EPSTEIN BECKER GREEN | EMPLOYEE BENEFITS PRACTICE

ACT NOW ADVISORY

New Effective Dates for Service Provider and Participant-Level Fee Disclosures

February 22, 2012

By Michelle Capezza, Joan A. Disler, and David D. Green

In recent years, the U.S. Department of Labor ("DOL") has undertaken significant initiatives to increase transparency and individual responsibility in managing retirement security, including helping plan fiduciaries and participants better understand fees and costs associated with retirement plans. To that end, the DOL issued final regulations on February 2, 2012, under Section 408(b)(2) of ERISA (the "Final 408(b)(2) Regulations"), which requires "covered service providers" to disclose to "responsible plan fiduciaries" (including employer plan sponsors and plan administrators) certain direct and indirect compensation that they receive in connection with the services that they provide to a plan.

The Final 408(b)(2) Regulations extend the due date for providing these disclosures to **July 1, 2012**. Once the plan fiduciaries receive the disclosures, they are required to assess the reasonableness of the compensation paid for necessary services and to identify potential conflicts of interest on a timely basis in order to avoid a "prohibited transaction" and resulting penalties.

The extension of the due date impacts the due date for participant-level disclosures that plan fiduciaries of individual account plans, such as 401(k) plans, are required to provide to participants under Section 404(a) of ERISA. The new due date is **August 30, 2012,** and the issuance date of the first quarterly participant statements is now **November 14, 2012**.

The time is ripe for employers to prepare for the imminent review that is required of the service provider disclosures, develop a process for making the required determinations of "reasonableness," and prepare for the participant-level disclosures.

Highlights of the Final 408(b)(2) Regulations

Under the Final 408(b)(2) Regulations, covered service providers must provide fee information to defined benefit plans and defined contribution plans that are covered by ERISA.

Covered Plans. The requirements apply to defined benefit and defined contribution plans but do not apply to individual retirement accounts, individual retirement annuities, simplified employee pension plans, simple retirement accounts, or to welfare benefit plans (although proposed rules for welfare benefit plans may be published in the future). Disclosures are also not required for certain "orphan" 403(b) accounts issued before

January 1, 2009, where employer contributions have ceased, accounts are fully vested, and owners can enforce their rights without employer involvement.

Covered Service Providers. The "covered service provider" is a service provider that reasonably expects $1,000 or more in compensation in connection with covered services. These providers include ERISA fiduciary service providers to a plan or "plan asset vehicle" (an investment entity holding equity or similar interests that are ERISA plan assets), registered investment advisers, and platform providers. Covered service providers also include other service providers that receive *indirect* compensation for services, including accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, brokerage, third-party administration, or valuation services.

Required Disclosures. Responsible plan fiduciaries will need to review and analyze required disclosures from covered service providers, including:

- Descriptions of all the services to be provided to the covered plan (by the covered service provider, affiliates, and subcontractors).

- A statement of whether the covered service provider, affiliate, or subcontractor will, or expects to, provide services directly to the plan or plan asset vehicle as a fiduciary under Section 3(21) of ERISA and/or as a registered investment adviser.

- Disclosures of comprehensive information about the compensation that will be received in connection with the services, such as:

    - Direct compensation from the plan, and
    - Indirect compensation (received from any source other than the covered plan, plan sponsor, covered service provider, or affiliate), which includes identification of the payer and a description of that arrangement to enhance the responsible plan fiduciary's ability to assess conflicts of interest.

- Descriptions of any compensation that the covered service provider, affiliate, or subcontractor can expect to receive in connection with the termination of the contract.

- Descriptions of compensation, which can include a description expressed in monetary amounts, formulas, percentages, per capita charges, or other reasonable methods. (If a ready description is not possible, a reasonable and good faith estimate can be provided.)

- Descriptions of investment-related disclosures (required for certain designated investment alternatives ("DIAs") of a participant-directed plan (such as a 401(k)). These include the total annual operating expense percentage for each DIA, and any other investment-related information regarding DIAs available to the covered service provider. Current disclosure materials of the issuer of the DIA may be

used if the issuer is regulated and if the service provider provides them in good faith.

Timing of Disclosures. After the initial disclosures are made by July 1, 2012, a disclosure must also be furnished in advance of the plan entering, extending, or renewing a service contact.

If a responsible plan fiduciary asks for additional information to meet its own disclosure obligations (*e.g.,* for participant-level disclosures or for the preparation of the Form 5500 Annual Report), such information must be provided "reasonably in advance" of when the fiduciary states it is needed. All other disclosures must be updated within 60 days of a change. Investment-related disclosures must be updated (and, therefore, reviewed) at least annually.

Errors in Disclosure: Available relief exists such that, if a responsible plan fiduciary discovers that a covered service provider fails to disclose certain information, then the fiduciary must request the information, in writing, upon discovering the omission to avoid causing the arrangement for services to be treated as a prohibited transaction. If the request to the service provider is not fulfilled within 90 days, the fiduciary must then determine, consistent with the general fiduciary rules of prudence, whether to discontinue the relationship and must report the failure to the DOL. If the information that is not disclosed promptly relates to future services, the fiduciary must terminate the service arrangement.

This highlights both the importance of prompt decision-making by the fiduciary when there is a compliance issue and the fact that the general fiduciary rules continue to apply in addition to these specific disclosure rules.

What Employers Should Do Now

Now is the time for plan sponsors to work with their service providers to assure that all of the required information under the Final 408(b)(2) Regulations is passed to the plan sponsor and plan fiduciaries by the July 1, 2012, deadline. In particular, employers should do the following:

- Review existing policies for assessing service providers to assure that appropriate persons have been designated to review plan contracts or arrangements and that procedures are in place for conducting such a review, both now and at appropriate intervals in the future.

- Have the appropriate officers or the responsible plan committee consider all of the required disclosures, together with other relevant factors, and determine or reaffirm that the plan should continue to work with current or proposed service providers.

- After reviewing the disclosures, ask the providers for any information that may not have been provided as required or for additional information needed to evaluate the providers.

- Document the review process and the outcome in committee minutes or other written form.

In addition, employers should prepare for disclosures to participants, which are due by **August 30, 2012**. Many employers and plan fiduciaries will rely on third-party administrators or investment providers to supply the required disclosures to participants. The duty to make the disclosures remains with the plan and its fiduciaries. However, procedures should be in place for assessing and monitoring the completeness of any third party's disclosures.

The disclosures are complex, but, with proper planning, employers and other plan fiduciaries will be able to timely meet the requirements.

****

For more information about this Advisory, please contact:

Michelle Capezza	**Joan A. Disler**	**David D. Green**
New York	New Jersey	New York
212-351-4774	973-639-8298	212-351-3797
mcapezza@ebglaw.com	jdisler@ebglaw.com	dgreen@ebglaw.com