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Final Rules Issued on Retirement Plan Fee Disclosures—Compliance Required by July 1

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On February 2, the Department of Labor ("DOL") released the final regulations under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). These rules require certain retirement plan service providers to disclose fee-related information to plan fiduciaries for the service provider arrangement to meet the "reasonableness" requirements of the section 408(b)(2) prohibited transaction exemption.

The final rule makes certain changes—summarized below— to the interim final rule published on July 16, 2010, and extends the effective date of these new disclosure requirements for new and existing arrangements from April 1, 2012 to July 1, 2012. Consequently, the related participant-level fee disclosure deadline to provide initial disclosures to participants is delayed, resulting in an August 30, 2012 deadline for calendar year plans to provide such initial disclosures to plan participants.

Background

Section 408(b)(2) of ERISA provides an exemption from the prohibited transaction rules if, among other requirements, the arrangement and compensation paid to a service provider of an employee benefit plan is "reasonable." On July 16, 2010, the DOL released an interim final rule requiring "covered service providers" of retirement plans to disclose fee-related information about the service provider arrangement to the "responsible plan fiduciary" ("RPF") for purposes of determining whether the arrangement is "reasonable." If these disclosure requirements are not satisfied, the expenses associated with the arrangement will not fall under the exemption from the prohibited transaction rules for service arrangements between a plan and a party in interest and may be subject to certain excise taxes under Code section 4975. These service provider fee disclosure rules are part of the DOL's ongoing initiative to enhance fee disclosures related to benefit plans, including, enhanced disclosure requirements through the Form 5500 annual report and participant-level fee disclosures.

The DOL requested comments to the interim final rule and made certain changes to the interim final rule. The remainder of this Client Advisory provides a summary of the changes to the just-released final rule

from the interim final rule. For a summary of the general requirements under the interim final rule, see our previous Client Advisory on the subject.

Changes from the Interim Final Rule

The final rule substantially incorporates the requirements under the interim final rule, subject to certain changes, including:

- **Definition of "Covered Plan."** Under the final rule, certain frozen Internal Revenue Code Section 403(b) annuity contracts and custodial accounts that were issued before January 1, 2009 are excluded from the definition of a "covered plan" and will not be subject to these service provider fee disclosure requirements.

- **Description of Indirect Compensation.** Service providers must include in applicable disclosures information related to any "indirect compensation" that is expected to be paid between a covered service provider and a third party. The final rule enhances these disclosures related to indirect compensation by requiring service providers to include a description and explanation of any such arrangement where indirect compensation is expected to be paid.

- **Sample Guide to Disclosures.** An Appendix to the final rule includes a "sample guide" that covered service providers can provide to RPFs. The guide is intended to enable the RPF to locate compensation information that is disclosed in multiple or complex documents. While use of this guide is "strongly encouraged" by the DOL, it is not currently required. However, the preamble to the final rule states that the DOL intends to issue a proposed regulation that would require covered service providers to use such a guide to assist RPFs in locating required information.

- **Disclosures of Designated Investment Alternatives ("DIA").** Under the final rule, covered service providers must disclose additional information for any investment that is a DIA under a participant-directed 401(k) or similar plan. Such disclosures include: (1) the total annual operating expenses for the DIA (expressed as a percentage and calculated in accordance with the participant-level fee disclosure rules) and (2) any other information that is within the control of, or reasonably available to, the covered service provider and is required to be disclosed as investment-related information under the participant-level fee disclosure rules.

- **Pass-Through Relief for Investment-Related Disclosures Relating to a DIA.** Covered service providers may now generally rely on investment-related disclosures of the issuer of the DIA so long as the issuer is one of several regulated entities specified under the rule.

- **Deadline to Disclose Changes to Investment-Related Information.** The deadline for disclosing changes to investment-related information was changed from requiring disclosure within 60 days of the change to at least annually. The deadline for disclosure of any other changes remains 60 days from the date the covered service provider is informed of the change.

- **Deadline to Disclose Requested Information.** Under the final rule, a covered service provider now must provide information requested by a plan in connection with the plan's reporting and disclosure requirements "reasonably in advance" of the date the plan must comply with the reporting or disclosure requirements.

- **Deadline to Correct Certain Errors or Omissions.** Under the final rules, if a covered service provider makes an error or omission in disclosing changes to previously disclosed information, such error

or omission can be corrected within 30 days after the covered service provider knows of the error or omission.

- **Requirement for Class Exemption.** Under the interim final rule, RPFs who met certain requirements could still qualify for the prohibited transaction exemption if the RPF relied on certain disclosures from the covered service provider that later turn out to be inadequate. Under this rule, the RPF must take reasonable steps to obtain the missing information and must notify the DOL if the service provider fails to comply with the request within 90 days. The final rule expands the requirements for such an exemption by providing that if a covered service provider fails to provide requested information to the RPF within 90 days, and the information relates to future services, the RPF must terminate the applicable service provider arrangement as "expeditiously" as possible.

Effective Date

The final rule extended its effective date from April 1, 2012 to July 1, 2012 to provide covered service providers and RPFs with additional time to comply with all of the requirements under the final rule. This means that all existing and new service provider arrangements must be in compliance with the final fee disclosure rule by July 1, 2012.

Last, as mentioned above, the effective date of the participant-directed fee disclosure rules is tied to these service provider fee disclosure rules. Accordingly, this means that, for calendar year plans, initial disclosures to participants must be made by August 30, 2012 and the first quarterly disclosures must be made by November 14, 2012. For a summary of the participant-directed fee disclosure rules and the first deadline extension, see our previous Client Advisories on the subject.

Next Steps for RPFs and Plan Administrators

Responsible plan fiduciaries and plan administrators need to take action to ensure all fiduciary obligations under the service provider and participant-directed plan fee disclosure rules are met, including:

1. Identifying the benefit plans and/or service providers to which the service provider and participant-directed fee disclosure rules apply (i.e., who are the "covered service providers" and which plans are "covered plans");

2. Monitoring and reviewing service provider fee disclosure to ensure that sufficient information is provided to the RPF and establishing a process to follow-up with the service provider and/or notify the DOL if adequate information is not provided.

3. Coordinating with service providers to determine who will prepare, compile and distribute applicable participant-level disclosures, including incorporating relevant service provider disclosures into the participant-level disclosures.

4. Establishing ongoing processes to (i) monitor and analyze fee disclosures and determine whether such arrangements are reasonable and (ii) monitor the distribution of participant-level fee disclosures.

5. Documenting the RPF's service provider review process and decisions made by the RPF during such review.

If you have any questions about the content of this publication, please contact the Pillsbury attorney with whom you regularly work or the Executive Compensation & Benefits group.

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