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Are You Ready to Comply with the DOL's New Disclosure Regime?

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At the time this article is published, covered service providers will have about seven months to assure they are in compliance with the Department of Labor's (DOL) Interim Final Rule on a Reasonable Contract or Arrangement under Section 408(b)(2)-Fee Disclosure (the IFR).[1] The disclosure requirements are more extensive than those under current regulations and will require evaluation of current disclosure procedures. If the IFR's requirements are not met, potentially significant excise taxes may be assessed.

Effective July 16, 2011, many asset managers, investment advisers, and other service providers to retirement plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) and investment managers of and advisers to investment contracts, funds, or products that consist of "plan assets" for purposes of ERISA will be required to disclose specific information regarding the services to be provided and the compensation they expect to receive. In the event the disclosure requirements are not met, the payment of any compensation from the plan's assets will result in a prohibited transaction (PT) pursuant to ERISA and the Internal Revenue Code of 1986, as amended (the Code). In the alternative, a responsible plan fiduciary can report a covered service provider who fails to disclose the required information to the DOL in order to avoid any excise taxes resulting from the PT effectively assuring that the sole responsibility for the tax lies with the covered service provider.

This article will assist asset managers, investment advisers, brokers and recordkeepers that

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provide a platform or menu of investments to participant-directed individual account plans, and other service providers in:

(i) Determining if they are a covered service provider with regard to an employee benefit plan;
(ii) Identifying what should be disclosed;
(iii) Considering some methods for meeting the requirements of the IFR; and
(iv) Providing an overview of potential enforcement issues in the event of non-compliance.

Law Prior to the Interim Final Rule

The IFR can be better understood when viewed in the context of the law applicable prior to July 16, 2011 and the DOL's reason for promulgating the IFR. ERISA provides that the payment of compensation from plan assets to a "party in interest" is a prohibited transaction. A "party in interest," among other things, is a service provider to the plan and a fiduciary with respect to the plan. However, section 408(b)(2) of ERISA provides for an exemption in the event that the compensation is (i) reasonable in amount, (ii) paid pursuant to a reasonable arrangement, and (iii) for services that are necessary to the establishment and operation of the plan.[2]

Prior to the IFR, the regulations promulgated under section 408(b)(2) simply amplified the language under the statute and gave no guidance on exactly what information should be reported to responsible plan fiduciaries so that they could verify 408(b)(2) compliance. However, in those regulations, the DOL specifically stated that the statutory exemption in section 408(b)(2) did not apply to the self-dealing PTs found in section 406(b) of ERISA. As such, a fiduciary party in interest could not use its discretion or authority in a manner that allowed the fiduciary to increase its own compensation.[3]

In recent years, the DOL became concerned that responsible plan fiduciaries did not understand how service providers were paid for services or were under the impression services were free of charge. This was largely due to changes in the way services were delivered and changes in the way the service providers were compensated. The DOL believed that the plan sponsors could not meet the requirements of section 408(b)(2) or their general fiduciary obligations under section 404(a)(1) of ERISA if they did not understand compensation arrangements including the revenue sharing aspects of such arrangements.[4] Furthermore, the DOL believed plan fiduciaries needed more information in order to "assess…the conflicts of interest that may affect a service provider's performance of services."[5]

After issuing proposed regulations in 2007,[6] conducting public hearings, and reviewing hundreds of comment letters, the IFR was issued with the intent that plan sponsors and fiduciaries better understand (i) how service providers were paid, (ii) how much they were paid, and (iii) for what they were paid. As such, much more information is now required to be disclosed. Note, however, the IFR does not change the DOL's prior position that a fiduciary that uses its discretion or control to increase the compensation paid to it or an affiliate cannot rely on the exemption under 408(b)(2).

Are you a Covered Service Provider?

The disclosure obligations in the IFR apply when a "covered service provider" provides certain services to a "covered plan" pursuant to a contract or arrangement.[7] A "covered plan" is an "employee benefit plan" as defined under section 3(2)(A) of ERISA, which is a "employee pension benefit plan" or a "pension plan."[8] However, the IFR specifically excludes individual retirement accounts and annuities, simplified employee pensions, or simple retirement accounts.[9] Therefore, the IFR, in essence, applies to tax-qualified defined contribution plans (for example, profit sharing, 401(k), and the like) and defined benefit plans (for example, pension, cash balance, and the like) sponsored by private sector employers.

