

THE NEWSLETTER OF THE BDO EMPLOYEE BENEFIT PLAN AUDIT PRACTICE

# EBP COMMENTATOR

SPECIAL EDITION

## FINAL FEE DISCLOSURE REGULATION ISSUED

IN THE FALL 2011 EDITION OF THE *EBP COMMENTATOR*, WE HELPED NAVIGATE YOU THROUGH THE NEW AND UPCOMING FEE DISCLOSURES.

**W**ith the final regulations under ERISA §408(b)(2) disclosure rules just released by the Department of Labor (DOL), we wanted to alert you to the key features of the final regulations (as well as changes from the earlier, interim final version). Additionally, we're going to recap the upcoming 404(a)(5) participant disclosures and how those disclosures have been impacted by this final regulation. Lastly, we'll discuss how all of this impacts your fiduciary responsibility and offer some practical suggestions you can begin to implement right away!

### ► 408(b)(2) FINAL REGULATION – REALLY IT'S FINAL

Released on Feb. 2, 2012, the DOL final regulation under 408(b)(2) is intended to help plan sponsors/fiduciaries understand the administrative and investment costs being paid from their plan's assets. Under the regulation, a covered service provider is required to provide the plan fiduciary with the necessary information to allow the fiduciary to assess the reasonableness of the indirect and direct compensation that the service provider, its affiliates and/or subcontractors receive related to the plan; identify potential conflicts of interest; and satisfy reporting and disclosure requirements under Title I of ERISA.

The effective date for the 408(b)(2) regulation is now July 1, 2012 (rather than the previously extended effective date of April 1, 2012). As a result, it also delays the effective date of

the related participant fee disclosures (see discussion below).

The regulation applies to plans covered by ERISA (defined benefit and defined contribution plans), but does *not* apply to the following types of plans:

- Welfare benefit plans (but expect upcoming separate disclosure requirements from the DOL for this type of plan)
- Simplified Employee Pension (SEPs) plans
- Savings Incentive Match Plan for Employees (SIMPLE) retirement plans
- Individual Retirement Accounts/Annuities (IRAs)
- Excluded 403(b) annuity contracts and custodial accounts under the DOL's Field Assistance Bulletins 2009-02 and 2010-01 (see additional discussion below)

It applies to covered service providers who expect to receive at least \$1,000 in compensation for services to the plan. The regulation defines "covered service providers" as:

- ERISA fiduciary service providers
  - Registered investment advisers
  - Recordkeepers or brokers ("platform providers")
  - Those who receive indirect compensation for their services (including: actuarial, accounting, auditing, consulting, custodial, insurance, investment advisory, legal, recordkeeping, third-party administration, securities brokerage or valuation services)
- Note that BDO, as plan auditor, would generally not be considered a covered service provider to the plan since fees are usually paid*



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### Helpful Websites:

<http://www.dol.gov/ebsa/>

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## FINAL FEE DISCLOSURE REGULATION ISSUED

Final 408(b)(2) Regulation  
Released (Feb. 2, 2012)

408(b)(2) Disclosures  
(Effective July 1, 2012)

404(a)(5) Initial Annual Disclosures  
(Effective Aug. 30, 2012)

404(a)(5) Quarterly Disclosures  
(Effective Nov. 14, 2012)

as a direct expense by either the plan sponsor or the plan.

Some notable changes from the interim final rule (published in July 2010) reflected in the final rule are:

- Excludes disclosure of 403(b) annuities and custodial accounts that already qualify for exclusion from the annual audit and Form 5500 reporting requirements (under Field Assistance Bulletins 2009-02 and 2010-01) are also excluded from the disclosure requirements, due to the difficulty in obtaining information about these accounts
- Expanded disclosure of indirect compensation received by a covered service provider to include a description of the arrangement
- Disclosure of changes to investment-related information (must be updated annually)
- Creates uniformity between the 408(b)(2) investment-related disclosures for the plans' investment alternatives and the 404(a)(5) participant-level disclosure requirements

The final regulation may be found at <http://www.dol.gov/ebsa/pdf/2012-02262-PI1.pdf>.

