

US Department of Labor Issues Final Rule on Service Provider Fee Disclosure

On February 3, 2012, the US Department of Labor (DOL) issued a final rule (the Final Rule) amending its longstanding regulations interpreting the statutory exemption for the provision of plan services under Section 408(b)(2) of the Employee Retirement Income Security Act (ERISA). The Final Rule will become effective on July 1, 2012 (the Effective Date) for all new and existing service provider relationships covered by the Final Rule.

The Final Rule requires certain Covered Service Providers that provide services to ERISA-governed retirement plans to provide additional disclosures as a condition of obtaining an exemption from the prohibited transaction rules under Section 406(a) of ERISA. The new disclosures are intended to assist plan fiduciaries with evaluating the reasonableness of the service provider's total compensation and determining whether the service provider has conflicts of interest that may affect its performance.

The Final Rule is part of the DOL's three-part regulatory initiative to require enhanced disclosures relating to direct and indirect service provider compensation. The revised Form 5500, including a revised Schedule C that significantly expands plan administrators' reporting requirements for service provider arrangements, is already in effect. On October 20, 2010, the DOL issued final regulations that impose additional disclosure obligations on fiduciaries of participant-directed plans that are effective either on the first day of the plan year beginning

on or after November 1, 2011 or 60 days after the Effective Date, whichever is later.

All of these initiatives are part of the DOL's recent focus on increasing transparency regarding fees and expenses paid by ERISA plans and ensuring that plan fiduciaries obtain the information they need to assess the compensation paid for services rendered to the plan—taking into account revenue-sharing arrangements among plan service providers and potential conflicts of interest. Although 401(k) plans and other participant-directed plans appear to be the primary focus of these initiatives, the Final Rule and the new reporting rules also apply to other types of plans.

Summary of Changes

The Final Rule is substantially similar to the interim final regulation that was published on July 16, 2010 (the Interim Rule). However, the Final Rule includes the following key changes:

- Certain 403(b) annuity contracts and custodial accounts are excluded from the definition of "Covered Plan" (see "*Plans Covered by the Final Rule*").
- The requirements for initial disclosures relating to "indirect compensation" have been expanded to include a description of the arrangement between the payer and the Covered Service Provider (see "*Initial Disclosure, Compensation, Indirect*").

- The initial investment-related disclosure requirements for fiduciaries of plan asset funds that are designated investment alternatives for participant-directed plans have been expanded to include investment-related information that must be disclosed to participants under the DOL’s participant disclosure regulation (*see “Initial Disclosure, Bank Collective Funds or Insurance Company Separate Accounts that are Designated Investment Alternatives”*).
- The initial investment-related disclosures required to be delivered by platform providers with respect to designated investment alternatives for participant-directed plans have been expanded to include investment-related information that must be disclosed to participants under the DOL’s participant disclosure regulation (*see “Initial Disclosure, Recordkeeping and Brokerage Services to Participant-Directed Plans”*).
- The rules permitting platform providers for participant-directed plans to satisfy their disclosure obligations by passing through disclosures received from the underlying designated investment alternatives have been clarified. They now allow disclosures from a bank collective fund or insurance company separate account to be passed through to the same extent as disclosures from a registered fund (*see “Initial Disclosure, Recordkeeping and Brokerage Services to Participant-Directed Plans”*).
- The timing has been changed for disclosures that are required to be delivered upon request of the plan fiduciary. Unlike the Interim Rule, which required information to be disclosed within 30 days of a request, the Final Rule requires that a Covered Service Provider disclose the requested information reasonably in advance of the date upon which the responsible plan fiduciary must comply with the applicable reporting or disclosure requirement under ERISA (*see “Continuing*

Disclosure Obligations, Responses to Requests”).

- The timing requirements for reporting changes to initial disclosures have been revised to allow disclosure of the investment-related information for designated investment alternatives required to be provided to fiduciaries of participant-directed plans to be delivered annually (rather than within 60 days after each change) (*see “Continuing Disclosure Obligations, Changes”*).
- The requirements for relief under the class exemption have been revised to require the plan fiduciary to terminate a delinquent service provider under certain circumstances (*see “New Prohibited Transaction Exemption for Plan Fiduciaries for Certain Disclosure Failures”*).
- The effective date of the Final Rule has been extended from April 1, 2012 to July 1, 2012.

Background

The prohibited transaction rules under ERISA prohibit fiduciaries from causing a plan to enter into certain types of transactions (including the provision of services) with persons who are parties in interest with respect to the plan. Parties in interest are defined to include any person who provides services to a plan. Section 408(b)(2) of ERISA provides a statutory exemption to permit parties in interest to provide services to a plan provided that (i) the contract or arrangement is reasonable, (ii) the services are necessary for the establishment or operation of the plan and (iii) no more than reasonable compensation is paid for the services. If a service contract constitutes a nonexempt prohibited transaction, the service provider is subject to excise tax penalties under Section 4975 of the Internal Revenue Code of 1986 (the Code).

In 1977, the DOL published regulations under Section 408(b)(2) to provide additional guidance on the scope of the exemptions. (The Department

of Treasury published corresponding regulations under the parallel provisions in Section 4975 of the Code at the same time.) Those regulations provide guidance on the application of each of the conditions of ERISA Section 408(b)(2). In the case of the “reasonable contract” requirement, the regulations merely required that the contract allow the plan to terminate it without penalty on reasonably short notice under the circumstances to prevent the plan from being locked into an arrangement that has become disadvantageous. To date, most fiduciaries and service providers to plans have relied primarily upon the statutory exemption afforded by Section 408(b)(2) because of its fairly straightforward conditions.

On December 13, 2007, the DOL published proposed amendments to its regulations under Section 408(b)(2) of ERISA (the Proposal), primarily to enhance a Covered Service Provider’s disclosure requirements in order for the arrangements to be considered reasonable. The Proposal would have required Covered Service Provider contracts to include specified terms and required Covered Service Providers to make specific disclosures of direct and indirect compensation arrangements, fiduciary status and conflicts of interests. The Proposal was not intended to modify or provide new guidance on any other aspect of Section 408(b)(2), such as what termination provisions are considered reasonable.

The DOL posted more than 100 public comments on the Proposal to its web site, many of which were critical of the Proposal’s scope and breadth. The DOL published the Interim Rule on July 16, 2010 in an “interim final” format in order to allow one more round of comments before finalizing the new rules.

Summary of Final Rule Requirements

While many of the issues raised by fiduciaries and service providers have not been resolved, the DOL has clarified certain matters in response to the many comments it received.

PLANS COVERED BY THE FINAL RULE

The Final Rule applies only to service provider relationships with certain Covered Plans. The Interim Rule defined Covered Plans to include employer-sponsored pension and retirement plans (other than individual retirement accounts (IRAs), SIMPLE IRAs and simplified employee pensions (SEPs)) that are not otherwise exempt from ERISA.

