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DOL Releases Interim Final Service Provider Disclosure Regulation

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On July 16, 2010, the U.S. Department of Labor (''DOL'') published long-awaited interim final rules that establish new disclosure requirements for ''covered service providers'' to pension plans subject to the Employee Retirement Income Security Act (135 PBD, 7/16/10; 37 BPR 1540, 7/20/10).[1] The new rules amend the existing regulation under Section 408(b)(2) of ERISA (the ''Regulation'').[2] DOL's stated objective in amending the Regulation is to ensure that pension plan fiduciaries selecting service providers have sufficient information to assess whether the terms of the service arrangements are reasonable, including the provider's compensation and any potential conflicts that may affect the provider's performance of its duties. Importantly, this amendment to the Regulation does not apply to ERISA-covered welfare plans.[3]

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[1] *See* Reasonable Contract or Arrangement Under ERISA Section 408(b)(2) – Fee Disclosure; Interim Final Rule, 75 Fed. Reg. 41600 (July 16, 2010) (''Interim Final Regulation'').

[2] 29 C.F.R. § 2550.408b-2.

[3] Earlier this year, DOL announced that it opened a separate regulatory project under Section 408(b)(2) to determine the disclosure requirements that would apply to welfare plan service providers and, in its most recent regulatory agenda

Implementing the new disclosure and other requirements imposed by the Regulation is expected to require substantial effort and expense on the part of covered service providers, and also by plan sponsors and other plan fiduciaries who will need to monitor compliance with the new requirements. In particular, recordkeepers and others providing certain services to Internal Revenue Code Section 401(k) and other participant-directed pension plans will face significant new disclosure obligations. On the other hand, the new rules reflected in the Regulation are less burdensome for most service providers than the DOL's initial proposal issued in December 2007 (238 PBD, 12/13/07; 34 BPR 2925, 12/18/07).[4] For example, in the final Regulation, the DOL eliminated the requirement that there be formal written contracts between plans and covered service providers and that service providers include in their disclosures a narrative description of their potential conflicts of interest.

The amendment to the Regulation will be effective as of July 16, 2011. The revised Regulation is an ''interim final rule'' and DOL has requested public comments which are due by Aug. 30, 2010. While the rule is final, we note that it is still possible that 401(k) fee legislation could be passed by Congress this year, requiring DOL to go back to the drawing board on these disclosure requirements.

We provide below an overview of the Regulation, and then discuss how it may be expected to affect plan service providers and plan fiduciaries, noting some of the topics that remain unclear or could be the subject of comments.

A. Background

The Regulation interprets ERISA Section 408(b)(2), which provides an exemption from ERISA's prohibited transaction rules for ''reasonable'' service arrangements between plans and parties in interest to those plans. Under ERISA Section 3(14), every provider of services to a plan is a ''party in interest'' with respect to that plan. And, the provision of services between a plan and a party in interest violates ERISA Sections 406(a)(1)(C) and (D) unless the arrangement complies with the conditions under the Section 408(b)(2) exemption. Generally, as described by the statute and the existing regulation, three conditions apply: (i) the services are necessary for the establishment and operation of the plan, (ii) no more than reasonable compensation is paid for the services, and (iii) the services are provided pursuant to a ''reasonable arrangement.''

Why is compliance with Section 408(b)(2) and the new Regulation important? If a service arrangement does not comply with conditions under ERISA Section 408(b)(2), the plan fiduciary approving the service arrangement will be deemed to have caused the plan to engage in a prohibited transaction, a violation of his or her fiduciary duties. A fiduciary who breaches his duties is potentially liable to the plan for resulting losses. The service provider participating in this prohibited transaction may be required to also participate in its ''correction,'' including possibly repaying to the plan some or all of its compensation. The service provider will also be liable for excise taxes under Section 4975 of the Internal Revenue Code, which imposes liability on ''disqualified persons'' who engage in prohibited transactions with pension plans. This tax is self-assessing (i.e., automatic) and not subject to the discretion of the IRS.

