rule 12b-1 fees).

DOL pointed out that, other than as described in this special rule, compensation paid among related parties within a bundled service arrangement need not be disclosed. Such payments affect only how compensation is allocated among the parties, rather than the total cost of services to the plan. This position is in response to concerns that providers would otherwise be required to create an artificial allocation of compensation within a bundled arrangement solely for disclosure purposes.

Recordkeeping Services

A special rule deals with the disclosure of compensation for recordkeeping services, without regard to whether the compensation is also covered by the other disclosure rules, so that some amounts may be reported more than once. For this purpose, "recordkeeping services" include services related to plan administration and monitoring of plan and participant transactions (e.g., enrollment, payroll deductions and contributions, offering designated investment alternatives and other covered plan investments, loans, withdrawals, and distributions), and the maintenance of covered plan and participant accounts, records, and statements.

This rule addresses the issue that recordkeeping services may be provided under an arrangement in which there is no explicit compensation for recordkeeping, as is common in bundled arrangements, or where the cost of recordkeeping is paid for through "revenue sharing" arrangements with mutual funds. To ensure that responsible plan fiduciaries receive disclosures about recordkeeping services and their costs, the rule requires that, in addition to a description of all direct and indirect compensation expected to be received in connection with the recordkeeping services, the covered service provider must also provide a reasonable, good-faith estimate of the stand-alone cost of the recordkeeping services. The estimate must take into account, as applicable, the rates that the service provider would charge to, or be paid by, third parties, or the prevailing market rates charged, for similar recordkeeping services for a similar plan with a similar number of covered participants and beneficiaries. This disclosure must include an explanation of the methodology and assumptions used to prepare the estimate and a detailed explanation of the recordkeeping services that will be provided.

The effect is to create an exception to the general rule that does not require unbundling of fees, with the result that recordkeeping fees, or their equivalent costs, must be separately disclosed.

Designated Investment Alternatives in Participant-Directed Plans

In the case of a covered service provider furnishing recordkeeping or brokerage services to participant-directed individual account plans, the following additional information must be provided for each designated investment alternative that would be receiving these services:

1) Any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, or transfer of, or withdrawal from, the designated investment alternative

2) The alternative's annual operating expenses if the return is not fixed

3) Any ongoing expenses in addition to annual operating expenses

This disclosure requirement can be met by using the current disclosure materials of the issuer of the designated investment alternative that include the necessary information, provided that (i) the issuer is not an affiliate of the covered service provider, (ii) the disclosure materials are regulated by a state or federal agency, and (iii) the covered service provider has no knowledge of the materials being incomplete or inaccurate. The permission to use the issuer's disclosure materials is intended to limit the covered service provider's liability for the completeness and accuracy of the disclosed information, recognizing that the recordkeepers and brokers are not directly involved in the day-to-day management of these investment vehicles, but rather serve merely as intermediaries between those vehicles and the plans.

Timing of Initial Disclosure Requirements; Changes

The disclosures must be provided reasonably in advance of the date the particular services contract or arrangement is entered into, extended, or renewed. (DOL declined to specify a time frame for the disclosure, to permit flexibility for the responsible plan fiduciary and potential service provider to work out how much time is reasonable.) An exception allows 30 days to provide the disclosure when an entity that was not treated as holding plan assets becomes a plan asset entity. Another exception permits information relating to a designated investment alternative to be provided as soon as practicable, but not later than the date the investment alternative has been designated as such by the responsible plan fiduciary.

Changes to the required information must be disclosed as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of the change. In the event disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, the information must be disclosed as soon as practicable.

DOL noted that nothing in the interim final regulation relieves a service provider of other obligations or limitations under ERISA that may require advance notice of changes.

Furnishing of Information on Request to Comply with Reporting and Disclosure Requirements

Upon request of the responsible plan fiduciary or plan administrator, the covered service provider must furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements of ERISA. This ties these rules to the Form 5500 Schedule C disclosure requirements, which are the legal obligation of the plan administrators rather than the service providers, making the affected service providers responsible to provide the requested information needed by the plan administrators (although DOL noted that this rule is not limited to the Form 5500 information—other reporting and disclosure requirements are covered as well). The information must be disclosed not later than 30 days following receipt of such a request in writing, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable.