The Final Rule added an exclusion from the definition of Covered Plans for all or that portion of a Code Section 403(b) plan that consists exclusively of annuity contracts or accounts that were frozen prior to 2009. In order to be excluded, (i) the contract or account must have been issued before January 1, 2009, (ii) all of the rights and benefits under the contract or account must be legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer and (iii) the individual owner must be fully vested in the contract or account.

The DOL is considering whether, and to what extent, additional disclosures should be provided to welfare benefit plans and other plans that are not covered by the Final Rule. In the preamble to the Final Rule, the DOL stated that, due to the significant differences between service and compensation arrangements of pension plans and those involving welfare plans, the DOL plans to develop separate, more specifically tailored disclosure requirements for welfare benefit plans.

SERVICE PROVIDERS COVERED BY THE FINAL RULE

The new requirements will only apply to certain service providers to Covered Plans. Covered Service Providers are service providers that expect to receive \$1,000 or more in direct or indirect compensation (including non-monetary compensation, such as gifts, entertainment and travel, subject to a \$250 aggregate *de minimis* threshold)¹ in connection with providing such services, whether such services are actually performed or such compensation actually received by the Covered Service Provider, an

affiliate or a subcontractor. Covered Service Providers include:

- **ERISA Fiduciaries.** Any service provider that provides services as an ERISA fiduciary directly to a plan or to a fund or other entity that is deemed to hold plan assets for ERISA purposes and in which the plan holds a *direct* equity interest. This would include persons who (i) exercise any discretionary authority or control respecting management of the plan or plan asset fund or exercise any authority or control respecting management or disposition of its assets, (ii) render investment advice for a fee or other direct or indirect compensation with respect to property of the plan or plan asset fund or have any authority or responsibility to do so or (iii) have any discretionary authority or discretionary responsibility in the administration of the plan.
- **Registered Investment Advisers.** Any service provider that provides services directly to the plan as an investment adviser registered under the Investment Advisers Act of 1940 (the Advisers Act) or state law. In a change from the Proposal, a registered investment adviser's status as a Covered Service Provider does *not* depend on whether the investment adviser acts as a fiduciary under the Advisers Act or state law. (For ease of reference, fiduciaries described above and registered investment advisers that are Covered Service Providers will be collectively referred to as "Fiduciary Service Providers.")
- **Providers of Certain Recordkeeping or Brokerage Services to Participant-Directed Individual Account Plans (Platform Providers).** Any service provider that provides recordkeeping or brokerage services to a participant-directed plan (such as a 401(k) plan) is a Covered Service Provider if one or more of the designated investment alternatives offered under the plan (other than a self-directed brokerage window) is "made available (e.g., through a platform or similar

mechanism) in connection with" the recordkeeping or brokerage arrangement. This category appears to focus on the role that such record keepers or brokers may play in the plan fiduciary's selection of investment options to be offered under the plan where the record keeper or broker may derive fees or other compensation from the investment options.

- **Certain Direct Service Providers that Receive Indirect Compensation (Direct/Indirect Service Providers).**

Direct/Indirect Service Providers are any persons that receive indirect compensation or fees in connection with the provision of any of the following specified services directly to a Covered Plan: accounting, actuarial, appraisal, auditing, banking, consulting related to investment policies or selection of plan investments or service providers, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, third-party administration or valuation services *provided*. Indirect compensation means any compensation received by the service provider or its affiliate *other than* from the Covered Plan, the plan sponsor, the Covered Service Provider or certain affiliates or subcontractors of the service provider. Persons who provide services indirectly to plans (e.g., to funds or other entities in which plans invest) do not fall into this category of potential Covered Service Providers, even if the fund is deemed to hold plan assets.

The Final Rule's definition of Covered Service Providers presents several interpretive difficulties when applying the definition to the marketplace. For example, it is unclear whether an entity that has multiple lines of business and offers a variety of services through separate agreements with a plan would be treated as a Covered Service Provider with respect to all such agreements if it acts as a Covered Service Provider under one agreement. In addition, there is nothing in the Final Rule that definitively excludes fiduciaries

that are employed by or affiliated with the plan sponsor from becoming Fiduciary Service Providers. Some commenters have asked the DOL to confirm that inside fiduciaries are not Covered Service Providers, but, until such guidance is issued, inside fiduciaries (e.g., in-house administrative committee members) should consider whether compliance with the Final Rule may be necessary and, if so, how the new conditions might apply.

The scope of the Direct/Indirect Service Provider definition has also attracted criticism in submitted comments. The DOL declined, in the Final Rule, to clarify its definition with respect to the sorts of services that might make one a Direct/Indirect Service Provider, taking its chosen terms to have accepted industry meanings. The DOL has otherwise indicated, however, that it intends the list of services to be comprehensive. Thus, service providers should take a fairly generous approach when determining whether the services for which they receive indirect compensation make them Direct/Indirect Service Providers. For example:

- **Banking.** The banking category could impact a broad range of non-fiduciary service arrangements that plans maintain with banks, such as benefits disbursements, tax processing, participant loan processing, performance measurement, custody and checking, to the extent that the bank receives indirect compensation for such services. To the extent that any of the banking services are provided in connection with trustee or other fiduciary services provided by a bank, they may be covered by the statutory exemption under Section 408(b)(6) of ERISA for ancillary services provided by a bank fiduciary.
- **Custodial Services.** The custodial services category could extend to custodial arrangements maintained in connection with brokerage or derivatives transactions. It could also extend to collateral or margin accounts, to the extent that such accounts contain plan assets.

- **Investment Brokerage.** The investment brokerage category could include securities brokers, services provided by futures commissions merchants and real estate brokers. The Final Rule clarified that brokers of insurance contracts are included in this category of Covered Service Providers.
- **Recordkeeping.** The Final Rule defines recordkeeping services to include services related to plan administration and monitoring of plan and participant and beneficiary transactions (e.g., enrollment, payroll deductions and contributions, etc.), as well as to the maintenance of Covered Plan and participant and beneficiary accounts, records and statements. Plan record keepers who do not maintain a platform through which investments are provided, but who do receive indirect compensation from, for example, one or more of the plan's investment options, would likely fall within this category of Direct/Indirect Service Provider. However, this definition appears to include a broader range of administrative-service providers, prompting some commenters to ask the DOL to confirm that this category was intended to pick up only those service providers generally considered to be "record keepers" in the benefit industry (and not, for example, service providers that provide Covered Plan participants the same record or account maintenance services they would offer other retail investors).