B. Overview of Regulation

The amendment to the Regulation under ERISA Section 408(b)(2) adds new substantive requirements interpreting the ''reasonable arrangement'' condition of that exemption. Importantly, the new regulatory requirements apply only to arrangements for services provided by ''covered service providers'' to ''covered plans,'' described more fully below.

1. Covered Plans. The new requirements apply only with respect to defined contribution and defined benefit pension plans covered by ERISA. The Regulation excludes from the definition of a ''covered plan'' individual retirement accounts and annuities (IRAs), simplified employee pension plans (SEPs), and simple retirement accounts (SIMPLEs) (even if these arrangements may be subject to ERISA).[5] Also excluded are so-called ''top-hat'' and similar plans not subject to part 4 of Title I of ERISA, as well as welfare plans.

2. Covered Service Providers. The enhanced disclosure requirements under the Regulation will only apply to a select set of service providers, which are identified based on the type of plan services provided and the amount and nature of compensation they may receive.[6] Generally, a covered service provider includes any service provider that reasonably expects to receive (together with its subcontractors and affiliates) $1000 or more in direct or indirect compensation for providing (itself or through affiliates or subcontractors) services in one of three categories

- *Services as a fiduciary or registered investment adviser.* This includes any person who (i) provides services directly to a covered plan that render the person a ''fiduciary'' as defined by ERISA Section 3(21), (ii) provides services to an investment contract, product, or entity that holds ''plan assets'' for ERISA purposes, and in which covered plans have *direct* equity investments, or (iii) provides services directly to a covered plan as an investment adviser registered under the Investment Adviser's Act of 1940 or any State law (a ''registered investment adviser'');
- *Certain recordkeeping or brokerage services.* This includes recordkeeping or brokerage services provided to a participant-directed individual account plan (e.g., participant-directed 401(k)), if one or more of the plan's designated investment alternatives will be made available in connection with the services arrangement (e.g., through a platform or other mechanism); or
- *Other ''key'' services for which the provider receives indirect compensation.* Key services include any of the following services: accounting, auditing, actuarial, appraisal, banking, consulting (meaning consulting related to the development or implementation of in-

(available at http://www.reginfo.gov), identified March 2011 as a target date for issuing proposed rules.

[4] *See* Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure; Proposed Rule, 72 Fed. Reg. 70988 (Dec. 13, 2007).

[5] *See* Interim Final Regulation at § 2550.408b-2(c)(1)(ii).

[6] *See* Interim Final Regulation at § 2550.408b-2(c)(1)(iii).

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vestment policies or objectives, or the selection or monitoring of service providers or investments), custodial, insurance, investment advisory (plan or participant-level), legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services, *but only if* the service provider reasonably anticipates receiving during the term of the services arrangement more than $1000 of (i) ''indirect compensation'' (as defined by the Regulation) or (ii) compensation from a related person that must be separately disclosed (such as commissions, soft dollars, finders fees, or other similar incentive compensation based on business placed or retained, or compensation charged against a covered plan's investment and reflected in the net value of the investment).

The Regulation provides some specific exclusions from ''covered service provider'' status. First, DOL intends that, generally, the Regulation will only apply to providers ''dealing directly with covered plans;'' therefore, the Regulation makes clear that no person is a covered service provider solely by providing services as an affiliate or subcontractor to a covered service provider.[7] This exclusion does not necessarily mean that compensation received by affiliates and subcontractors is not disclosed under the Regulation, as discussed below.

Secondly, the Regulation excludes most service providers to investment funds (*i.e.*, any investment contract, product, or entity) in which plans may invest, other than those covered service providers who are fiduciaries to an investment entity that holds plan assets and in which plans invest *directly*.[8] Thus, none of the following are covered service providers under the Regulation: (i) providers of non-fiduciary services to a ''plan assets'' vehicle, (ii) service providers (other than fiduciaries) to an ''underlying'' investment entity in the case of a ''fund of funds,'' and (iii) any service provider to an investment entity that does not hold plan assets, such as a mutual fund or a fund in which benefit plan investment is limited.

