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Department of Labor Extends Deadlines for Fiduciary and Participant Level Disclosures

July 14, 2011

On July 13, 2011, the U.S. Department of Labor (DOL) issued new guidance delaying the effective date of the new fiduciary-level disclosure rules required by interim final regulations (the “408(b)(2) Interim Final Regulations”) under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") until April 1, 2012. The DOL’s new guidance also delayed the date that initial participant-level fee disclosures must be provided under the final regulations under Sections 404(a) and 404(c) of ERISA (the “Participant Disclosure Regulations”).

The 408(b)(2) Interim Final Regulations

By way of background, the 408(b)(2) Interim Final Regulations, originally published on July 16, 2010, require certain service providers to employee pension benefit plans and certain entities holding “plan assets” to disclose information regarding their compensation so as to assist plan fiduciaries in assessing the reasonableness of the service provider’s contract with the plan and the potential for conflicts of interest. A contract or arrangement for services that does not satisfy these new disclosure rules would not be considered a “reasonable” arrangement under ERISA’s prohibited transaction exemption for necessary service contracts or arrangements and, therefore, would not be covered by the exemption.

The 408(b)(2) Interim Final Regulations originally would have applied to arrangements entered into on or after July 16, 2011, as well as to arrangements already in effect as of that date. (see Proskauer’s client alert on the 408(b)(2) Interim Final Regulations). In February 2011, the DOL stated its intention to extend until January 1, 2012 the applicability date of these rules. (see Proskauer’s client alert on that extension).

In the guidance just issued, the DOL further delayed the effective date until April 1, 2012 in order to give service providers and plan fiduciaries more time to review the final regulations (which the DOL indicated will be issued prior to year-end) and modify their systems and disclosures as necessary.

The Participant Disclosure Regulations

On October 20, 2010, the DOL issued the Participant Disclosure Regulations, which established new fiduciary requirements for disclosures to participants and beneficiaries in participant-directed individual account plans, such as 401(k) plans. The Participant Disclosure Regulations generally require administrators to disclose to plan participants and beneficiaries who have the right to direct the investment of assets held in their accounts, among other things, both plan-wide and individual fee and expense information that may be charged against their plan accounts.

The new disclosures include both quarterly and annual disclosures of certain specified information. In addition, certain disclosures are required on or before the date on which a participant or beneficiary can first direct his or her investments. (see Proskauer’s client alert on the Participant Disclosure Regulations and the content of each of these disclosures).

Although the Participant Disclosure Regulations were effective December 20, 2010, their applicability date to a plan is the first day of the plan year beginning on or after November 1, 2011. Accordingly, the DOL adopted a transition rule that originally provided that initial disclosures for a particular plan were not due until 60 days after the rule’s applicability date to the plan.

Under the guidance just issued, the DOL has modified the transition rule to provide that the initial disclosures (required on or before the date on which a participant or beneficiary can first direct investments) must be provided by the later of 60 days after the plan’s applicability date or 60 days after the April 1, 2012 effective date of the 408(b)(2) Interim Final Regulations.[1] Further, the first quarterly statement would not be required until 45 days after the end of the quarter in which the initial disclosures were due.

Thus, for example, a calendar year plan (which would have an applicability date of January 1, 2012) need not provide initial disclosures until May 31, 2012 (i.e., 60 days after April 1, 2012). That plan's quarterly statements would then not be due until August 14, 2012 (45 days after the end of the second quarter).

The DOL stated that this modification to the transition rule was intended to align the effective date of the participant-level disclosure rules with the effective date of the fiduciary-level disclosure rules under the 408(b)(2) Interim Final Regulations.

[1] The DOL confirmed that this extension applies not only for the newly required information under ERISA Section 404(a), but also for the information newly required as a result of the Participant Disclosure Regulations' changes to ERISA Section 404(c)'s disclosure requirements.

Related Professionals

- **Pamela A. Onufer**
  Special Pension investment Counsel
- **Robert M. Projansky**
  Partner
- **Steven D. Weinstein**
  Partner
- **Ira G. Bogner**
  Managing Partner