INITIAL DISCLOSURE

The Final Rule requires a Covered Service Provider to provide certain initial disclosures to a plan fiduciary with the authority to cause each Covered Plan to enter into the service arrangement (the Responsible Plan Fiduciary). The disclosures are not required to be separate from the service contract and general disclosure provided in connection with the service arrangement. Generally speaking, the initial disclosures must be provided in advance of entering into, extending or renewing a contract

or arrangement between the Covered Plan and the Covered Service Provider (or, in the case of existing contacts, prior to the effective date of the Final Rule) and must describe the following:

Nature of Services To Be Provided. The initial disclosures must include a description of the services to be provided pursuant to the contract or arrangement. The disclosure is not required to be any more specific when describing such services other than is necessary to enable a Responsible Plan Fiduciary to evaluate the reasonableness of the fees the Covered Plan will pay for them. Thus, in circumstances where it is well-understood that a service would really consist of several “sub-services” (e.g., custodial arrangements typically involve settlement, safekeeping, pricing and reporting services), the Final Rule generally does not require each of the sub-services to be specifically disclosed.² The Final Rule clarified that a Covered Service Provider must disclose all services to be provided pursuant to the contract or arrangement, even if some of the services are beyond those that make such service provider a Covered Service Provider.

Compensation. A Covered Service Provider must disclose compensation that it, as well as any affiliate or subcontractor, reasonably expects to receive in connection with providing the disclosed services. The Final Rule distinguishes between four kinds of compensation that all Covered Service Providers must disclose:

- **Direct.** The Covered Service Provider must disclose all compensation the service provider, any affiliate or any subcontractor reasonably expects to receive from the Covered Plan in connection with providing the services.³ Direct compensation may be disclosed on an aggregate basis or may be separated out on a service-by-service basis.
- **Indirect.** The Covered Service Provider must also disclose any compensation received from any source other than the Covered Plan, the plan sponsor, or the Covered Service Provider or its affiliates in connection with the services

provided pursuant to the contract or arrangement. The DOL indicated in the Final Rule that it intends the words “in connection with” to be construed broadly. In addition to disclosing the amount of indirect compensation the Covered Service Provider, an affiliate or a subcontractor reasonably expects to receive, the service provider must also identify the services for which it will receive the compensation, as well as the party that will be paying the compensation. In addition, the Final Rule added a requirement to describe the arrangement between the party that will be paying the compensation and the Covered Service Provider, an affiliate or a subcontractor, as applicable, pursuant to which the indirect compensation is paid. The DOL explained that this new requirement is intended to illustrate for the Responsible Plan Fiduciary potential conflicts of interest on the part of the Covered Service Provider, an affiliate or subcontractor resulting from the receipt of indirect compensation.

- **Related-Party Compensation.** This is a description of all compensation to be allocated among the Covered Service Provider, its affiliates (excluding for this purpose employees who receive compensation from their employer on account of work performed) or subcontractors, but only if such compensation is set on a transaction basis (e.g., commissions, soft dollars, finder’s fees or similar incentive compensation) or charged directly against a Covered Plan’s investment and reflected in the net value thereof (e.g., 12b-1 fees applied to reduce recordkeeping costs that are included in a bundled fee arrangement). This disclosure must identify the services for which the compensation is paid, as well as the payers and recipients of such compensation, including whether any such payer or recipient is an affiliate or subcontractor of the Covered Service Provider. Related-party compensation must be disclosed, even if it must also be disclosed under another provision of the Final Rule. Thus, this disclosure appears to be

intended to assist Responsible Plan Fiduciaries in evaluating potential conflicts of interest.

- **Termination Compensation.** If the Covered Service Provider, an affiliate or a subcontractor reasonably expects to receive compensation in connection with a termination of the contract or agreement, this compensation must be disclosed, including a description of how any prepaid amounts will be calculated and refunded upon termination.

Manner of Receipt. The Covered Service Provider must describe the manner in which the compensation will be received (e.g., whether it will be billed to the plan or deducted from an account maintained on behalf of the plan).

In addition to the disclosures described above, certain Covered Service Providers must also disclose the following information in their initial disclosures:

Status. If a Fiduciary Service Provider (or an affiliate or subcontractor) reasonably expects to provide the disclosed services, either as a fiduciary under ERISA or as a registered investment adviser, it must disclose this fact, unless the service provider will be providing services only as a registered investment adviser to an entity that holds plan assets.⁴ In such a case, the registered investment adviser does not need to disclose its status with respect to such services. However, it is not entirely clear when a person that is a registered investment adviser will be deemed to be “providing services as a registered investment adviser for purposes of the Final Rule.”

Fiduciary Services to Plan Asset Entities that Are Not Designated Investment Alternatives.

If a Fiduciary Service Provider acts as an ERISA fiduciary to a fund or other entity that holds plan assets and in which a Covered Plan holds a direct equity investment, the initial disclosure must include (i) a description of any compensation that will be charged directly against the plan’s investment in the entity—such as commissions, sales loads, sales charges, deferred sales charges,

redemption fees, surrender charges, exchange fees, account fees and purchase fees—and that is not included in the annual operating expenses of the fund or entity and (ii) a description of annual operating expenses (if the fund’s return is not fixed) and any other ongoing expenses.

With respect to the first category—compensation charged directly against the plan’s investment in a fund—fees or other charges paid to the fund, rather than the Covered Service Provider, its affiliate or subcontractor, presumably would not need to be disclosed.

The Final Rule does not address the situation where there are no operating expenses to disclose. The Final Rule does not require disclosure of the amount of expenses for plan asset funds that are not designated investment alternatives for participant-directed plans. So, in the case of investment funds that have no operational history on which to base any quantification of expenses at the time the initial disclosure is made, the types of expenses that will be charged to the fund should be clearly disclosed. The DOL has indicated in informal discussions that the ultimate goal behind the disclosure of expenses is to provide Responsible Plan Fiduciaries with a basis for an “apples-to-apples” comparison of expenses among investment options. In light of this, fiduciaries making these additional disclosures for an entity without an operational history should take into account customary industry practices with respect to disclosing such expenses.

Bank Collective Funds or Insurance Company Separate Accounts that Are Designated Investment Alternatives.

The Final Rule added new initial disclosure requirements for a Fiduciary Service Provider to a plan asset fund, insurance company separate account or other plan asset entity in which the Covered Plan has a direct equity investment if such plan asset fund, insurance company separate account or other plan asset entity is a designated investment alternative for a participant-directed plan. The DOL noted that these new disclosure

requirements are intended to better conform the disclosures under the Final Rule to the investment-related information required to be provided by plan fiduciaries or administrators to participants under the DOL's participant-level disclosure regulation.⁵

The initial disclosures for a bank collective fund, insurance company separate account or other plan asset entity that is a designated investment alternative must include: (i) a description of any compensation that will be charged directly against the plan's investment—such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees—and that is not included in the annual operating expenses of the investment contract, product or entity; (ii) if the fund's return is not fixed, the total annual operating expenses expressed as a percentage and calculated in accordance with DOL's participant disclosure regulation (29 C.F.R. Section 2550.404a-5(h)(5));⁶ and (iii) any other information or data about the particular designated investment alternative that is within the control of, or reasonably available to, the Fiduciary Service Provider and that is required for the plan administrator to comply with the investment disclosure obligations described in the DOL's participant disclosure regulation (29 C.F.R. Section 2550.404a-5(d)(1)), including the asset category of each alternative, performance data, benchmarks, and fee and expense information.