3. Required Disclosures – In General. Each covered service provider that provides services to a covered plan must provide certain information to a responsible plan fiduciary in writing ''reasonably in advance'' of the plan's entering into the service arrangement.[9] If there are changes to information disclosed at ''point-of-sale,'' the updated information generally must be disclosed to the plan fiduciary within 60 days from the date the covered service provider is informed of the change. The specific information that must be disclosed includes

- *Description of services.* A description of the services to be provided to the plan under the services contract or arrangement (excluding non-fiduciary services provided to an investment entity);
- *Statement of fiduciary status.* If applicable, a statement that the covered service provider (or its affiliate or a subcontractor) will provide services to the plan (or to an investment entity) as a fiduciary or as a registered investment adviser;
- *Direct compensation.* A description of all ''direct compensation'' the covered service provider (together with its affiliates and subcontractors) reasonably expects to receive for the identified services; for this purpose ''direct compensation'' means compensation paid by the covered plan and excludes any compensation paid by a plan sponsor;
- *Indirect compensation.* All ''indirect compensation'' the covered service provider (together with its affiliates and subcontractors) reasonably expects to receive in connection with the services, with a description of the services for which the indirect compensation is to be received and the payer of the compensation; for this purpose, ''indirect compensation'' excludes compensation received from a covered service provider, its subcontractors and affiliates, but might still be disclosed as ''compensation paid among related parties'' described below;
- *Compensation paid among related parties.* Compensation paid among a covered service provider, its affiliates or subcontractors in connection with services, which must be disclosed *only if* it is (1) set on a transaction basis (including commissions, soft dollars, finder's fees or other incentive compensation), or (2) charged directly against the plan's investment and reflected in the net value of the investment; compensation paid to employees for work performed is not required to be disclosed; this related party disclosure must identify the services for which the compensation will be paid, the payers and recipients;
- *Termination compensation.* A description of any compensation that the covered service provider (together with its affiliates and subcontractors) reasonably expects to receive in connection with the termination of the services contract or arrangement; and
- *Manner of receipt.* The manner in which the service provider will receive its compensation, such as whether the plan will be billed or fees will be deducted directly from plan accounts or investments.

4. Additional Disclosures – Recordkeeper, Brokers and Investment Fiduciaries. In addition to the disclosure obligations imposed on all covered service providers, the Regulation imposes specific disclosure requirements on recordkeepers, brokers and certain investment fiduciaries. Specifically, and as discussed in more detail below

- fiduciaries to investment entities that hold plan assets, and recordkeepers or brokers that make investment vehicles available to participant-directed plans, must provide information about the fees and expenses attendant to the plan's investment alternatives, including fees charged directly or indirectly against amounts invested in an investment entity;[10] and
- recordkeepers must provide additional information about their fees for recordkeeping services, including in some circumstances, a reasonable and good faith estimate of the cost to the plan of recordkeeping services.[11]

DOL explained that these additional disclosure requirements are intended to ensure that plan fiduciaries receive information about the fees and expenses paid in connection with plan investments. According to DOL, a service provider that is a fiduciary to an investment vehicle or that, in connection with recordkeeping or brokerage services, makes investment vehicles available to plans (e.g., through a platform or similar mechanism) is

[7] *See* Interim Final Regulation at § 2550.408b-2(c)(1)(iii)(D)(1); *see also* 75 Fed. Reg. at 41604-6.

[8] *See* Interim Final Regulation at § 2550.408b-2(c)(1)(iii)(D)(2).

[9] Interim Final Regulation at § 2550.408b-2(c)(1)(iv), (v).