Disclosure Errors

In response to comments, DOL added relief for service providers for disclosure errors and omissions, to prevent inadvertent mistakes from resulting in the service provider's loss of the section 408(b)(2) prohibited transaction exemption. Under this provision, no contract or arrangement will fail to be reasonable solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information. To qualify for this relief, the provider must disclose the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the provider knew of the error or omission.

Class Exemption for Responsible Plan Fiduciaries from Covered Service Provider Violations

The interim final regulation provides a class exemption that can protect a responsible plan fiduciary from violating the prohibited transaction rules in the event of a failure by a covered service provider to provide the required disclosures. The following conditions must be met:

1) The responsible plan fiduciary did not know that the covered service provider failed or would fail to make the required disclosures, and reasonably believed that the covered service provider disclosed the required information.

2) Upon discovering that the covered service provider failed to disclose required information, the responsible plan fiduciary requests in writing that the covered service provider furnish the information.

3) If the covered service provider fails to comply with the written request, the responsible plan fiduciary notifies DOL of the covered service provider's failure, not later than 30 days following the earlier of (a) the covered service provider's refusal to furnish the requested information or (b) 90 days after the written request is made. The notice must contain, among other things, a description of the services being provided, the information the covered service provider failed to disclose, and whether the covered service provider continues to provide services to the plan. DOL has made a sample notice available on its website at http://www.dol.gov/ebsa/DelinquentServiceProviderDisclosureNotice.doc.

4) Following discovery of a failure to disclose required information, the responsible plan fiduciary must determine whether to terminate or continue the contract or arrangement. In making such a determination, the responsible plan fiduciary must evaluate the nature of the failure; the availability, qualifications, and cost of replacement service providers; and the covered service provider's response to notification of the failure.

Where the class exemption applies, the responsible plan fiduciary will be covered, but the covered service provider will be treated as engaging in a nonexempt prohibited transaction. That prohibited transaction, and the service provider's liability for prohibited transaction excise taxes, would continue until the service arrangement is terminated or the disclosure failure is cured. Even if the service provider furnishes the necessary information in response to the responsible plan fiduciary's request, this prohibited transaction must be reported on the plan's Form 5500.

Preemption of State Law

The interim final regulation provides that it is not to be construed as superseding any state law, such as a state contract or consumer protection law, which governs service provider disclosures, except to the extent the state law prevents the application of a requirement of the regulation. Thus, service providers could be subject to multiple sets of legal rules concerning disclosure obligations. DOL said that while this provision does not address any preemptive effect that ERISA generally may have on state laws that regulate parties that provide services to employee benefit plans, its view is that a state disclosure law in connection with services arrangements generally would not "relate to" employee benefit plans so as to trigger ERISA preemption.

Effective Date

As indicated above, the new rules are effective one year after publication in the *Federal Register*, which will be July 16, 2011. They will apply to all covered service contracts or arrangements as of that date, without regard to whether the contract or arrangement was entered into earlier. For preexisting contracts or arrangements, the disclosures must be furnished no later than the effective date.

Deleted Requirements

In response to comments, several controversial requirements from the proposal were not included in the interim final regulation.

The proposal had required narrative disclosures from the service provider regarding its potential conflicts of interest in providing its services. The interim final regulation does not include the conflict of interest disclosures, instead relying on full disclosure of any "indirect" compensation the covered service provider would receive from parties other than the plan or plan sponsor. DOL was persuaded that plan fiduciaries would be in a better position to assess actual and potential conflicts of interest by reviewing this information, which would be clearer and more meaningful to them than the proposed conflict of interest disclosure requirements.

The proposal also had required a formal written contract delineating the service provider's disclosure obligations. In response to concerns about the complexity and costs of requiring formal written contracts, including the need to revise all existing contracts, this requirement was deleted. Nevertheless, DOL said that it continues to believe that setting forth the disclosure obligations in writing generally will help ensure that all parties clearly understand their respective responsibilities under the new rules.

Comment Period

Because the final regulation contains a number of significant changes from the proposal, and in view of its importance and potentially significant effects, DOL decided to publish the regulation as an interim final regulation, to permit additional comments. Comments are due by August 30, 2010.