The Final Rule clarified that the determination of whether an investment's return is fixed should be made in accordance with the participant disclosure regulation, which provides that funds with fixed returns are those that provide a fixed or stated rate of return to the participant, for a stated duration, and with respect to which investment risks are borne by an entity other than the participant.

Also, as is discussed below, the Final Rule clarifies that Platform Providers may satisfy their

reporting obligation with respect to designated investment alternatives that are bank collective funds or insurance company separate accounts by passing on to the plan fiduciaries the disclosures for such vehicles prepared by the banks and insurance companies, thereby standardizing the treatment of registered and unregistered vehicles.

Recordkeeping and Brokerage Services to Participant-Directed Plans. Platform Providers must provide additional disclosures regarding each designated investment alternative under a participant-directed plan for which recordkeeping or brokerage services will be provided by the Platform Provider, regardless of whether the investment alternatives are plan asset entities (excluding brokerage windows, self-directed brokerage accounts, and similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated).

The Final Rule confirmed that the Platform Provider's disclosure obligation extends to all designated investment alternatives, even if they are outside of the Platform Provider's platform and are independently selected by the plan fiduciary. In addition, the initial investment-related disclosures required to be delivered by Platform Providers have been expanded in the Final Rule to include investment-related information that must be disclosed to participants under the DOL's participant disclosure regulation.

Under the Final Rule, with respect to each designated investment alternative, the initial disclosure must include: (i) a description of any compensation that will be charged directly against the plan's investment—such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees—and that is not included in the annual operating expenses of the investment contract, product or entity; (ii) if the fund's return is not fixed, the total annual operating

expenses expressed as a percentage and calculated in accordance with the DOL's participant disclosure regulation (29 C.F.R. Section 2550.404a-5(h)(5)); and (iii) any other information or data about the particular designated investment alternative that is within the control of, or reasonably available to, the Platform Provider and that is required for the plan administrator to comply with the investment disclosure obligations described in DOL's participant disclosure regulation (29 C.F.R. Section 2550.404a-5(d)(1)).

The Final Rule provides that this initial disclosure requirement may be satisfied by providing to the plan fiduciary current disclosure materials provided by the issuers of the designated investment alternatives or information replicated from such materials but only (i) if the issuer is not an affiliate of the Platform Provider, (ii) the issuer is a registered investment company, an insurance company qualified to do business in any state, an issuer of a publicly traded security, or a financial institution supervised by a state or federal agency and (iii) the Platform Provider acts in good faith and does not know that the materials are incomplete or inaccurate and furnishes the Responsible Plan Fiduciary with a statement that the Platform Provider is making no representations as to the completeness or accuracy of such materials. The Final Rule clarified that this "pass-through" reporting option extends not only to disclosures issued by a registered fund, but also to disclosures issued by banks in connection with collective investment funds and insurance companies in connection with separate account investment options. In the Final Rule, the DOL also clarified that the statement described in (iii) above can be satisfied by a single statement in the service contract.

Commenters have criticized this pass-through reporting option on various grounds. For example, in some cases, providing prospectuses for dozens of investment options on an investment platform would not result in

meaningful disclosure for Responsible Plan Fiduciaries, who often would not have the resources to evaluate the disclosures fully.

In response to such comments, the DOL extended the pass-through reporting safe harbor to summaries based on the prospectuses and other disclosures provided by the issuers, since such summaries may be in a more user-friendly format, provided that the other conditions of the safe harbor are satisfied. It is not clear what policy bases justify the exclusion of affiliated issuers from the pass-through reporting option, since Platform Providers will have little alternative but to rely on such disclosure materials anyway.

Although commenters asked the DOL to specify that the contemplated disclosures can be made through the use of third-party service providers that collect the required information and provide informative summaries of that information, the DOL only confirmed that a Covered Plan administrator is permitted to retain a service provider to fulfill its obligations under the participant disclosure regulation.

Recordkeeping Services. If a Covered Service Provider will be providing recordkeeping services, whether as a Platform Provider, a Direct/Indirect Service Provider or otherwise, the initial disclosure must include a description of all direct and indirect compensation that the service provider, an affiliate or a subcontractor reasonably expects to receive in connection with such recordkeeping services. This compensation must be disclosed whether the compensation is paid through direct charges for such services or through other fees or compensation received by the Covered Service Provider, an affiliate or a subcontractor. If the recordkeeping services are expected to be provided without explicit compensation, or if recordkeeping compensation is to be offset or rebated based on the receipt of other compensation received by the Covered Service Provider, an affiliate or a subcontractor, the description must include a reasonable, goodfaith estimate of the cost to the plan of the

recordkeeping services, including an explanation of the methodology used to derive the goodfaith estimate.

CONTINUING DISCLOSURE OBLIGATIONS

After the initial disclosures have been made and the contract or arrangement has been entered into, the Final Rule requires Covered Service Providers to provide additional disclosures in order to continue to qualify for the exemption available under Section 408(b)(2). These continuing disclosure obligations arise in three circumstances:

Responses to Requests. Upon written request by the Responsible Plan Fiduciary, a Covered Service Provider must provide any other information relating to the compensation received in connection with the contract or arrangement that is required for the plan to comply with any reporting and disclosure requirements imposed under Title I of ERISA, including any regulations, forms and schedules. Unlike the Interim Rule, which required information to be disclosed within 30 days of a request, the Final Rule requires that a Covered Service Provider disclose the requested information reasonably in advance of the date upon which the Responsible Plan Fiduciary must comply with the applicable reporting or disclosure requirement under ERISA (unless extraordinary circumstances beyond the Covered Service Provider's control preclude the Covered Service Provider from providing the information within that time frame, in which case it must be provided as soon as practicable.

If, for example, a Covered Service Provider fails to provide all of the information required by the plan administrator to satisfy the enhanced reporting requirements in Schedule C reasonably in advance of the due date identified by the Responsible Plan Fiduciary (absent extraordinary circumstances), it appears that the DOL could take the position that the provision of services is not covered by Section 408(b)(2). Since many Covered Service Providers' systems

are set up to provide this information on a regular, annual basis, rather than upon request, such an interpretation could be quite problematic. Accordingly, Covered Service Providers might seek agreements with Responsible Plan Fiduciaries that they will request such information only at agreed-upon times and only as reasonably necessary for the satisfaction of their own disclosure and reporting obligations.

The obligation to provide additional disclosures extends beyond Schedule C to any reporting or disclosure obligation imposed under Title I, including information plan administrators may need to comply with the new participant disclosure regulation.