### ▶ THERE'S MORE TO COME – PARTICIPANT DISCLOSURES

As you're reviewing the disclosure information from your service providers under the 408(b)(2) regulations, don't forget that the plan sponsor/fiduciary is required to provide disclosure of this information (and more) to plan participants! These 404(a)(5) disclosures

to the participants require the plan sponsor/fiduciary to disclose fees and expenses paid from the plan's assets, as well as information quarterly regarding the fees and expenses actually deducted from the participant's account during the quarter.

The delayed compliance date for the 408(b)(2) disclosures has in turn delayed the effective dates for the participant-related disclosures. The initial annual disclosure of plan-level and investment-level fees and expenses must be provided to participants no later than Aug. 30, 2012 (60 days after the effective date of the 408(b)(2) regulation). The first quarterly statement must be provided to participants no later than Nov. 14, 2012 (45 days after the end of the third quarter, during which quarter the initial disclosures were first required). This first quarterly statement only needs to reflect the fees and expenses deducted from the participant's account during the third quarter (July 2012– Sept. 2012 period) to which the statement relates.

The DOL's Technical Release 2011-03, which can be found at <http://www.dol.gov/EBSA/pdf/tr11-03.pdf>, provides an interim policy that allows plan administrators to furnish the information required under the final participant disclosure rule *electronically* to participants (and permits the use of continuous access websites, if certain conditions and safeguards are met). This might be an efficient (and cost-saving way) for your plan to provide the required information to participants.

### ▶ REMEMBER YOUR FIDUCIARY RESPONSIBILITIES

As the fiduciary, you're *required* to know what fees the plan pays so that you only allow reasonable fees to be paid from plan assets. You must also adhere to a very high standard of care, skill, prudence and due diligence in performing your responsibilities (and this includes the fees that you allow the plan to pay).

- As the DOL has noted, even a small increase in plan fees paid from plan assets can, over time, significantly eat away at the ultimate account balance. When assessing whether the fees are "reasonable," consider that you're ultimately answering to the DOL and the participants.
- Of course, an important consideration is the adage "you get what you pay for." You may find that the best and most prudent course of action is to select service providers who are not the least expensive in the market, but who provide the best value and service to the plan and the participants.
- One of the best ways to demonstrate that you're a prudent fiduciary is to *document, document, document!* Having meeting minutes, copies of documents analyzed and other documentation can demonstrate how you've complied with these regulations and carried out your fiduciary duties.
- Start early! Hopefully, you've already been talking with your service providers, keeping detailed notes and minutes of plan management's meetings and process, and familiarizing yourself with the disclosure requirements.

#### BDO EBP PRACTICE

BDO is nationally recognized in the field of employee benefit plan consulting and auditing. We audit nearly 1,000 plans nationwide, ranging from 100 participants to close to 300,000 participants. Our engagements are staffed with accountants experienced with all types of audits including defined contribution (401(k), profit sharing, ESOP, and 403(b) plans), defined benefit (pension, cash balance), multi-employer and health and welfare plans. We have extensive ERISA knowledge of audit and filing requirements, including full-scope, limited-scope, Form 11-K filings and Master trusts.

In addition, BDO has a National Employee Benefit Plan Audit Group that meets regularly to develop training and guidance and discuss updates in the industry and auditing practices. Our professionals are regular presenters at local, state and national seminars. BDO's professionals continue to be extensively involved as Chair of the American Institute of Certified Public Accountants (AICPA) National Conferences on Employee Benefit Plans. Many of our professionals serve in leadership roles in the accounting profession as senior advisors and are active members of several governing boards and CPA societies. For example, our professionals currently serve on various AICPA committees, such as the AICPA Employee Benefit Plan Audit Quality Center Executive Committee and the AICPA's Joint 403(b) Plan Audit Task Force (we are proud to have representation at the Chair level for these committees). BDO's EBP professionals have also served on the Employee Benefit Plan Expert Panel in the past.

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