[10] Interim Final Regulation at § 2550.408b-2(c)(1)(iv)(F).

[11] Interim Final Regulation at § 2550.408b-2(c)(1)(iv)(D).

in the best position to provide this additional disclosure because it has relationships with the covered plan and the investment alternative. With respect to separate disclosure of recordkeeping fees, DOL believes that making available information necessary to permit plan fiduciaries to make informed decisions about the costs of plan recordkeeping services is ''fundamental'' to a responsible plan fiduciary's ability to satisfy its ERISA obligations.[12]

5. Reporting and Disclosure Information on Request. On the request of a plan fiduciary or the administrator of the covered plan, a covered service provider must provide any information relating to compensation received that is required for the covered plan to comply with the reporting and disclosure requirements under Title I of ERISA, such as the Form 5500 or requirements that might be imposed under future DOL regulations governing disclosure to participants of participant-directed plans. Information requested by plan fiduciaries or administrators must generally be provided within 30 days of the request.[13]

6. Inadvertent Errors in Disclosure. A concern raised in connection with DOL's proposed service provider disclosure regulation was that the exemption would be unavailable if a service provider ultimately received compensation that it had not disclosed, either because it had not expected to receive the compensation or inadvertently failed to accurately describe the compensation in the point-of-sale disclosure. In the new Regulation, DOL addressed this concern. First, the Regulation requires disclosure of the direct and indirect compensation that a service provider ''reasonably expects'' to receive, so that a service provider that receives unexpected compensation will not fail to satisfy the conditions of the Regulation solely for that reason. The new Regulation also provides that a services arrangement will not fail to be ''reasonable'' solely because a service provider, acting in good faith and with reasonable diligence, makes an error or omission in its disclosure, so long as the service provider discloses the correct information as soon as practicable, but no later than 30 days from the date on which the service provider knows of the error or omission.[14]

7. Class Exemption for Plan Fiduciaries. Technically, the failure of a covered service provider to provide any of the disclosures required by the Regulation could mean that the Section 408(b)(2) exemption is not available for the services arrangement, and in that event, the responsible plan fiduciary could be deemed to have caused the plan to engage in a non-exempt services arrangement – a prohibited transaction under ERISA Sections 406(a)(1)(C) and (D). The plan fiduciary could be liable for making the plan whole for losses arising out of the services arrangement (e.g., excessive fees).

DOL has provided some relief to plan fiduciaries who find themselves in this situation. The Regulation includes a class exemption.[15] If the conditions of the class exemption are met, a plan fiduciary will not be deemed to have engaged in a prohibited transaction solely because a service provider failed to provide the disclosures otherwise required to rely on Section 408(b)(2). The plan fiduciary may take advantage of this special ''exemption within an exemption'' only if the plan fiduciary meets detailed conditions within specific timeframes, including making a specific request to the provider for any information that the fiduciary discovers has been omitted, and notifying the DOL in writing if the provider fails to respond by the specified deadline. The plan fiduciary must also determine whether to terminate or continue the services arrangement in light of a covered service provider's failure to disclose the required information.

Importantly, while a plan fiduciary who satisfies the exemption within an exemption will not be deemed to have breached its duties in entering into the services arrangement based on faulty disclosures, the service provider will still be liable for excise taxes for participating in the non-exempt prohibited transaction with the plan.[16]

C. Observations

1. Comparison to Form 5500, Schedule C. In recent years, service providers and plan fiduciaries have devoted substantial effort to complying with the expanded reporting requirements under Form 5500 Schedule C, which is used to report to DOL the compensation received by plan service providers in connection with the plan. In November 2007, DOL finalized changes to the Schedule C to require enhanced reporting with respect to ''indirect compensation'' received by plan service providers and other persons in connection with plan services (221 PBD, 11/16/07; 34 BPR 2702, 11/20/07).[17] The new Schedule C requirements are effective for the 2009 plan year.