Changes. If any changes to the information subject to the initial disclosures occur, then the Covered Service Provider must disclose such changes no later than 60 days from the date on which the Covered Service Provider is informed of the change, unless extraordinary circumstances preclude such disclosure, in which case the information must be provided as soon as practicable. The Final Rule does not predicate the obligation to update the initial disclosures on the materiality of the changes. However, the Final Rule permits investment-related disclosures relating to designated investment alternatives for participant-directed plans (as described above) to be updated just annually (rather than within 60 days from the date of each change).

Consistent with their initial disclosure obligations, Platform Providers have ongoing disclosure obligations with respect to investment alternatives that are added to the Covered Plan's platform after it enters into the contract or arrangement with the Platform Provider. The Final Rule requires the Platform Provider to provide additional disclosures with respect to such investment alternatives "as soon as practicable" but in any case *before* the designation of the investment alternative. In the preamble to the Final Rule, the DOL clarified

that a change to the designated investment alternatives by a plan fiduciary during the term of a contract or arrangement should be disclosed as a “change” to the initial disclosures in accordance with the procedures described above.

Correction of Inadvertent Errors and Omissions. If a Covered Service Provider, acting in good faith and with reasonable diligence, makes an error or omission in its initial disclosures or in a response to a Responsible Plan Fiduciary’s request, it can still qualify for the exemption available under Section 408(b)(2) if it provides the correct information as soon as practicable, but not later than 30 days from the date on which the Covered Service Provider knows of the error or omission.

Exemption for Responsible Plan Fiduciary. The Final Rule affords Responsible Plan Fiduciaries a special exemption in the event of a Covered Service Provider’s failure to disclose the information required as long as the Responsible Plan Fiduciary did not know of the omission and, upon discovering the omission, takes steps to obtain the information, reports to the DOL any Covered Service Provider who fails to comply with requests within 90 days after the request is made, and terminates the delinquent service provider as expeditiously as possible, consistent with its duty of prudence.

SPECIAL CONSIDERATIONS FOR PRIVATE INVESTMENT FUNDS

The general partner, manager or other fiduciary of a fund that is deemed to hold plan assets will be a Fiduciary Service Provider with respect to the ERISA plan investors in the fund. As a result, the fiduciaries responsible for investing in such funds will be required to ensure that Section 408(b)(2) or another prohibited transaction exemption is available for the provision of services by such persons. The disclosures required under Section 408(b)(2) could be included in the private placement memorandum for the fund or in a supplemental side letter or other document.

It is possible that an ERISA investor may be eligible for other exemptions that would cover the deemed service transaction between the ERISA investor and the fund fiduciary. For example, as discussed below under “Alternative Exemptions for Service Contracts,” the fiduciary of an ERISA investor may be a qualified professional asset manager (QPAM) or in-house asset manager (INHAM) and eligible for one of those exemptions. If the fund is a collective trust, insurance company separate account or other pooled investment fund maintained by a bank or insurance company, the deemed service transaction may also be eligible for the exemption afforded under Section 408(b)(8) of ERISA.

Fiduciaries of private investment funds that are deemed to hold plan assets under ERISA must also ensure that service contracts entered into on behalf of the fund either comply with Section 408(b)(2) or another prohibited transaction exemption.

The disclosure requirements in the Final Rule apply only to plan asset funds in which the plan holds a *direct* equity interest and does not apply to other funds in which that entity may invest, even if the underlying funds hold plan assets. The Final Rule thus clearly does not apply to the underlying fund managers in familiar fund-of-fund arrangements. In such arrangements, only the manager of the top-tier fund is a Covered Service Provider. The Final Rule’s application in feeder- and blocker-fund contexts is less clear, however. For example, fund managers often manage both a main fund and, either directly or through an affiliate, one or more feeder funds into the main fund.

Because of the breadth of the disclosure requirements, such fund managers may be required to provide disclosures with respect to their management of the main fund if they or their affiliate are Covered Service Providers to the feeder funds in which Covered Plans invest. In addition, if the fund is a designated investment alternative, the Covered Service

Provider must factor in all expenses and fees that reduce the alternative's rate of return when disclosing total annual operating expenses (*see* endnote 6).

WHO IS AN AFFILIATE?

The Final Rule defines the affiliates of any Covered Service Provider to include any person or entity that directly or indirectly controls, is controlled by, or is under common control with the Covered Service Provider, as well as any officer, director, employee of or partner in the Covered Service Provider. Therefore, a Covered Service Provider should consider whether employees involved in the provision of services to a Covered Plan may receive indirect compensation in connection with such services, such as meals, entertainment, educational conferences or travel reimbursement.

WHO IS A SUBCONTRACTOR?

A subcontractor is a person or entity, other than an affiliate of the Covered Service Provider, that reasonably expects to receive at least \$1,000 in compensation for (i) performing one or more of the Covered Services on behalf of the Covered Service Provider pursuant to a contract or arrangement with the Covered Service Provider or an affiliate or (ii) performing one or more of the Covered Services contemplated by the Covered Service Provider's contract or arrangement with a Covered Plan.

A subcontractor would not become a Covered Service Provider by reason of providing Covered Services on behalf of a Covered Service Provider and thus would not become directly subject to the new disclosure requirements. However, the Covered Service Provider will be required to disclose whether the subcontractor will provide services as a registered investment adviser or a fiduciary, describe any transaction-based compensation or fees charged against the plan's investment that will be paid to the subcontractor and make the other required disclosures with respect to the subcontractor's services. For

example, the manager of a fund that holds plan assets might retain an unaffiliated investment manager to manage cash or a sub-portfolio of the fund. Unless it is specifically contemplated in the fund documents that cash management will be delegated to a third-party manager at the cost of the fund, the cash manager would be a subcontractor to the manager, who would be the Covered Service Provider responsible for any disclosures required with respect to the arrangement.

DISCLOSURE OBLIGATIONS OF AFFILIATES AND SUBCONTRACTORS

Subcontractors and affiliates of Covered Service Providers do not have any independent disclosure obligations, even if they provide services that *would* have made them Covered Service Providers had they contracted directly with a Covered Plan. The Final Rule generally requires a Covered Service Provider to make the requisite disclosures regarding the Covered Service Provider *and* each of the service provider's affiliates and subcontractors. A Covered Service Provider's failure to deliver all of the requisite disclosures regarding its affiliates and subcontractors that provide services in connection with the arrangement will not cause the affiliates or subcontractors to be in a prohibited transaction.

INITIAL DISCLOSURES

If a contract is in place prior to the Effective Date, the initial disclosures must be delivered prior to the Effective Date. After the Effective Date, the Final Rule will require Covered Service Providers to provide the required initial disclosures reasonably in advance of the date that a contract or arrangement for the provision of services is entered into, extended or renewed.

Commenters have found this "entered into" criterion to be vague in some circumstances. For example, is it the date the contract is first signed, the services are first rendered or compensation first paid? In the Final Rule, the DOL declined to

adopt any of the specific dates suggested by commentators (e.g., the date the contract is legally binding or the date the contract is signed) and stated that “[t]ying disclosures to a determination of when a contract or arrangement becomes legally binding is not practicable because such determinations may depend on many facts and circumstances, as well as different State laws.”

