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Brief Delay of the New Fee Disclosure Rules—What Plan Sponsors Need to Know and Do Now

Earlier this month, the Department of Labor (DOL) announced a brief delay of the effective dates for its new service provider and participant fee disclosure rules. Specifically, the service provider fee disclosure rules will become effective as of April 1, 2012, and the participant fee disclosure rules will become effective as of May 31, 2012 for calendar year plans (later for certain non-calendar year plans).

Over the past few years, the DOL expended significant resources in developing new regulations on fee disclosure requirements for retirement plans. Plan sponsors are in the unique position of both receiving certain disclosures (under the service provider fee disclosure rules) and being responsible for providing other disclosures (under the participant fee disclosure rules).

Listed below are some important steps plan sponsors can take now to prepare for the implementation of these new rules.

Step 1: Anticipate Disclosures From Covered Service Providers

- While service providers are primarily responsible for complying with their fee disclosure obligations, plan sponsors bear significant responsibility as well. Specifically, if a covered service provider does not provide the required disclosures in a timely manner, the plan sponsor must request the information from the service provider. If a service provider fails to comply with such a request, the plan sponsor must report the service provider to the Department of Labor.
- Under the new rules, certain plan service providers (including, among others, trustees, investment advisors, recordkeepers, and consultants and professionals who receive indirect compensation) will be required to provide plan sponsors with an initial disclosure with detailed information regarding: (1) the services to be provided to the plan, (2) the fiduciary status of the service provider in relation to the plan (e.g., fiduciary or non-fiduciary), and (3) a description of all direct and indirect compensation the service provider and related parties expect to receive based on their relationship with the plan.
- Upon request, covered service providers must provide plan sponsors with any fee-related information needed to enable plan sponsors to comply with ERISA's reporting and disclosure requirements, including the participant fee disclosure rules described below.
- In anticipation of the April 1, 2012 applicability date for these requirements, plan sponsors should: (1) determine which of their service providers are covered by the fee disclosure rules, (2) confirm with those service providers that they are preparing the required disclosures, and (3) consider adding provisions to their contracts with such service providers requiring the service providers to comply with these rules.

Step 2: Prepare Participant Fee Disclosures for 401(k), 403(b) and Other Participant-Directed Plans

- Plan sponsors must provide a set of initial disclosures to plan participants no later than May 31, 2012 for calendar year plans (later for certain non-calendar year plans). These disclosures contain information about the plan that is not customized for each participant, and must be provided annually. Thereafter, customized quarterly statements will need to be provided to plan participants describing the actual dollar amount of certain fees and expenses charged to each participant's account.
- The non-customized participant fee disclosures include a wide variety of information about the plan—including general operational rules, administrative expenses and investment-related information. Among other things, the investment-related information must include detailed performance and fee information about the available investment vehicles in chart form and refer participants to websites providing detailed information about each investment vehicle.
- Separate proposed regulations would require the disclosures to include detailed information regarding any available target date funds.
- For the customized individual participant disclosures, plan sponsors need to review their internal and external recordkeeping systems to ensure they will be able to accurately report the actual amount of fees and expenses charged to each participant's account. For the non-customized participant disclosures, plan sponsors will need to synthesize the information received from service providers to prepare the disclosures.

Step 3: Decide How Participant Fee Disclosures Will Be Made

- Disclosures must be made annually to all eligible employees and to all beneficiaries. In addition, updated disclosures must generally be provided at least 30 days, but no more than 90 days, in advance of any changes to the underlying information.
- The DOL specifically contemplates that the annual disclosures may be included in a summary plan description (SPD). However, the need to make the disclosures annually, and to update them in advance of changes, may make use of the SPD impractical.
- Quarterly account statements present a natural venue for the customized disclosures of the amounts charged to participant accounts on a quarterly basis.
- Notably, the DOL has indicated that revised rules relating to electronic distribution of required disclosures under ERISA are forthcoming. Pending the issuance of such guidance, however, plan sponsors contemplating electronic disclosure will need to determine whether it is feasible to comply with the existing, and somewhat onerous, safe-harbor rules for electronic disclosures.

The attorneys in Venable's [Employee Benefits and Executive Compensation Group](#) are available to help both plan sponsors and service providers in preparing for the implementation of these substantial new requirements.

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