A "covered service provider" is a "service provider" that enters into a contract or agreement with the plan or a plan representative to provide services to the plan and reasonably expects to receive $1,000 or more of direct or indirect compensation.[10] A "service provider" includes an individual or entity within the

following categories, regardless of whether the services will be directly provided by the service provider or indirectly through its affiliate or its subcontractor:

1. *Direct Fiduciary Services Provider*: This category includes an individual or entity that provides fiduciary services directly to the plan. In most cases, this will be an asset manager that has the discretion and control to independently manage plan assets.[11]
2. *Indirect Fiduciary Services Provider*: This category includes an individual or entity that provides fiduciary services to an investment contract, product or entity that holds "plan assets" under the DOL's plan asset regulation, 29 C.F.R. § 2510.3-101 (ERISA Plan Assets), and in which the plan owns a direct equity investment.[12] As such, this category will normally include investment advisers and managers of collective trusts established under Revenue Ruling 81-100 and hedge funds, private equity funds, and other alternative entities that are deemed to hold ERISA Plan Assets. However, due to the "direct equity interest" requirement, an adviser or manager of a fund that is part of a "fund of funds" is not a service provider to the plan merely by reason of the plan's investment in the "fund of funds."
3. *Investment Advisory Services*: This category includes an individual or entity that provides services directly to the plan as an investment adviser registered under the Investment Advisers Act of 1940 (Advisers Act) or any state law.[13] As such, this definition includes a provider of advisory services whether or not such services constitute "investment advice" as defined under ERISA or whether or not the service provider is otherwise acting as a fiduciary for purposes of ERISA.
4. *Recordkeeping and Brokerage Services Provider*: This category includes an individual or entity that provides recordkeeping or brokerage services to a defined contribution plan that allows participants to exercise investment discretion with regard to amounts held in his or her individual account, which is often called a participant-directed account plan. Furthermore, in connection with providing such services, the recordkeeper or broker makes one or more investment alternatives available to the participants, such as through an investment platform.[14]
5. *Providers of Other Services Receiving Indirect Compensation*: This category includes an individual or entity that provides certain services enumerated in the IFR and expects to receive indirect compensation. Those services include, but are not limited to, appraisal, banking, investment consulting (relating to the development of investment policies or the selection and monitoring of plan investments), recordkeeping, securities or other investment brokerage, third party administration, and valuation.[15] "Indirect compensation" is explained below.

As noted above, within each of the categories, an individual or entity may be a covered service provider (CSP) even if the actual services are rendered by its affiliate or its subcontractor. By including in the definition of service provider the provider's affiliates and subcontractors, the IFR intends to capture a large number of service providers as CSPs. However, the IFR provides some relief by narrowing the definition of CSP. First, if services listed in numbers one through five above are performed by a person or entity that is an affiliate or subcontractor of the CSP and provides services under the contract or arrangement with the plan, the affiliate or subcontractor is not a CSP.[16] For example, if a broker offers an investment fund platform and it subcontracts out recordkeeping responsibilities to a third party provider, the subcontractor is not a CSP and, as such, only the broker (not the third party provider) has the reporting responsibility under the IFR. Second, a service provider to an investment contract, product, or entity is not a covered service provider except to the extent that such services are provided as an ERISA fiduciary to an investment contract, product, or entity that holds ERISA Plan Assets.[17] Therefore, for example, an investment adviser to an ERISA plan asset hedge fund that is deemed to hold ERISA plan assets would be a CSP; however, the fund's prime broker would not be a CSP. Thus, the

IFR reporting obligations must be met by the adviser (not the prime broker).