NO GRANDFATHERING OF EXISTING CONTRACTS OR ARRANGEMENTS

The Final Rule will apply to contracts or arrangements that are already in existence on the Effective Date. Accordingly, Covered Service Providers must satisfy the disclosure requirements with respect to contracts or arrangements entered into prior to the Effective Date. If a contract or arrangement is entered into prior to the Effective Date, the initial disclosures must be made by the Effective Date rather than in advance of the commencement of the service-provider relationship.

FORMAT OF DISCLOSURE

The Final Rule does not require that the arrangement for the provision of services be in writing; however, the required disclosures must be provided in writing. The Final Rule does not require a service provider to provide the required disclosures in any specific form, or even in a single document, as long as the required information is included in written materials delivered to the plan fiduciary. For example, the disclosures could be contained in an investment adviser’s SEC Form ADV,⁷ an offering memorandum or prospectus, or a combination of any of these plus supplemental disclosures, as necessary.⁸

In the preamble to the Final Rule, the DOL stated that it intends to engage in a separate rulemaking process to determine whether Covered Service Providers will be required to provide a disclosure document or a separate

guide detailing where the initial disclosures can be found.

The DOL included a “sample guide” as an appendix to the Final Rule (*see Appendix A*). Although the DOL did not adopt the “sample guide” as a mandatory part of the Final Rule, the DOL strongly encouraged Covered Service Providers to offer plan fiduciaries a guide, summary or similar tool to assist them in identifying all the disclosures required under the Final Rule, particularly when service arrangements and related compensation are complex and information is disclosed in multiple documents.

In the preamble to the Final Rule, the DOL clarified that the Final Rule does not prohibit Covered Service Providers from furnishing the required disclosures electronically. However, the DOL cautioned that, “unless the covered service provider’s disclosure information on a website is readily accessible to responsible plan fiduciaries, and fiduciaries have a clear notification on how to gain such access, the information on the website may not be regarded as furnished within the meaning of the [Final Rule].”

DEFINITION OF COMPENSATION

Similar to the approach taken in the DOL’s Form 5500 amendments, compensation is defined very broadly to include money, or anything of monetary value received by the Covered Service Provider or its affiliate (including officers, directors, employees and partners of the Covered Service Provider) in connection with the service provided to the Covered Plan or the financial products in which the plan’s assets are invested. This compensation includes gifts, awards, trips for employees, research, finder’s fees, placement fees, commissions, sub-transfer agent fees, 12b-1 distribution fees, soft-dollar research and services and float income. The only exclusion from the definition is for non-monetary compensation valued at \$250 or less, in the aggregate, during the term of the contract or arrangement.⁹

In the preamble to the Final Rule, the DOL stated that Covered Service Providers may look to the DOL's guidance and methodology concerning non-monetary compensation for purposes of the Form 5500 for guidance regarding accounting for and allocating non-monetary compensation for purposes of the Final Rule.

CONSEQUENCES FOR FAILURE TO COMPLY

If a Covered Service Provider must rely on Section 408(b)(2) in order to provide services to a Covered Plan but fails to satisfy all of its disclosure obligations, including any of its continuing obligations, the exemption afforded by Section 408(b)(2) will no longer apply to the service-providing arrangement. The arrangement would then become a prohibited transaction, potentially subjecting the plan fiduciary to liability for breach of fiduciary duty and the Covered Service Provider to excise taxes under Section 4975 of the Code. This much is clear; what is not clear is how such excise taxes would be assessed on the prohibited transaction.

For example, it is not clear whether failing to satisfy the Final Rule with respect to a request for information would render the entire course of the service relationship a prohibited transaction or if only providing services after such a failure would constitute a prohibited transaction. In addition, the excise tax is based on a Code-defined "amount involved," which, in the case of the parallel Code provision to Section 408(b)(2) of ERISA, means just the excess compensation paid for the services. Nothing in the Final Rule changes the manner in which the excise tax penalty is calculated under Section 4975 of the Code—in fact, the DOL specifically acknowledged the authority of the Secretary of the Treasury to interpret this provision. Accordingly, where the compensation paid for services is not excessive, the resulting prohibited transaction may not trigger any excise tax penalties for the service provider.

As discussed below under *New Prohibited Transaction Exemption for Plan Fiduciaries for*

Certain Disclosures, a plan fiduciary may be able to avoid ERISA fiduciary liability for a Covered Service Provider's failure to comply by taking certain steps, including possible reporting of the delinquent service provider to the DOL and termination of the delinquent service provider.

Comparison with Schedule C Requirements

Like the Final Rule, Schedule C is designed to help Responsible Plan Fiduciaries make informed decisions about the service providers they retain for their plans. Accordingly, there are many similarities between the two, even though their disclosure regimes are ultimately very different.

As an initial matter, the DOL has clearly stated that, while there may be some overlapping concepts between the two regimes, they are independent of one another. Thus, for example:

- Covered Service Providers may have to disclose indirect compensation under the Final Rule that would not be reportable by a plan administrator under Schedule C.
- Compensation that would be indirect for Schedule C purposes may be direct for purposes of the Final Rule.
- Not all Covered Plans are covered by Schedule C, and not all service providers whose compensation must be reported on Schedule C are Covered Service Providers.
- Written disclosures required to qualify for alternative reporting under Schedule C may be insufficient for initial disclosure purposes (and vice versa).

Fundamentally, the two regimes are different in that Schedule C is retrospectively oriented, while the Final Rule contemplates the disclosure of compensation prospectively. Several commenters have argued that it would make sense to align the two regimes more closely, which would also minimize compliance burdens. For example, like the Final Rule, Schedule C requires the reporting of compensation received only if it exceeds

certain *de minimis* amounts over the course of a plan year, but these *de minimis* amounts are different than amounts in the Final Rule (namely, they are significantly higher). In addition, in some cases, the Final Rule requires prospective disclosure of information that is more feasibly disclosed on a retrospective basis (the potential receipt of non-monetary compensation, for example) so that it might make sense to shift certain disclosure requirements in their entirety from the Final Rule to Schedule C. The DOL did not address these comments in the Final Rule.

Prior to the promulgation of the Final Rule, most Covered Service Providers (other than managers of certain direct filing entities) did not have any direct obligation to provide the information required on Schedule C. Such Covered Service Providers have generally complied with requests for information from plan fiduciaries, however, because, among other reasons, the fiduciaries would be required to report them if they did not comply. Thus, many Covered Service Providers have already implemented procedures for recording and providing information that must be reported on Schedule C.