The new service provider disclosure requirements imposed by the Regulation will be, to an extent, complementary to the changes made to Schedule C. For example, both schemes will use similar, though not identical, definitions of direct and indirect compensation, and the Regulation will specifically require service providers to provide information to plan fiduciaries to assist them in completing the Schedule C. Further, like the Schedule C, the Regulation includes, as part of the class exemption, a requirement that plan fiduciaries report to DOL those plan service providers who have failed to provide the necessary disclosures.

On the other hand, the Regulation differs from the Schedule C in some significant respects, and it will be important to keep these differences in mind as service providers and plan fiduciaries implement procedures to comply with the Regulation.

- Schedule C reporting and the Regulation will not necessarily apply to the same types of plans. Specifically, small pension plans with 100 or fewer participants are not required to complete the Schedule C; but these small plans are ''covered plans'' under the Regulation. On the other hand, large welfare plans, which may be required to complete Schedule C, are, at this time, excluded from the Regulation.

[12] *See* 75 Fed. Reg. at 41611.
[13] Interim Final Regulation at § 2550.408b-2(c)(1)(vi).
[14] Interim Final Regulation at § 2550.408b-2(c)(1)(vii).
[15] Interim Final Regulation at § 2550.408b-2(c)(1)(ix).
[16] 75 Fed. Reg. at 41615-16.
[17] *See* Annual Reporting and Disclosure, 72 Fed. Reg. 64710 (Nov. 16, 2007) (Final Rule); Revision of Annual Information Return/Reports, 72 Fed. Reg. 64731 (Nov. 16, 2007) (notice of adoption of revisions to annual return/report forms).

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■ The Schedule C generally requires reporting of compensation received by a broader group of ''service providers'' than the more limited group of ''covered service providers'' subject to the Regulation. For example, a provider may be reportable on Schedule C even if it has no direct relationship with a plan but receives compensation in connection with services it provides as a subcontractor to a plan provider or because of a ''position with the plan.'' This type of provider would not be a covered service provider under the Regulation. In addition, the compensation thresholds under the two schemes are different (i.e., $1000 in total under the Regulation in comparison to $5000 per year for Schedule C purposes), so that in some instances compensation received by a covered service provider (as defined under the Regulation) would not be reported on Schedule C.

Finally, like Schedule C, the Regulation includes in the definition of ''indirect compensation'' non-monetary compensation, including meals, entertainment, and gifts. Under the Regulation, the same requirements generally apply to the disclosure of non-monetary compensation that would apply to any other indirect compensation in connection with plan services received by a covered service provider. Thus, a covered service provider is required to disclose prior to contracting with the plan the persons from whom it reasonably expects to receives gifts and entertainment and the amount it expects to receive. DOL has provided little guidance on how, and in how much detail, a provider is to describe the gifts and entertainment it expects to receive.

Like the Schedule C, there is a de minimis exception for gifts and entertainment under the Regulation. Specifically, a covered service provider is required to disclose gifts and entertainment only if the value is expected to exceed a total of $250 from a single source during the term of the arrangement. The Regulation's de minimis exception differs from both the de minimis thresholds under Schedule C and the thresholds set forth in the DOL's enforcement guidance regarding violations of the anti-kick back rule under ERISA Section 406(b)(3).[18] For example, the Regulation applies the $250 threshold based on the term of the agreement, while thresholds for purposes of Schedule C and DOL's Enforcement Policy apply on an annual basis. Also, unlike both Schedule C and DOL's Enforcement Policy, the Regulation does not provide an exception for expenses associated with educational conferences. The lack of consistency in the treatment of non-monetary compensation under these three regulatory schemes will further complicate procedures that plans and covered service providers need to track, monitor, and disclose the receipt of meals, gifts, entertainment, and other non-monetary compensation.