Note that identification of the CSP only establishes what party will be responsible for disclosing certain information to responsible plan fiduciaries. Therefore, just because a service provider is not a CSP does not mean that compensation paid to or by that provider need not be reported. For example, in the event that a broker subcontracts out recordkeeping services to a third party that is not a CSP, the compensation paid to the recordkeeper typically must be disclosed to the responsible plan fiduciary. However, the broker as the CSP has the reporting obligation to disclose rather than the third party provider. In addition, a "subcontractor" is defined under the IFR as a third party independent of the CSP who enters into a contract *with the CSP* to perform the services in numbers one through five above and who reasonably expects to receive $1,000 or more in compensation.[18] As such, in the case of an arrangement in which an asset manager provides fiduciary investment management services to a plan and the responsible plan fiduciary independently selects a broker to transact shares on behalf of the plan at the direction of the asset manager, the broker, because it is not engaged by the asset manager to perform brokerage services, is likely a CSP if it receives indirect compensation or is otherwise a CSP.

As a Covered Service Provider, What are you Required to Disclose?

Once a manager, adviser, recordkeeper, broker, or other party determines it is a "covered service provider" with respect to a plan, the CSP should determine what it must disclose to the responsible plan fiduciary, which is the party authorized to enter into the contract or agreement on behalf of the plan (for example, sponsoring employer, or investment committee). That information can be summarized under five separate categories, which are provided in more detail below:

(i) Services;
(ii) Direct compensation and indirect compensation;
(iii) Investment disclosure by fiduciary service providers;
(iv) Investment disclosure by brokers and recordkeepers offering investment platforms; and
(v) Other information.

Services

The CSP must provide to the responsible plan fiduciary a description of the services to be provided pursuant to the contract or agreement.[19] While most contracts and agreements include such information, more descriptive language may be required because, as discussed below, the types or sources of compensation used to pay for the services provided under the contract or agreement must be disclosed. As such, services may need to be expressed in groups or categories or with more specificity so that they can be coordinated with the compensation disclosure.

Direct and Indirect Compensation

The primary focus of the IFR is how compensation is paid to a CSP, its affiliates, and its subcontractors and how much compensation is paid to the CSP, its affiliates, and its subcontractors. In order to accomplish this, the IFR establishes two definitions of compensation, direct compensation and indirect compensation, which must be reported by the CSP to the responsible plan fiduciary.

"Direct compensation" is compensation expected to be received by the CSP (or an affiliate or subcontractor of the CSP) directly from the plan in exchange for the provision of the services that will be provided pursuant to the contract or agreement.[20] For example, asset management fees deducted directly from a plan account in exchange for the discretionary management of plan assets is direct compensation. In addition, transaction fees for plan distributions and loans deducted from a participant's account are direct compensation.

"Indirect compensation," on the other hand, is compensation expected to be received by the CSP (or its affiliate or subcontractor) from any source other than the plan, the CSP, an affiliate of the CSP, or certain subcontractors of the CSP in exchange for the provision of the services that will be provided pursuant to the contract or agreement.[21] If the exact

amount of compensation to be paid cannot be determined, which is often the case, the CSP may present the anticipated amount of compensation to be paid to the responsible plan fiduciary using a formula or some other reasonable method as long as such fiduciary is able to determine how much compensation may be paid under the contract or agreement and whether such compensation is reasonable.[22] "Indirect compensation" covers a broad array of payments such as 12b-1 fees, shareholder servicing fees, and sub-transfer agent fees that are paid by investment funds, but then directed (usually by the responsible plan fiduciary) to the CSP, its affiliates, or its subcontractors. In addition, payments made by a fund's adviser, distributor, or other party in connection with the fund investment (for example, marketing support payments) are likely indirect compensation if paid to a CSP (or its affiliate or subcontractor). "Soft dollars" paid by brokers to advisers are also an example of indirect compensation.

Identification of direct and indirect compensation is important because the CSP must disclose to the responsible plan fiduciary both types of compensation and for what services each type of compensation is being paid.[23] Direct compensation can be reported in the aggregate or by service (as determined by the CSP). However, with respect to indirect compensation, the CSP must specify the services for which the indirect compensation will be received and identify the payer of the indirect compensation.[24]

In addition, the CSP must disclose how that compensation will be shared among the CSP, its affiliates, or its subcontractors if (i) the compensation is in connection with the provision of the services to be provided under the contract or agreement, and (ii) the compensation is paid on a transaction basis (for example, commissions, soft dollars, or finder's fees) or the compensation is paid from the plan's investment and reflected in its net value (for example, 12b-1 fees). More specifically, the CSP must disclose:

(i) The services for which such compensation will be paid;
(ii) The payers and recipients of such compensation; and
(iii) The status of the payers or recipients as affiliates or subcontractors (if applicable).[25]

The IFR also requires the specific disclosure of compensation paid for recordkeeping services, even if the CSP, its affiliate, or its subcontractor does not specifically track the portion of the compensation attributable to such services. As such, CSPs need to determine how much of the compensation paid under an agreement is attributable to the recordkeeping services. Otherwise, the CSP must make a "reasonable and good faith estimate" of the cost of providing such services and disclose the methodology and assumptions used in reaching the estimate. The IFR provides that CSPs should look to "prevailing market rates charged, for similar recordkeeping services for a similar plan with a similar number of covered participants and beneficiaries."[26]

Based upon the foregoing CSPs must disclose both direct and indirect compensation to responsible plan fiduciaries. Furthermore, in the event of indirect compensation, the CSP must be very specific in describing for what services the compensation is paid, who is receiving the compensation, and who is paying the compensation. The reporting obligations with respect to indirect compensation are heightened with respect to payments of revenue sharing among the CSP, its affiliates, and its subcontractors. Furthermore, CSPs must begin reporting amounts of compensation received for recordkeeping services or come up with a methodology for reasonably estimating what those costs would be.

Investment Disclosure by Fiduciary Service Providers

If the CSP is a fiduciary with respect to a plan investment contract, product, or entity that includes ERISA plan assets (for example, collective trusts, or alternative investment funds that are ERISA funds) and in which the plan has a direct equity investment, the CSP must disclose:

(i) Any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, transfer

of, or withdrawal of the interest (for example, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees);

(ii) Annual operating expenses (for example, expense ratio); and

(iii) Any ongoing expenses other than the annual operating expenses (for example, wrap fees, mortality and expense fees).

However, this information need not be provided if it was already communicated in accordance with the IFR by a CSP providing recordkeeping and brokerage services.[27]

Investment Disclosure by Recordkeeping and Brokerage Service Providers

As noted above, CSPs include recordkeeping service providers and brokerage service providers that make available a platform of investment alternatives to a participant-directed account plan. Such CSPs must, in addition to meeting the other disclosure requirements included in the IFR, disclose to the responsible plan fiduciary the information discussed above regarding (i) transactional fees, (ii) annual operating expenses, and (iii) other ongoing expenses with respect to each investment offering under the platform. However, in the event an investment alternative available under the platform is not issued by an affiliate of the CSP broker or recordkeeper, that information can be provided by making available the issuer's disclosure materials if the materials are regulated by state or federal agency (for example, a mutual fund prospectus).[28]

Other Information Required to Be Disclosed

Although much of the IFR is focused on the types of compensation paid, to whom it is paid, and for what services it is paid, there is other information that must be provided. This additional information includes the following.

Fiduciary or Investment Adviser Status: The CSP must disclose whether such CSP, its affiliate, or its subcontractor will be, as determined under ERISA, providing fiduciary services or reasonably expects it will be providing fiduciary services directly to a plan or indirectly to a plan by reason of providing services to an investment fund, contract, or product that is deemed to be ERISA plan assets. Therefore, CSPs have an affirmative obligation to recognize fiduciary status and must consider carefully whether they are in fact acting as such or may so act. Notably, recent proposed regulations issued by the DOL in 2010, if finalized in their current form will result in many CSPs being a fiduciary under ERISA while they probably are not fiduciaries under current regulatory guidance. Even if the CSP is not an ERISA fiduciary, the CSP must disclose, if applicable, that the CSP, its affiliate, or its subcontractor will provide or reasonably expects to provide services directly to the plan as an investment adviser under the Advisers Act or any state law.[29]

Compensation for Termination of Contract: The CSP must disclose any compensation that the CSP, its affiliate, or its subcontractor will receive in the event that an agreement or contract is terminated. The disclosure also should explain how any prepaid amounts will be calculated and refunded upon termination.[30]

Manner of Receipt of Compensation: The CSP must notify the responsible plan fiduciary how compensation paid to the CSP for services provided under the contract will be received by the CSP. Accordingly, the CSP must state whether the plan will be billed or if the compensation will be deducted directly from participant accounts.