DOL indicated that the comments it received were mixed as to whether DOL should establish standards for the format in which the required information must be disclosed. DOL did not know whether such standards would be feasible, given the large variety of service arrangements and variations in the ways in which information is currently disclosed. DOL asked for comments on the costs versus the benefits of adding a requirement that the covered service provider furnish a "summary" disclosure statement containing an overview of the key information required to be disclosed, and describing where to find more detailed information.

One issue DOL left open was the effect of the new rules on other exemptions. Several commenters had indicated that they would not be subject to the new disclosure requirements, because they are relying on other exemptions to cover their service arrangements. While DOL did not express a view at this time, it said it would be reviewing these issues on a case-by-case and exemption-by-exemption basis.

Effect on Fee Disclosure Legislation

While DOL has been considering service provider disclosure rules, several service provider disclosure bills have been introduced in Congress. The bills would require disclosure of fees and, as in DOL's original proposal, potential conflicts of interest. Some of the bills were limited to 401(k) and other individual account plans, whereas others were broader in scope. Rather than amending the prohibited transaction rules, they would impose disclosure requirements under a separate statutory provision, with fines and penalties rather than prohibited transaction liability for nondisclosure.

One of these bills was passed by the House of Representatives earlier this year as part of tax extenders legislation, but those provisions were deleted in the Senate version. DOL had held up the interim final regulation pending action on the House bill, and decided to go forward only after it appeared that no further action on the bill was expected. The bill's sponsor—Rep. George Miller (D-Calif.), the chair of the House Education and Labor Committee—has said that he intends to continue to press for passage of his bill, despite the finalization of the DOL proposal. However, the adoption of the DOL regulation may decrease the level of support for the Miller bill, as many of the concerns underlying the bill have now been addressed.

Observations

The interim final regulation culminates several years of consideration by DOL of service provider fee disclosure issues. It significantly alters the consequences for covered service providers of not providing full disclosure of compensation received.

DOL chose to tie these new requirements to the ERISA prohibited transaction rules, because those are the only rules under the statute that can be used to impose liability directly on nonfiduciary service providers. While DOL made several changes from the proposal, including the addition of relief for inadvertent errors, to protect service providers from strict liability where they have acted in good faith, the threat of prohibited transaction excise taxes will, by design, serve to motivate compliance.

DOL was responsive to the many comments it received, so that the resulting rules should be more workable than the original proposal. Among other things, it deleted the conflict of interest narrative disclosure requirement, which had raised significant concerns, and narrowed the scope of covered service providers. However, DOL also added a special rule on disclosure for recordkeeping services that can be expected to impose additional burdens.

The category of service providers covered by the new rules is considerably narrower than the service providers whose compensation must be reported on the Form 5500 Schedule C. Nevertheless, DOL indicated that the required disclosures may also be appropriate for service providers who do not fall within the covered categories. Thus, these new rules may have a larger impact on business practices, even where not specifically required by regulation.

During the next 12 months, both service providers and plan sponsors/fiduciaries should develop a plan for how they will comply with the new rules by the July 16, 2011 effective date. For service providers, this should include:

- Determining whether they provide services covered by the new rules, keeping in mind that some of the covered services involve relationships with plan asset entities rather than directly with the plans themselves.

- If they provide covered services, developing disclosure materials for those services, including (if applicable) an approach to estimate the overall costs of recordkeeping services and coordination with the disclosure materials used by designated investment alternatives.

- Developing a process for delivering the appropriate disclosure materials in advance of entering into service contracts and arrangements, and to current plan customers in advance of the effective date.

For plan sponsors and fiduciaries, this should include:

- Developing a process to track the disclosures that they should be receiving once the new rules are effective, from both existing and new service providers. This process should include steps for determining which service providers are providing covered services and whether those providers have furnished the required disclosures.

- Developing a process for analyzing the disclosures received. This should include steps for reviewing the information provided, requesting information from a covered service provider if its disclosures do not comply with the regulation's requirements, and notifying DOL if the service provider does not respond in a timely manner.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact the authors, **Donald J. Myers** (202.739.5666; dmyers@morganlewis.com) or **Michael B. Richman** (202.739.5036; mrichman@morganlewis.com), or any of the following Morgan Lewis attorneys:

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