The Final Rule significantly changes this dynamic, however, because it now incorporates, as a condition for relief under Section 408(b)(2), a requirement that the Covered Service Provider disclose, on request, any information that is required for the fiduciary of the Covered Plan to comply with its reporting and disclosure requirements. Because the new disclosure obligation does not extend beyond information that is required, Covered Service Providers that have already developed compliance procedures for Schedule C purposes will probably find that further procedures are not necessary to gather such information. However, the Final Rule threatens to significantly impact the timing of such procedures, because Responsible Plan Fiduciaries could request the “required” information at any time. As discussed above,

this is one feature of the Final Rule that has generated significant concern from commenters.

New Prohibited Transaction Exemption for Plan Fiduciaries for Certain Disclosure Failures

The Final Rule provides a prohibited transaction exemption for plan fiduciaries (the Fiduciary Exemption) to address situations in which a Covered Service Provider fails to satisfy the new disclosure requirements. Under Section 406 of ERISA, a Responsible Plan Fiduciary who causes the plan to enter into a transaction that the fiduciary knows, or should know, constitutes a prohibited transaction is subject to fiduciary liability. The Fiduciary Exemption is subject to the following conditions:

- The Responsible Plan Fiduciary must have reasonably believed that the service provider satisfied the disclosure requirements under the Final Rule.
- Upon discovering the disclosure failure, the plan fiduciary must request in writing that the service provider furnish the required information.
- If the service provider fails to comply with the written request within 90 days of the request, the plan fiduciary must provide a detailed written notification to the DOL of such failure no later than 30 days following the service provider’s failure or refusal to provide the information, and the plan fiduciary must determine whether or not to terminate the contract or arrangement. The DOL has published a sample “Delinquent Service Provider Disclosure” notice (*see Appendix B*) that plan fiduciaries may file with the DOL online.
- If the requested information relates to future services and is not disclosed promptly after the end of the 90-day period, the plan fiduciary must terminate the contract as expeditiously as possible, consistent with its duty of prudence.

Disclosures Not Required for Certain Contracts and Arrangements

Compliance with the extensive disclosure requirements under the Final Rule is not required if (i) a service contract is covered by another prohibited transaction exemption, (ii) the services are provided solely to a fund or vehicle that is not deemed to hold plan assets, (iii) the service contract is with an IRA or other plan that is not a Covered Plan or (iv) the contract is with a service provider that is not identified as a Covered Service Provider.

ALTERNATIVE EXEMPTIONS FOR SERVICE CONTRACTS

There are a number of other exemptions that could provide relief for a service contract, depending upon the nature of the Responsible Plan Fiduciary or the type of service. For example, the parties to a service contract might be able to rely on one of the following:

- The QPAM Exemption, if a fiduciary that meets the requirements of a qualified professional asset manager under prohibited transaction exemption (PTE) 84-14 negotiates and causes the plan to enter into the service contract pursuant to that exemption.
- The INHAM Exemption, if a fiduciary that qualifies as an in-house asset manager under PTE 96-23 negotiates and causes the plan to enter into the contract pursuant to that exemption.
- The bank collective trust exemption, if the service contract is entered into with a bank collective trust pursuant to PTE 91-38.
- The insurance company separate account exemption, if the service contract is entered into with an insurance company separate account pursuant to PTE 90-1.
- The insurance company general account exemption, if the service contract is entered into with an insurance company general account pursuant to PTE 95-60.

- The exemption available under Section 408(b)(6) of ERISA, if the services are ancillary to fiduciary services provided by a bank to a plan.
- The exemption available under Section 408(b)(8) of ERISA permitting, among other things, a bank or insurance company to receive reasonable compensation in connection with services to a pooled investment fund maintained by the bank or insurance company.

However, a bank, an insurance company or a registered investment adviser eligible for one of the exemptions described above for service contracts it enters into on behalf of the plan may still need to rely on Section 408(b)(2) for *its own* service contract with a Covered Plan. In addition, ERISA fiduciaries may seek to obtain the information described in the Final Rule in order to satisfy their own duty of prudence, even if not required to comply with Section 408(b)(2). ERISA fiduciaries that wish to avail themselves of the protection afforded by the new class exemption might also seek to require the service provider to comply with the Final Rule, even if another exemption is available.

EXEMPTION NOT REQUIRED FOR SERVICES PROVIDED TO NON-PLAN ASSET FUNDS AND VEHICLES

Compliance with Section 408(b)(2) of ERISA is also not required for services that are provided solely to a fund or vehicle in which a plan has an interest if the fund or vehicle is not deemed to hold plan assets under ERISA. For example, if an ERISA plan invests in a mutual fund (which is statutorily exempt from ERISA) or in a hedge fund, real estate fund or private equity fund that is eligible for a plan asset exception, transactions entered into by the mutual fund or private investment fund are not subject to the prohibited transaction rules of ERISA.

However, if the investment in a non-plan asset fund or vehicle is made pursuant to a service arrangement with a plan, a Covered Service Provider may be required to disclose information

regarding compensation it (or its subcontractors or affiliates) receives at the fund level. For example, if an investment adviser to a plan causes the plan to invest in an affiliated mutual fund in reliance on PTE 77-4, the investment adviser would be required to deliver Section 408(b)(2) disclosures regarding fees paid by the mutual fund to the investment adviser or any of its affiliates. Or, if the mutual fund is a designated investment alternative made available through a Platform Provider, the Platform Provider will be responsible for delivering the required disclosures with respect to the mutual fund. As was discussed above, the disclosure obligation may be satisfied through disclosures otherwise provided to the Responsible Plan Fiduciary, such as in the mutual fund prospectus or the disclosures provided for compliance with PTE 77-4.

NEW DISCLOSURE REQUIREMENTS NOT NECESSARY FOR SERVICE PROVIDERS OTHER THAN COVERED SERVICE PROVIDERS

The new disclosure requirements under the Final Rule do not have to be satisfied for service contracts between a plan and a service provider that is not a Covered Service Provider. Such contracts, however, that were entered into in reliance on Section 408(b)(2) would need to continue to comply with the other requirements of the exemption.

No Preemption of State Law

The Final Rule clarifies that it is not intended to supersede any provision of state law that governs disclosures by parties that provide Covered Services except to the extent that the state law would prevent the application of a requirement of the Final Rule. ♦

If you have any questions regarding the Final Rule or any other matter raised in this Legal Update, please contact your regular Mayer Brown lawyer or any of the following lawyers.

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Endnotes

- ¹ The DOL noted in the Final Rule that the focus is on whether \$1,000 is expected to be received as compensation in connection with providing the services, regardless of whether the compensation is expected to be received in a particular year or during the term of the contract. Furthermore, the DOL cautioned parties against structuring contracts for ongoing services specifically to avoid the \$1,000 threshold and indicated that the DOL will look to the substance, rather than the form, of the contract or arrangement in determining compliance with the *de minimus* threshold.
- ² Although some commenters on the Interim Rule requested an explicit definition of the level of detail necessary for a description of services, the DOL refrained from doing so. In the Final Rule, the DOL explained that the Final Rule “requires that the responsible plan fiduciaries receive the basic information needed to make informed decisions about service costs and potential conflicts of interest. If responsible plan fiduciaries need assistance in understanding any information furnished by the service provider, as a matter of prudence, they should request assistance, either from the service provider or elsewhere.”
- ³ In the Final Rule, the DOL clarified that “direct” compensation includes compensation that initially is paid by the plan sponsor if the plan sponsor is reimbursed by the Covered Plan and compensation that is paid directly from participants’ and beneficiaries’ accounts.