What are the Timing and Delivery Requirements Applicable to CSPs?

While the IFR gives guidance regarding what information needs to be disclosed (discussed above) and when it needs to be disclosed (discussed below), the IFR does not mandate how or in what format such information should be delivered to responsible plan fiduciaries. Both the timing requirements and some thoughts on the delivery of the information are provided below.

Timing Requirements

In the case of agreements and contracts entered into on or after January 16, 2011, the

IFR includes specific timing requirements regarding when initial disclosures must be made. The IFR states that the information must be disclosed as soon as reasonably possible before the date the contract or arrangement becomes effective or the date the contract or agreement is renewed, as applicable. In the event a service provider to an investment fund, contract, or product that is not subject to the IFR because the fund, contract, or product does not hold ERISA plan assets later becomes a CSP because the fund, contract, or product is later deemed to hold ERISA plan assets, the required information must be delivered by the CSP as soon as possible but not later than 30 days after the fund, contract, or vehicle is deemed to hold ERISA plan assets.[31]

The timing issues for pre-existing contracts and agreements are slightly different. As stated above, the effective date of the IFR is July 16, 2011. The DOL states that the IFR applies to all contracts and arrangements with respect to a covered plan, even those already in existence on or before the IFR effective date.[32] As such, CSPs should review their existing contracts and agreements during the next several months to determine if the required information has been delivered to the responsible plan fiduciaries. While the DOL will not require that every existing contract or arrangement be re-drafted or re-negotiated to assure all of the disclosure requirements are met, many CSPs may find they should send a separate communication describing to responsible plan fiduciaries where the required disclosure information can be found in current agreements and supplementing any information that may not already be made available.

In the event of any change to the information required to be disclosed pursuant to the IFR on or after July 16, 2011, whether or not the contract or agreement was entered into before or after that date, such change must be disclosed to a responsible plan fiduciary as soon as possible after the change, but in no event later than 60 days after such change.[33] Furthermore, if a new investment alternative is added to an investment platform offered by a recordkeeper or broker, the required investment information discussed above (that is, transactional fees, annual operating expenses, and ongoing expenses) must be communicated as soon as possible before the investment alternative is added, but in no event later than the date the alternative is added.[34] In light of the requirement that changes be communicated, a CSP should implement procedures whereby it identifies changes to prior disclosed information and then timely communicates such changes to the responsible plan fiduciary.

Disclosure Upon Request

Pursuant to the IFR, a responsible plan fiduciary or plan administrator may request that the CSP provide "any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements of Title I of the Act and the regulations, forms and schedules issued thereunder." The CSP must provide this information no later than 30 days from the receipt of a written request.[35] Notably, the IFR goes beyond compensation information required to meet the requirements of the ERISA section 408(b)(2) exemption because Title I of ERISA also includes the general fiduciary provisions as well as the prohibited transaction provisions. As such, a CSP may be in a position where it is asked to provide information beyond that required in the IFR and, based upon the language in the IFR, must provide it.

Form of Disclosure

The IFR does not specifically provide for how the required disclosure information should be delivered. While the proposed 408(b)(2) regulations required that the disclosure be reflected in the contract or agreement between the CSP and the plan or responsible plan fiduciary and indicated that existing contracts would have to be redrafted to include the disclosures, the DOL specifically noted in the IFR that inclusion in the contract or agreement itself was not necessary. Furthermore, although it specified that the disclosure must be in writing, the DOL did not provide any specific guidance within the IFR on the format in which the required disclosures should be made.[36] However, the DOL stated in the

Preamble to the IFR that it was contemplating adding to its final rule a "summary disclosure" of one or two pages that could be delivered to the responsible plan fiduciary and would provide an overview of the information that should be provided. Furthermore, the summary would provide a "road map" to where the required information could be found. The DOL solicited comments on the idea of a summary and how it should be presented.[37]

While under the IFR there is no mandated form or format for the disclosure, CSPs probably can simply amend their existing "form" agreements by July 16, 2011 to assure that the required disclosure information is communicated and then use those agreements for new clients or in the event of a renewal of a pre-existing agreement. However, in light of the fact that responsible plan fiduciaries will be aware of the IFR and its obligations thereunder, adopting a summary like that described in the Preamble may make good business sense, as well as facilitate compliance. A separate summary disclosure may be more effective in communicating changes to the information as required by the IFR. Brokers and recordkeepers that are required to report expense information for investment alternatives offered under their investment platforms may also find that disclosure in the form of a chart is more user-friendly and easier to update.

