

Final 408(b)(2) Regulations Issued – The Count Down Begins



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On February 3, 2012 the ERISA Section 408(b)(2) final regulations for service provider fee disclosures were published in the Federal Register by the U.S. Department of Labor (“DOL”). (See <http://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2262.pdf>) The publication of the final regulations follows a joint announcement by the DOL and Treasury Department on February 2, 2012. (See News Release at <http://www.dol.gov/opa/media/press/ebsa/EBSA20111653.htm>) They claim their executive actions “will expand available options and provide greater transparency to help working families successfully plan for retirement and manage their retirement savings.”

Secretary Solis' statement in the News Release on fee disclosure confirms the rumors that the delay in releasing the final fee disclosure regulation until after President Obama's State of the Union address appears to be politically motivated and, if so, provides one more example of politics playing a strong role in retirement policy that affects service providers, plan sponsors and participants. The delayed release of the final regulations has been interpreted by some as a strategic move by the Obama Administration to claim credit during an election year for a fee

disclosure initiative that was originally published as a proposed regulation and a proposed class exemption on December 13, 2007 by the prior Administration. While many cheer the finalization of the fee transparency regulations, which arguably has its roots tied to the “Study of 401(k) Plan Fees and Expenses” issued on October 13, 1998, it is unknown to what extent any participants have experienced irreparable harm as a result of the delay.¹

Effective Date:

Service providers must comply with the plan level fee disclosure requirements by July 1, 2012. This provides all service providers an additional 90 days from the previous effective date of April 1, 2012 to comply with the final disclosure requirements. In addition, the corresponding participant-level fee and investment disclosure requirements issued under ERISA Section 404(a) have been postponed to August 30, 2012 since the deadline for providing participant

¹ This study was sponsored by the Office of Policy and Research of the Department of Labor's Pension and Welfare Benefits Administration. The purpose of the study is to examine the incidence, structure, and magnitude of fees and expenses charged to sponsors of and/or participants in 401(k) plans. It encompasses issues and information addressed at public hearings held by the Department of Labor on November 12, 1997.

disclosures is set at 60 days after the effective date of the 408(b)(2) service provider disclosure regulations. The delay provides a fiduciary an additional 60 days to meet their disclosure obligations for the first quarterly statement disclosing actual fees and expenses to participants. For calendar year plans, the initial quarterly disclosure of fees and expenses charged to participants must be provided no later than 45 days following the close of the third calendar quarter i.e., by November 14, 2012 (previously August 14, 2012). See Table 1.

Is this the Final or should we expect more?

It appears the debate over the actual effective date for plan and participant-level disclosures rages on. In discussions with many service providers there is a lack of confidence these new effective dates are reliable. As a result, some service providers have indicated that they will not begin to prepare for either effective date until they are convinced the DOL will not delay the effective date or change the requirements. While understandable, taking a wait and see approach, at this time, is a high risk proposition with no upside benefits.

Suggested Approach- Comply Before the Effective Date!

Failure to comply creates consequences that are too severe to ignore.² Should the DOL elect to enforce the current final regulations to their fullest extent, service providers that ignore the effective date may experience repercussions that could affect the future viability of the service provider's business. While it is possible the DOL could revise the existing regulations, it is extremely unlikely that any further extensions or regulatory

² Failure to comply will cause the retirement plan to engage in a prohibited transaction. 77 FR 5632

changes will be issued before the elections. We recommended that every service provider prepare to meet the disclosure requirements prior to the July 1, 2012 effective date.

Duty Calls – What is the Next Step for Service Providers?

For existing service provider relationships, all “covered service providers” must deliver a written disclosure to the “responsible plan fiduciary”³ on or preferably before July 1, 2012 for existing contracts or arrangements. The written disclosure requirement does not impose an obligation on any service provider to re-write, re-issue or create a service agreement.⁴ In addition, the written disclosure is not required to be signed and acknowledged by the responsible plan fiduciary; although, the service provider and responsible plan fiduciary could be expected to prove the disclosures were received timely. For new engagements, the disclosures must be provided to the responsible plan fiduciary reasonably in advance of the date the contract or arrangement is entered into, extended or renewed.⁵ The DOL has not defined what is “reasonably in advance” leaving the parties to the service contract or arrangement to make that determination.⁶ As a result, the contract could be given as late as the day it is memorialized. This, of course, assumes the responsible plan fiduciary will attest the disclosures were received with penalty of time “to review, analyze and consider the

³ 29 C.F.R. 2550.408b-2(c)(1)(viii)(E)

⁴ Consistent with the Department's position in the interim final rule, although required information must be disclosed “in writing,” the final rule does not require that a formal contract or arrangement itself be in writing or that any representations concerning the obligations of the covered service provider be included in such written contract or arrangement. 29 C.F.R. 2550.408b-2, FN 16, 77 FR 5635

⁵ 29 C.F.R. 2550.408b-2(c)(1)(v)(A)

⁶ 77 FR 5643

disclosures in compliance with his or her ERISA fiduciary obligations.”⁷ In other words, the disclosures were provided with sufficient time for the fiduciary to make an informed decision.

Expectations – What is the Action Plan for a Plan Sponsor?

Plan sponsors or the responsible fiduciary should expect to receive the appropriate disclosure materials before the effective date to review and document a prudent process. In fact, the fiduciary should inform each covered service provider as soon as possible and in writing when the fiduciary expects to receive the disclosure information in order to dedicate the time needed to assess the disclosure materials to determine compliance before the effective date. This approach will permit the fiduciary to document their files with appropriate activity that supports a prudent process. A fiduciary’s activity to meet their obligations by the effective date should include the following steps:

1. Download a copy of the regulations;
2. Read and familiarize yourself with the regulatory obligations under ERISA Section 408(b)(2);

3. Write a letter to all covered service providers (“CSP”) requesting:
 - a. To receive the disclosures by a specified date, and
 - b. An immediate response from the CSP informing you whether they can meet your request;
4. Review the materials once received;
5. Draw a conclusion;
6. Include a note in the file that identifies:
 - a. The date you received the information,
 - b. The date you reviewed the information, and
 - c. Your conclusion.

This outline reflects minimal activity to support a fiduciary’s prudent process and it assumes the CSP is cooperative. If the CSP (a) is not cooperative, (b) fails to provide the required information, or (c) informs you they do not intend to comply; then a different course of action must be explored. Our next Newsletter will outline the steps that should be considered by a fiduciary if the CSP falls short of their regulatory obligations.

TABLE 1:

| Issue | Previous Effective Date | New Effective Date | Additional Time |
|--|-------------------------|--------------------|-----------------|
| 408(b)(2) Service Provider Disclosures | April 1, 2012 | July 1, 2012 | 90 days |
| 404(a)(5) Participant Disclosures | May 31, 2012 | August 30, 2012 | 90 days |
| Delivery of Participant Quarterly Disclosure | August 14, 2012 | November 14, 2012 | 90 days |

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⁷ *Id.*