



For your information

Volume 35 | Issue 51 | July 31, 2012

Managing Service Provider Disclosures Received - or Not - Under ERISA Section 408(b)(2)

Plan fiduciaries of ERISA-covered defined benefit and defined contribution plans need to take a proactive approach to meeting their obligations under the new fee disclosure requirements outlined in regulations under ERISA Section 408(b)(2). Covered service providers should have submitted disclosure documents by July 1, 2012. Fiduciaries are now responsible for confirming that all appropriate disclosures have been received and that those disclosures contain all the information required by DOL regulations. The regulations provide exemptive relief for responsible plan fiduciaries that take certain steps when a covered service provider fails to disclose required information. Fiduciaries must send written requests for any missing information and report disclosure failures to the DOL. In some cases, fiduciaries will have to terminate contracts with service providers.

Background

The Employee Retirement Income Security Act of 1974 (ERISA) generally prohibits the provision of goods, services, or facilities between an employee benefit plan and a party-in-interest. ERISA Section 408(b)(2) exempts certain contracts or arrangements for essential services between service providers and plans if both the contract/arrangement and the compensation for services are “reasonable.” Final regulations issued by the Department of Labor (DOL) in February 2012 require covered service providers to provide fiduciaries with information about their compensation and the services they provide. Under the regulations, only covered service provider contracts or arrangements that provide this information can be reasonable and thereby qualify for the exemption for service contracts or arrangements between a plan and a party-in-interest under ERISA Section 408(b)(2) (and the corresponding prohibited transaction provisions of the Internal Revenue Code). [See our February 23 [For Your Information.](#)]

Confirm and Review

For plan fiduciaries, receiving a Section 408(b)(2) disclosure is only the first step in a process, and not a goal in and of itself. Plan fiduciaries must review these disclosures to determine if the services being delivered are necessary for administration of the plan and if fees are reasonable in relation to comparable third-party arrangements. And because many fiduciaries are receiving this level of detail

for the first time, they should also ensure that these agreements reflect their understanding of plan services and costs.

If the responsible plan fiduciary does not receive a required disclosure, or on review of the submitted material discovers that a covered service provider failed to disclose all of the required information, it must request the missing information in writing. A covered service provider has 90 days to provide the proper disclosures. If the service provider refuses to provide the disclosures, or does not respond within 90 days, to qualify for relief under a prohibited-class exemption the responsible fiduciary must report the failure to the DOL within 30 days of the earlier of the refusal to provide information or the expiration of the 90-day window, and terminate the contract for future services “as expeditiously as possible.”

Revised Filing Option

The final 408(b)(2) regulation dealing with service provider disclosure of compensation and conflicts of interest provides two methods for submitting notices to the DOL when covered service providers fail to provide the required information. The current regulation says that responsible plan fiduciaries may mail notices to the DOL or email notices to OEDelinquentSPnotice@dol.gov. A DOL direct final rule published July 16, 2012 amends these submission procedures by providing a new mailing address and providing for electronic submission through the Department’s website instead of via email. The new mailing address is:

U.S. Department of Labor
Employee Benefits Security Administration
Office of Enforcement
P.O. Box 75296
Washington, DC 20013

The new option for responsible plan fiduciaries who wish to submit notices electronically is offered through a dedicated link on the DOL’s website, at www.dol.gov/ebsa/regs/feedisclosurefailurenotice.html. This page provides instructions on how to submit the required notice and, unlike electronic or postal mail submissions, provides immediate confirmation that the notice was received by the DOL.

The DOL’s direct final rule becomes effective September 14, 2012 unless significant adverse comment is received by August 15, 2012.

In Closing

Plan fiduciaries responsible for overseeing payments from plan assets need to be diligent in assessing both the suitability of the type of services provided to the plan and the amount paid for those services from plan assets. July 1 marks the beginning of the first round of review. Going forward, each new contract for services will require similar scrutiny, and reporting if necessary.

Buck Can Help

- Determine which vendors are considered covered service providers and help ensure that they provide all required disclosures
- For a defined contribution plan that never separately received an estimate of recordkeeping costs, review the estimate for reasonability in light of Buck's experience with comparable plans
- Assist with the reporting of service providers using the new DOL website

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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