Furthermore, as noted above, with respect to agreements existing before July 16, 2011, the information required in the IFR must be disclosed to the responsible plan fiduciaries. As such, in many cases CSPs will need to communicate information that is required to be disclosed in the IFR, but not included in the current contracts or agreements. For example, vague or passing references to sharing of revenue, payments from fund-related parties, and finder's fees will likely not be adequate under the IFR. In addition, references to prospectuses for information regarding fees may not be adequate if the issuer is an affiliate of a broker or recordkeeper providing an investment platform. As such, CSPs need to consider what additional information should be sent to clients and how that will be delivered, such as through a supplement to the existing agreement or a letter to clients.

What Happens if a CSP does not Comply with the IFR?

As noted above, the IFR provides for a statutory exemption, which protects the responsible plan fiduciary (not the CSP), from the excise taxes levied by reason of party in interest PTs when plan assets are used to pay CSPs. In the event of noncompliance with the disclosure obligations of the IFR, the general rule is that a PT occurs and "any" party in interest will owe a 15 percent excise tax of the "amount involved" pursuant to section 4975(a) of the Code (and possibly an additional excise tax of 100 percent of the amount involved under section 4975(b) of the Code if the Internal Revenue Service (IRS) notifies the party in interest). However, if the responsible plan fiduciary meets the exemption requirements outlined in the IFR, the CSP (not the responsible plan fiduciary) will be liable for the excise tax.[38] Although there are differing interpretations of the "amount involved" in this context, arguably the "amount involved" is all of the compensation paid, an amount which can be significant.

In the event that a responsible plan fiduciary does not know the CSP failed to provide the information at the time the contract or agreement became effective or renewed the disclosure information required under the IFR and reasonably believed such information was provided, the responsible plan fiduciary must upon discovering that it was not provided request in writing that the fiduciary provide the information. If the CSP fails to provide the information within 90 days of receipt of the written request, the responsible plan fiduciary must report to the DOL very specific identifying and contact information about the CSP. That written notice must be sent to the DOL no later than 30 days following the earlier of (i) the CSP's refusal to provide the requested information or (ii) 90 days after the CSP has not responded to a written request for the missing information. Upon realizing that certain information is missing, the responsible plan fiduciary must also reevaluate whether remaining in the contract or agreement is appropriate under ERISA.[39]

The exemption provisions are significant from the perspective of CSPs because such provisions impose a significant burden on

the compliance and business activities of the CSPs. If a CSP receives a written request for additional information pursuant to the exemption, the CSP has an obligation to determine if the request is appropriate (that is, information required under the IFR was not delivered) and then respond within a 90 day period. While the consequences of the DOL receiving notification from a responsible plan fiduciary are not specifically discussed in the IFR, it is important to note that the DOL in the past has used its enforcement authority to investigate the operations of service providers that are CSPs as defined under the IFR. A CSP should not be surprised by an investigation by the DOL in the event of the DOL's receipt of multiple notifications regarding noncompliance. At a minimum, a CSP should expect a call from the DOL intended to clarify the circumstances of the noncompliance. Furthermore, in the event of noncompliance, assessment of the aforementioned section 4975 excise taxes by the IRS should also be anticipated. As such, CSPs should put procedures in place to make sure adequate information is disclosed when the contract term begins or renews and when there are changes to the information, in order to minimize non-compliance in the first place, as well as procedures designed to address later requests by responsible plan fiduciaries under the auspices of the exemption.

Summary and Conclusion

The IFR presents a significant compliance burden on CSPs as they will be required by July 16, 2011 to disclose significantly more information to responsible plan fiduciaries that enter into agreements or contracts with the CSP on behalf of ERISA-governed retirement plans. Therefore, asset managers, investment advisers, brokers and recordkeepers that make available investment platforms to participant-self-directed investment accounts and other service providers should determine if they are CSPs under the IFR.