- ⁴ The DOL issued a proposed amendment to the regulation on fiduciary investment advice and has announced its plans to re-propose the amendment. Included in the parties treated as ERISA fiduciaries under the proposed amendment are persons who provide investment advice for a fee and persons who represent or acknowledge that they are acting as an ERISA fiduciary with respect to providing such advice. 75 Fed. Reg. 65263 (Oct. 22, 2010).
- ⁵ 29 C.F.R. § 2550.404a-5, published at 75 Fed. Reg. 64910 (Oct. 20, 2010).
- ⁶ Under the participant disclosure regulation, total annual operating expense is the sum of the following (before waivers and reimbursements for the most recently completed fiscal year and expressed as a percentage of the average net asset value for that year): “(A) Management fees as described in the Securities and Exchange Commission Form N-1A that reduce the alternative’s rate of return; (B) Distribution and/or servicing fees as described in the Securities and Exchange Commissions Form N-1A that reduce the alternative’s rate of return; and (C) Any other fees or expenses not included in [(A) or (B) above] that reduce the alternative’s rate of return (e.g., externally negotiated fees, custodial expenses, legal expenses, accounting expenses, transfer agent expenses, recordkeeping fees, administrative fees, separate account expenses, mortality and expense risk fees), excluding brokerage costs described in Item 21 of Securities and Exchange Commission Form N-1A.” 29 C.F.R. § 2550.404a-5, published at 75 Fed. Reg. 64910 (Oct. 20, 2010).
- ⁷ SEC-registered investment advisers must deliver Part II of the SEC Form ADV (which includes disclosures regarding compensation and conflicts) to clients prior to entering into an advisory contract.
- ⁸ 77 Fed Reg. 5632 (Feb. 3, 2012). Though still far-reaching, the new requirements imposed by the Final Rule are significantly narrower than those the DOL had proposed on December 13, 2007. *See* 72 Fed. Reg. 70988 (Dec. 13, 2007).
- ⁹ The DOL declined requests by commenters to measure the \$250 threshold on a calendar- or plan-year basis, rather than over the term of the contract or arrangement.

Appendix A

DOL'S SAMPLE 408(B)(2) DISCLOSURE GUIDE[†]

REQUIRED INFORMATION	LOCATION(S)
Description of the services that ABC will provide to your plan.	Master Service Agreement § 2.4, p. 1
A statement concerning the services that ABC will provide as [an ERISA fiduciary] [a registered investment adviser].	Master Service Agreement § 2.6, p. 2
Compensation ABC will receive from your plan (“direct” compensation).	Master Service Agreement § 3.2, p. 4
Compensation ABC will receive from other parties that are not related to abc (“indirect” compensation).	Master Service Agreement § 3.3, p.4 Stable Value Offering Agmt § 3.1, p. 4
Compensation that will be paid among ABC and related parties.	Master Service Agreement § 3.5, p. 6
Compensation ABC will receive if you terminate this service agreement.	Master Service Agreement § 9.2, p. 11
The cost to your plan of recordkeeping services.	Master Service Agreement § 3.4, p. 5
Fees and expenses relating to your plan’s investment option. *total annual operating expenses	<p>(1) Capital and Income Fund Trans. Fees: InvestCo Prospectus, Fund Summary, p. 2 TAOE: *InvestCo Prospectus, Fund Summary, p. 2</p> <p>(2) International Stock Fund Trans. Fees: www.weblink/ABCProspInv2/trans.com TAOE: www.weblink/ABCProspInv2/taoe.com</p> <p>(3) Small Cap Fund Trans. Fees: www.ABCweblink/ProspInv3/trans.com TAOE: www.weblink/ABCProspInv3/taoe.com</p> <p>(4) Bond Market Index Fund Trans. Fees: www.weblink/ABCProspInv4/trans.com TAOE: www.weblink/ABCProspInv4/taoe.com</p> <p>(5) Stable Value Fund Trans. Fees: Stable Value Offering Agmt, § 2.4, p.3 TAOE: Stable Value Offering Agmt, § 2.3, p.3</p> <p>(6) Money Market Fund Trans. Fees: www.weblink/ABCProspInv6/trans.com TAOE: www.weblink/ABCProspInv6/taoe.com</p>

[†] Published as exhibit to DOL’s Final Rule on 408(b)(2), *see* 77 Fed. Reg. 5633, 5659 (Feb. 3, 2012).

Appendix B

DOL'S SAMPLE NOTICE – DELINQUENT SERVICE PROVIDER DISCLOSURE*

[Date of Notice]

Delinquent Service Provider Disclosure Coordinator,
Office of Enforcement
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W., Suite 600
Washington, DC 20210

Re: [Plan Name]
[Sponsor EIN/Plan number]
[Plan sponsor's name; address]

Delinquent Service Provider Disclosure Coordinator:

The employee benefit plan referred to above has entered into a contract or arrangement for the provision of services with the following service provider:

[Name of covered service provider]
[Address of covered service provider]
[EIN of covered service provider, if known]
[Contact person for covered service provider]
[Telephone Number of contact person]

This matter relates to the following services provided to the plan by the service provider:

[Brief description of services provided to plan by covered service provider]

I am the responsible plan fiduciary to whom disclosures must be made pursuant to 29 CFR § 2550.408b-2(c)(1). I have determined that the plan has not received the following information from the service provider as of [INSERT DATE]:

[Brief description of information the covered service provider failed or refused to disclose or furnish]

I requested in writing such missing information from the service provider on [INSERT DATE]. As of the date of this letter, the service provider has not submitted the information pursuant to my request.

I acknowledge that I have 30 days following the earlier of the covered service provider's refusal to furnish the requested information or the date which is 90 days after the date of my written request to the service provider to file this notice with the Department in order to fulfill the requirements of paragraph (c)(1)(v) under the Department's regulations at 29 CFR § 2550.408b-2(c)(1).

The covered service provider [chose one]: continues to provide services under the contract or arrangement or was terminated.

* Available on the DOL's web site at: <http://www.dol.gov/ebsa/DelinquentServiceProviderDisclosureNotice.doc>.

Finally, we have the following additional comments/information relating to this matter:
[Comments/information]

I declare that I have examined this notice and to the best of my knowledge and belief, it is true, correct and complete.

[Signature]

[Title of person signing on behalf of subject plan i.e., “responsible plan fiduciary”]

[Address, e-mail address, and telephone number]

[Plan sponsor’s name, address and telephone number]

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