



CLIENT BULLETIN

Responsibility of Pension Plan Fiduciaries to Report to DOL the Failure of Covered Service Providers to Make the Required Compensation Disclosures

In [Client Bulletin 2012-07](#), we discussed the new [regulation](#) that specifies no contract or arrangement for services between a covered pension plan and a covered service provider is "reasonable" within the meaning of *ERISA* Section 408(b)(2) unless the covered service provider makes certain disclosures about its compensation (direct and indirect) for services related to the plan.

This regulation is sometimes referred to as the "408(b)(2) disclosure" regulation or the "service provider compensation disclosure" regulation and is due from service providers to plans by July 1, 2012. Contracts or arrangements that are not "reasonable" give rise to a "prohibited transaction" between the pension plan fiduciary and the covered service provider. This *Client Bulletin* takes a look at what steps a pension plan fiduciary must take to avoid a prohibited transaction liability if a covered service provider fails to make the required disclosures. The regulation is available by "[clicking here](#)."

The regulations provide a "get out of jail free" card for plan fiduciaries to avoid engaging in a prohibited transaction when a covered service provider fails to disclose required information. This section of the regulations is found at Section 2550.408b-2(c)(1)(ix), available by "[clicking here](#)."

This section provides a class exemption that exempts a responsible plan fiduciary from the restrictions of *ERISA* Section 406(a)(1)(C) and (D) if, among other things, the fiduciary did not know that the covered service provider failed to make required disclosures and "reasonably believed" that such disclosures were made. There are strings attached – the plan fiduciary must take certain steps to be eligible for the exemption upon discovery of a disclosure failure by a covered service provider within designated timeframes.

These steps include:

- (1) requesting in writing that the covered service provider furnish such information;
- (2) notifying the DOL of any disclosure failures by a covered service provider that are not corrected within 90 days of the written request by the plan fiduciary; and
- (3) determining whether to terminate or continue the contract or arrangement with the covered service provider in light of the disclosure failure.

The DOL noted that fiduciaries seeking the relief provided by the exemption have the burden of demonstrating compliance with the conditions of the exemption. For example, according to the *Preamble*, responsible plan fiduciaries should be entitled to relief provided by the class exemption only if they have a *reasonable belief* that the disclosures required to be provided to the covered plan are complete.

To this end, responsible plan fiduciaries should appropriately review the disclosures made by covered service providers. According to the DOL, fiduciaries should be able to, at a minimum, *compare the disclosures* they receive from a covered service provider *to the requirements of the regulation* and form a *reasonable belief* that the required disclosures have been made.

If a covered service provider does not respond to the plan fiduciaries request for a complete disclosure, the plan fiduciary must send the DOL a Delinquent Service Provider Notice (*Notice*) about this disclosure failure.

This *Notice* must contain the following information:

- (1) The name of the covered plan;
- (2) The plan number used for the covered plan's Annual Report;
- (3) The plan sponsor's name, address, and EIN;
- (4) The name, address, and telephone number of the responsible plan fiduciary;
- (5) The name, address, phone number, and, if known, EIN of the covered service provider;
- (6) A description of the services provided to the covered plan;
- (7) A description of the information that the covered service provider failed to disclose;
- (8) The date on which such information was requested in writing from the covered service provider; and
- (9) A statement as to whether the covered service provider continues to provide services to the plan.

The *Notice* must be filed with the DOL *not later than 30 days after the earlier of:*

- (1) The covered service provider's refusal to furnish the information requested by the plan fiduciary; or
- (2) 90 days after the written request is made;

The *Notice* should be sent to the:

U.S. Department of Labor
 Employee Benefits Security Administration
 Office of Enforcement
 200 Constitution Ave., NW., Suite 600
 Washington, DC 20210

or

may be sent electronically to OEDelinquentSPnotice@dol.gov.

The DOL has developed a sample *Notice* to help with compliance with the DOL notification requirement. The sample *Notice* is available on the DOL website at: <http://www.dol.gov/ebsa/DelinquentServiceProviderDisclosureNotice.doc>.

According to the regulation's *Preamble*, filing the *Notice* with the DOL **does not** relieve a plan administrator of the obligation to report a prohibited transaction in accordance with the instructions to the Form 5500, without regard to whether the covered service provider furnishes information in response to the fiduciary's written request. Therefore, a note should be made to include any disclosure failures on the 5500.

The next step a plan fiduciary must take after sending the DOL the *Notice* of non-disclosure is to determine the extent to which the contract or arrangement with the covered service provider can be continued consistent with the fiduciary's "duty of prudence" under *ERISA* Section 404 (*i.e.* is it prudent to continue to contract with a covered service provider that has a disclosure failure?).

The regulation assumes that plan fiduciaries will take into account various factors in making this determination, such as the nature of the failure and the availability and costs of a replacement service provider.

NOTE: Although this section of the regulation is intended to give the responsible plan fiduciary some flexibility in securing replacement services, the *Preamble* to the regulation section notes this flexibility is not intended to permit fiduciaries to continue contracts or arrangements *indefinitely* when there has been an unresolved disclosure failure.

The regulation also requires that if the requested information relates to "future services" (*i.e.*, services that will be performed after the end of the 90-day period after the plan fiduciary makes written request to the covered service provider) and is not disclosed promptly after the end of such 90-day period, then the responsible plan fiduciary **shall** terminate the contract or arrangement as expeditiously as possible, consistent with the duty of prudence.

Pension plan fiduciaries should establish procedures to have the service provider disclosures monitored and compared to the requirements of this regulation; track any disclosures that need follow-up written requests for complete information; monitor compliance with any required *Notice* to the DOL and follow through with analysis and/or termination of any contract with a non-compliant service provider.

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