



## Legal Alert: Final Section 408(b)(2) Disclosures Regulation Published; Disclosure Deadline Extended

2/23/2012

**Executive Summary:** The Department of Labor (DOL) has issued a final regulation establishing specific disclosure obligations for covered service providers (CSPs) regarding service details and fee information that must be provided to responsible plan fiduciaries as required by ERISA Section 408(b)(2). These disclosure requirements are established as part of a statutory exemption from ERISA's prohibited transaction provisions. The final regulation also extends the deadline for the disclosures from April 1, 2012 to July 1, 2012. The new effective date for CSPs also impacts when plan fiduciaries must make participant-level disclosures. For calendar year plans, the initial annual disclosure of plan-level and investment-level information must be furnished no later than August 30, 2012. The first quarterly statement must be furnished no later than November 14, 2012.

### **CSP Disclosure Requirements**

The final regulation imposes specific disclosure obligations on CSPs to ensure plan fiduciaries have the information they need to: assess the reasonableness of compensation received by the CSP; identify any potential conflicts of interest; and satisfy the reporting and disclosure requirement imposed by Title I of ERISA. The disclosures must be made in writing to a responsible plan fiduciary of a covered plan and must describe the services to be provided and all direct and indirect compensation to be received by a CSP, its affiliates, or subcontractors.

The final regulation 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 annuity contracts and custodial accounts described in Internal Revenue Code section 403(b). Additionally, the final regulation does not apply to employee welfare benefit plans. The DOL has indicated that it will separately publish proposed disclosure requirements for welfare benefit plans in the future.

The final regulation applies to CSPs who expect at least \$1,000 in compensation to be received for services to a covered plan. CSPs not in compliance as of July 1, 2012, will be subject to the prohibited transaction rules of ERISA section 406 and Internal Revenue Code section 4975 penalties. The final regulation is available at:  
<http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=25781&AgencyId=8&DocumentType=2>.

### ***Participant-Level Disclosures***

The DOL published a final regulation in October 2010 requiring the disclosure of specified plan and investment-related information, including fee and expense information, to participants and beneficiaries of participant-directed individual account plans. See 29 CFR § 2550.404a-5. The investment-related disclosure requirements of the 408(b)(2) final regulation conform to the participant-level disclosure regulation. Additionally, the final regulation's new July 1 effective date impacts when disclosures must first be furnished under the participant-level disclosure regulation. The transitional rule for the participant-level disclosure regulation was revised in July 2011 so that the first disclosures would follow the effective date of the 408(b)(2) regulation. Thus, for calendar year plans, the initial annual disclosure of "plan-level" and "investment-level" information (including associated fees and expenses) must be furnished no later than August 30, 2012 (which is 60 days after the 408(b)(2) regulation's July 1 effective date). The first quarterly statement must then be furnished no later than November 14, 2012 (which is 45 days after the end of the third quarter (July through September), during which initial disclosures were first required). According to the DOL, this quarterly statement need only reflect the fees and expenses actually deducted from the participant or beneficiary's account during the July through September quarter to which the statement relates.

In addition to the final regulation, the DOL has published a fact sheet regarding the final regulation, <http://www.dol.gov/ebsa/newsroom/fs408b2finalreg.html>, and a list of changes to the final fee disclosure rule, <http://www.dol.gov/ebsa/408b2changes.html>.

If you have any questions regarding this Alert or other employment-related benefits issues, please contact Tiffany Downs, [tdowns@fordharrison.com](mailto:tdowns@fordharrison.com), any member of Ford & Harrison's Employee Benefits practice group, or the Ford & Harrison attorney with whom you usually work.