Benefits Alert

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DOL Releases Final Rule on Service Provider Fee Disclosures and Extends Deadlines

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The Department of Labor (DOL) has released its final rule on service provider fee disclosures. These disclosures are required pursuant to Section 408(b)(2) of the Employee Retirement Income Security Act (ERISA), which generally sets forth a statutory exemption to the prohibited transaction rules for reasonable and necessary service provider arrangements. The final rule requires covered service providers to disclose information about their compensation and potential conflicts of interest. The interim final rule was to be effective on April 1, 2012; the final rule extends that deadline to July 1, 2012.

Background

The furnishing of goods, services, or facilities between a plan and a "party in interest" to the plan is generally prohibited under Section 406(a)(1)(C) of ERISA. As a result, a service agreement between a plan and a service provider would constitute a prohibited transaction because any person providing services to the plan is a party in interest. However, Section 408(b)(2) of ERISA exempts arrangements between plans and service providers that otherwise would be prohibited transactions if the contract or arrangement is reasonable, the services are necessary for the establishment or operation of the plan, and no more than reasonable compensation is paid for the services.

On July 16, 2010, the DOL published an interim rule on service provider disclosures relating to the compensation received for the services provided to covered plans. In response, it received several comments, and the rule was revised to address some of these comments. The final rule requires "covered service providers" to (1) provide "responsible plan fiduciaries" with information they need to assess the reasonableness of total compensation, both direct and indirect, received by the provider, its affiliates, and/or subcontractors; (2) identify potential conflicts of interest; and (3) satisfy reporting and disclosure requirements under Title I of ERISA. The final rule applies to ERISA-covered defined benefit and defined contribution pension plans; it does not apply to simplified employee pension plans (SEPs), SIMPLE retirement accounts, IRAs, and certain (pre-2009) annuity contracts and custodial accounts described in Internal Revenue Code (Code) Section 403(b). It does not apply to employee welfare benefit plans.

The final rule covers providers who expect at least $1,000 in compensation to be received for services to a covered plan. It applies to fiduciary service providers to a covered plan or to a "plan asset" vehicle in which such plan invests; investment advisers registered under federal or state laws; record-keepers or brokers who make designated investment alternatives available to the covered plan; and providers of various services to the covered plan who receive "indirect compensation" in connection with such services. The final rule includes a significant class exemption from the prohibited transaction provisions of ERISA for responsible plan fiduciaries who enter into service contracts without knowing that the provider has failed to comply with its disclosure obligations.

Changes in the Final Rule

According to the DOL, the final rule retains the basic structure of the proposed and interim final rules. However, the final rule reflects several modifications to the interim final rule based on comments received by the DOL. These include the following:

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- the exclusion for certain (pre-2009) Code Section 403(b) annuity contracts and custodial accounts;
- expansion of the information that must be disclosed concerning a covered service provider's receipt of indirect compensation to include a description of the arrangement between the payer and the service provider pursuant to which indirect compensation will be paid;
- conformance of investment-related disclosures for covered plans' designated investment alternatives to the requirements of the DOL's participant-level disclosure regulation; and
- a separate provision for the disclosure of changes to investment-related information, which must be updated at least annually.

The final rule does not set forth a specific format for the required disclosures. However, it does include an appendix with a sample Guide to Services and Compensation. The DOL also announced that in the near future it intends to publish for comment a separate proposal that would require service providers, in addition to providing the required fee and investment expense information, to furnish a guide or similar tool to assist plan fiduciaries in identifying and locating the "potentially complex information that must be disclosed and which may be located in multiple documents."

Planning Ahead

The extended deadline will give service providers more time to comply and complete their disclosures. Plan fiduciaries will, however, have to wait another three months to receive the disclosures. In the interim, plan fiduciaries, such as administrative committees, should develop procedures for reviewing disclosures to be received by July 1, 2012.

On a related note, the extension does provide some relief for employers because the initial DOL participant disclosure requirements are also extended. For calendar-year plans, the initial annual disclosure must be furnished no later than August 30, 2012 (60 days after the July 1, 2012 effective date). Also, for calendar-year plans, the first quarterly statement (for fees incurred July through September) will need to be furnished by no later than November 14, 2012 (45 days after the end of the third quarter).

If you have any questions about the final rule, please contact David Joffe or one of the other attorneys in the Employee Benefits & Executive Compensation Group at Bradley Arant Boult Cummings LLP.

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