2. Significance to Plan Service Providers. The Regulation represents a substantial step by DOL towards more directly regulating the activities of certain types of non-fiduciary service providers under ERISA. While compliance with Section 408(b)(2) serves primarily to protect the plan fiduciary from prohibited transaction liability under ERISA Section 409, it also ensures that the service provider will not be subject to the excise taxes applicable under Section 4975 of the Code. Thus, service providers to pension plans will have a strong interest in satisfying the conditions of the Regulation. And, given the emphasis on provider disclosure in the Regulation, plan service providers can be expected to bear most of the costs of implementing the Regulation.

Even though the new Regulation will require substantial commitment by plan providers, we believe that the Regulation represents a significant improvement over the 2007 proposal for these service providers. In addition to the elimination of the written contract requirement and the narrative description of conflicts of interest, specific areas of improvement include

■ the requirements imposed by the Regulation are clearly limited to entities with a direct service relationship to the plan;

■ the Regulation's clearer guidelines about the compensation that must be disclosed to plan fiduciaries;

■ an arrangement for services will not fail to be ''reasonable'' merely because of inadvertent errors or omissions in disclosure, provided corrective action is taken;

■ service providers will have flexibility to express compensation in terms of a formula, an estimate or other explanation that reasonably describes the nature of the compensation; and

■ DOL has clarified that compensation paid by a plan sponsor is not subject to the Regulation's requirements.

3. DC Plan Recordkeepers and Brokers. Implementing the Regulation is likely to present particular challenges for recordkeepers and brokers to individual account plans.

a. Recordkeeping Compensation Disclosure. One of the more difficult aspects of the Regulation may be the obligation imposed on recordkeepers to disclose specific information regarding the cost of recordkeeping services. The requirement is aimed at identifying for plan fiduciaries the cost of the recordkeeping services separately from the total amounts a plan may pay for a package of services including recordkeeping and other services such as trustee services and investment products. The Regulation provides that a provider of recordkeeping services, including services related to plan administration and monitoring of plan and participant transactions, and maintenance of plan and participant accounts, records and statements, must disclose

■ a description of all direct and indirect compensation the recordkeeper (and its affiliates and contractors) reasonably expects to receive in connection with the recordkeeping services; and

■ if the recordkeeper reasonably expects recordkeeping services to be provided, in whole or in part, without explicit compensation for such services, or when compensation for such services is offset or rebated based on other compensation received by the recordkeeper (or an affiliate or subcontractor), a good faith estimate of the ''cost to the covered plan'' of the services, taking into account the rates that would be charged to (or paid by third parties for) the services, or prevailing market rates for a plan with similar characteristics.[19]

[18] *See* 72 Fed. Reg. at 64743; DOL EBSA Enforcement Manual Chap. 48, § 12.

[19] Interim Final Regulation at § 2550.408b-2(c)(1)(iv)(D).

Under this provision, a recordkeeper who provides recordkeeping services to a plan and collects and retains fees from investment entities in which the plan invests (such as mutual funds) may be providing services without ''explicit'' compensation and would be required to disclose ''a reasonable and good faith estimate of the cost to the covered plan of such recordkeeping services.'' This requirement would appear to apply to revenue sharing received by recordkeepers from affiliated investment funds as well as unaffiliated funds, even if, as is typical today, there would otherwise be no explicit allocation of mutual fund revenue between the investment fund and the recordkeeper. The Regulation provides some guidance for developing a ''reasonable and good faith estimate'' by referring to the rates that the service provider would charge or would be paid by third parties, or prevailing market rates for plans with similar characteristics. However, an important question, we believe, is whether this guidance is sufficient for recordkeepers to develop their estimates and whether, in fact, these estimates will be helpful to plan fiduciaries in evaluating plan fee and service arrangements.

b. Investment Disclosure by Recordkeepers and Brokers. The Regulation also imposes duties on recordkeepers and service providers that offer brokerage services to participant directed plans to act as conduits of information about the investment funds that they make available to plans. Specifically, where the plan's designated investment alternatives are made available in connection with the services offered by a recordkeeper or broker, the recordkeeper or broker must disclose with respect to each investment alternative designated by the fiduciary for the plan

