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## DOL Finally Finalizes the 408(b)(2) Regulation

On February 2, 2012, the Department of Labor ("DOL") issued its Final Rule requiring "Covered Service Providers" (or "CSPs") to ERISA-covered retirement plans to provide information about their compensation for purposes of DOL's regulations under ERISA section 408(b)(2) ("the 408b-2 Regulation"). The Final Rule and DOL's discussion in the preamble to the Final Rule ("Preamble") include important changes and clarifications to the Interim Final Rule that was published on July, 16, 2010. The following highlights some of these changes and clarifications.

*Effective Date* - The DOL delayed the effective date of the 408b-2 Regulation until July 1, 2012. The DOL also delayed the effective date of the participant-level disclosure regulation under 29 C.F.R. § 2550.404a-5 to August 30, 2012. This means that participant directed 401(k) and similar plans must furnish their first quarterly statement of fees and expenses actually deducted from participant accounts to participants no later than November 14, 2012.

*Certain 403(b) Plans not "Covered Plans"* - The DOL excluded certain 403(b) plans from the types of pension plans covered by the Final Rule. Specifically, the DOL excluded 403(b) plans issued to employees before January 1, 2009, where the employer ceased making contributions, where the individual contract is enforceable against the insurer without employer involvement, and where such individual owners are fully vested in the benefits offered under the contract.

*Insurance Brokers* - The DOL clarified within the Preamble to the Final Rule that it intends to include insurance brokers as CSPs under the category of "insurance services."

*Indirect Compensation Disclosures* - The information that must be disclosed by a CSP receiving "indirect compensation" must now include a description of the arrangement between the payer and the CSP pursuant to which the "indirect compensation" is paid.

*Disclosure of Total Annual Operating Expenses* - In an effort to harmonize the Final Rule with the participant-level disclosure regulation, the Final Rule now requires the disclosure of "Total Annual Operating Expenses" of any investment fund that is a designated investment alternative ("DIA") expressed as a percentage, and calculated in accordance with the DOL's participant-level disclosure regulation. The Final Rule also requires CSPs to disclose any other information relating to DIAs that is within the control of, or reasonably available to, the CSP.

*Timing of Changes to Investment-Related Disclosures* - The Final Rule amends the deadline for disclosing changes to investment-related information to "at least annually." The Interim Final Rule previously required that all changes be disclosed within 60 days.

*Timing of Other Previously Disclosed Information* - The deadline for disclosure of changes to other information that has been previously disclosed remains 60 days from the date a CSP is informed of the change.

*Provision of Additional Information Requested by Responsible Plan Fiduciary* - Upon request, CSPs must provide responsible plan fiduciaries additional information required to satisfy the plan's annual reporting and disclosure obligations under the Final Rule. This information must be provided "reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator must comply." The Interim Final Rule required this information be provided within 60 days. Responsible plan fiduciaries must make their requests for additional information to CSPs in writing.

*"Guide" to Initial Disclosures* - The DOL indicates in the Preamble that it intends to propose additional rules that would require a CSP to separately furnish a summary or guide to help responsible plan fiduciaries navigate disclosures made in separate or disparate documents. Perhaps as a precursor to what may later be required by further regulation, the DOL has provided a sample guide as an appendix to the Final Rule that CSPs may use to assist plan fiduciaries with their review of the required disclosures.

*Definition of Compensation* - The Final Rule enhances the definition of "compensation" allowing for a "reasonable and good faith" estimate of compensation or cost if the CSP cannot otherwise readily describe the compensation or cost. This may be useful where CSPs may not know all of the compensation they will earn, because, for example, a plan sponsor has not yet selected all of the plan's investment options. CSPs who wish to estimate the cost must explain the methods and assumptions used for the estimate.

*Effect on Other Existing Class Exemptions* - The DOL states that they are currently reviewing a number of class exemptions involving service provider arrangements and anticipate providing guidance in the near future. We understand that DOL is currently reviewing class exemptions that address sales of insurance products and mutual funds, including PTCE 84-24 and Part II of PTCE 75-1, among others.

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