In light of the fact that the exemption offered under IFR will shift the burden of paying any excise taxes arising from failing to meet the disclosure requirements exclusively to the CSP and that the exemption requires responsible plan fiduciaries to report non-compliant CSPs to the DOL, CSPs should consider implementing procedures to assure compliance with the IFR throughout the term of the contract or agreement and upon renewal. In addition, during the next seven months, each CSP should review the "form" or "model" contract that it uses with its clients and other materials governing or explaining the relationship between the CSP and the plan to determine if additional information should be disclosed at the time the contract begins or is renewed and should determine how it will communicate this information, such as through the contract or agreement or through a separate summary document. Furthermore, CSPs should review current contracts and agreements to determine if additional disclosure is necessary by July 16, 2011 and to determine how such information will be provided to the responsible plan fiduciaries.

Notes

1. 75 FR 41600 (July 16, 2010).
2. 29 U.S.C. § 1108(b)(2).
3. 29 C.F.R. 2550.408b-2.
4. 75 FR at 41600.
5. *Id.*
6. *Reasonable Contract or Arrangement under Section 408(b)(2)-Fee Disclosure;* Proposed Rule, 72 FR 70988 (Dec. 13, 2007).
7. 29 C.F.R. § 408b-2(c)(1)(i).
8. 29 C.F.R. § 408b-2(c)(1)(ii).
9. *Id.* Although such plans are not subject to the IFR, they are subject to the PT provisions of section 406 of ERISA, the PT provisions of section 4975 of the Code, or both. As such, compliance with the exemption under section 408(b)(2) of ERISA and the parallel exemption under section 4975(d)(2) of the Code is likely necessary though compliance with the IFR is not required.
10. 29 C.F.R. § 408b-2(c)(1)(iii).
11. 29 C.F.R. § 408b-2(c)(1)(iii)(A)(1).
12. 29 C.F.R. § 408b-2(c)(1)(iii)(A)(2).
13. 29 C.F.R. § 408b-2(c)(1)(iii)(A)(3).
14. 29 C.F.R. § 408b-2(c)(1)(iii)(B).
15. 29 C.F.R. § 408b-2(c)(1)(iii)(C).
16. 29 C.F.R. § 408b-2(c)(1)(iii)(D)(1).
17. 29 C.F.R. § 408b-2(c)(1)(iii)(D)(2).

18. 29 C.F.R. § 408b-2(c)(1)(viii)(F).
19. 29 C.F.R. § 2550.408b-2(c)(1)(iv)(A).
20. 29 C.F.R. § 408b-2(1)(i)(iv)(C)(1).
21. 29 C.F.R. § 408b-2(1)(i)(iv)(C)(2).
22. 29 C.F.R. 2550,408b-2(c)(1)(viii)(B)(3).
23. 29 C.F.R. 2550.408b-2(c)(1)(iv)(C)(2).
24. 29 C.F.R. 2550.408b-2(c)(1)(iv)(C)(1) and (2).
25. 29 C.F.R. 2550.408b-2(c)(1)(iv)(C)(3).
26. 29 C.F.R. § 2550.408b-2(c)(1)(iv)(D).
27. 29 C.F.R. § 2550.408b-2(c)(1)(iv)(F).
28. 29 C.F.R. § 2550.408b-2(c)(1)(iv)(G).
29. 29 C.F.R. § 2550.408b-2(c)(1)(iv)(B).
30. 29 C.F.R. § 2550.408b-2(c)(1)(iv)(C)(4).
31. 29 C.F.R. § 2550.408b-2(c)(1)(v)(A)(1).
32. 75 FR at 41617.
33. 29 C.F.R. § 2550.408b-2(c)(1)(iv)(B).
34. 29 C.F.R. § 2550.408b-2(c)(1)(v)(A)(2).
35. 29 C.F.R. § 2550.408b-2(c)(1)(vi)(A).
36. 75 FR at 41601.
37. 75 FR at 41607.
38. 29 C.F.R. § 2550.408b-2(c)(1)(ix).
39. 29 C.F.R. § 2550.408b-2(c)(1)(ix)(A)—(G).

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