- the amounts charged directly against investments in connection with sales, transfer of or withdrawals from the alternative (e.g., sales charges, redemption fees, exchange fees, etc.);
- the annual operating expenses of the alternative if the return is not fixed (e.g., the expense ratio); and
- any additional ongoing expenses (e.g., wrap fees, mortality, expense fees).[20]

As a practical matter, we understand that most recordkeepers and brokers that make investment alternatives available to plans through an investment platform or similar mechanism already typically provide materials that describe the available investment alternatives. However, under the Regulation, recordkeepers and brokers will now have a duty to provide that information and will risk participating in a non-exempt prohibited transaction if they fail to deliver the information. The Regulation attempts to reduce the burden on these providers by permitting them to deliver disclosure materials issued by the investment alternative (such as a mutual fund prospectus), if (i) the issuer is not an affiliate of the recordkeeper, (ii) the materials are regulated by a state or federal agency, and (iii) the materials are not known to the recordkeeper or broker to be incomplete or inaccurate. However, it does not appear that a recordkeeper or broker may rely on disclosure materials issued by an investment alternative with which it is affiliated.[21] In addition, a broker or recordkeeper may not be able to rely on disclosures issued by the sponsors of investment vehicles that are not mutual funds, such as bank collective investment funds and insurance company pooled separate accounts, because these materials may not be deemed ''regulated'' under state or federal law, as required by the Regulation.

Finally, it is notable that the Regulation imposes a duty to disclose information relating to plan investment options first on recordkeepers and brokers of participant-directed plans, and then on fiduciaries to investment entities holding ''plan assets'' if the recordkeeper or broker does not provide this information. Thus, the Regulation imposes disclosure duties on a non-fiduciary recordkeeper first, even though, generally, ERISA's focus is to regulate the conduct of fiduciaries.

4. Impact on Plan Fiduciaries. Although most of the burden of complying with the Regulation may fall primarily on a plan's service providers, plan fiduciaries expecting to receive and review service provider disclosures should consider adopting procedures to ensure that each of the conditions of the Regulation is met in a timely manner. These procedures might include the following

- identification of all ''covered service providers'' for example, some potentially covered service providers, such as individuals serving in trustee or other fiduciary roles for a plan may not be aware that they may be covered service providers;
- procedures for soliciting and reviewing the required provider disclosures, including review of existing agreements before the effective date of the Regulation, review of disclosures and arrangements before engaging new service providers and upon any contract extension or renewal, and review of updated disclosures provided by current providers;
- revision of standard ''requests for proposal'' and contract terms to incorporate requirements that will support compliance with the Regulation;
- a process to identify circumstances in which additional disclosure may be required, such as the addition of a new investment option under a participant-directed plan or a change in the ''plan asset'' status of an investment alternative; and
- a process for complying with the requirements under the class exemption when a service provider fails to provide the required disclosures, including seeking information from the provider, notifying DOL as required, and timely reviewing whether to continue the services arrangement in light of the service provider's failure to comply with the Regulation.

5. Opportunity for Comments. DOL has specifically asked for comments regarding whether the Regulation should be amended to include a requirement that covered service providers provide a ''summary'' disclosure statement. DOL has asked for input regarding the burdens that creating such a statement would impose as well as whether it would benefit plan fiduciaries. Other aspects of the Regulation likely to generate comments include the new duty imposed on recordkeepers and brokers to provide investment information to plans and the requirement that recordkeepers develop and disclose separately the cost of recordkeeping services. Comments must be submitted by Aug. 30, 2010.

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[20] *See* Interim Final Regulation at § 2550.408b-2(c)(1)(iv)(G).
[21] *See* 75 Fed. Reg. at 41612.

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