

MEMO# 25330

July 14, 2011

DOL Finalizes Extension of 408(b)(2) and Participant Disclosure Rules

[25330]

July 14, 2011

TO: PENSION MEMBERS No. 40-11

OPERATIONS MEMBERS No. 14-11

BANK, TRUST AND RECORDKEEPER ADVISORY COMMITTEE No. 41-11

TRANSFER AGENT ADVISORY COMMITTEE No. 55-11 RE: DOL FINALIZES EXTENSION OF 408(b)(2) AND PARTICIPANT DISCLOSURE RULES

DOL issued a final extension of the applicability date for its service provider disclosure regulation under section 408(b)(2) and the deadline by which disclosures must first be provided to participants under its section 404(a) participant disclosure rule. [\[1\]](#) The first applicability date for service provider disclosure will be April 1, 2012 and the date by which the first participant disclosure must be made will be no earlier than 60 days after that. The first date on which certain new information required under the participant disclosure rule must appear in quarterly benefit statements would be no earlier than August 14, 2012.

Proposal

On June 1, 2011, DOL proposed to extend these dates and requested comments on the proposed timeframes. [\[2\]](#) Under the proposal, the 408(b)(2) service provider disclosure interim final regulation – otherwise due to go into effect on July 16 for both new and existing contracts and arrangements – would have been extended to January 1, 2012. The participant disclosure regulation, applicable for plan years beginning on or after November 1, 2011, originally provided that the first disclosures to current participants (i.e. participants with the right to direct investment of their account on the applicability date) would be due 60 days after the applicability date. The proposal would have extended this to 120 days after the applicability date and applied the transition rule to participants who become eligible for the plan in between the applicability date and the end of the 120-day period.

Final Extension

408(b)(2) Regulation: The effective date for the interim final service provider disclosure rule

[3] is extended from July 16, 2011 to April 1, 2012. This is three months longer than the timeframe in the proposed extension. [4] DOL indicated that it intends to publish a final 408(b)(2) regulation before the end of the year and it does not expect that the changes to the interim final rule are likely to require more additional time for compliance than is provided by this extension.

Participant Disclosure Regulation: The transitional rule in the final participant disclosure regulation [5] is amended to require that initial disclosures be furnished no later than the later of 60 days after a first day of the first plan year beginning on or after November 1, 2011, or 60 days after the effective date of the 408(b)(2) rule. The transitional rule also provides that certain quarterly disclosures must be furnished no later than 45 days after the end of the quarter in which the initial disclosures are required to be furnished to participants and beneficiaries pursuant to the transitional rule. DOL agreed with many commenters that the transition rule should be tied to the effective date for the final 408(b)(2) regulation, to ensure that the 408(b)(2) regulation becomes effective first. Because of the three month longer extension of the 408(b)(2) regulation, DOL adopted a 60-day transition period under the participant disclosure rule, rather than the proposed 120-day period.

DOL provided the following example to illustrate the new bifurcated transitional rule:

As to calendar year plans, the participant-level disclosure regulation becomes applicable on January 1, 2012. Pursuant to subsection (A) of the final transitional rule, such plans must furnish their first set of initial disclosures (all disclosures other than disclosures required at least quarterly) no later than May 31, 2012, which is 60 days after the April 1, 2012 effective date of the 408(b)(2) regulation. Further, pursuant to subparagraph (B) of the transitional rule, the disclosures required by paragraphs (c)(2)(ii) and (c)(3)(ii) of the regulation (e.g., the quarterly statement of fees/expenses actually deducted) would have to be furnished no later than August 14, 2012, which is the 45th day after the end of the second quarter (April – June) in which the initial disclosure was required.

DOL also clarified a footnote from the proposed extension stating that the extension would not affect the changes to the 404(c) regulation, which apply for plan years beginning on or after November 1, 2011. Because the changes to the 404(c) regulation incorporate the information required to be furnished under the 404(a) participant disclosure regulation, there was some concern that this information would have to be provided with respect to participants in 404(c) plans before the deadlines applicable to the 404(a) rule. DOL confirmed that plan administrators do not have to furnish the newly required information under the 404(c) regulation before that information must be delivered (subject to the final transition rule) under the participant disclosure regulation.

Electronic Delivery

DOL also addressed several comments it received regarding the standards for electronic delivery of participant disclosures under the 404(a) rule. The Institute and others requested that DOL quickly issue guidance to allow plans to use the framework in Field Assistance Bulletin 2006-03 (pertaining to benefit statements) on at least an interim basis for the participant disclosures under the 404(a) rule. [6] DOL responded that it is carefully analyzing these comments as part of its broader review of the public comments received

pursuant to its recent electronic delivery RFI and that it will provide guidance on this issue in advance of the regulation's compliance date.

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endnotes

[1] The announcement of the final extension is available here:
<http://www.dol.gov/ebsa/pdf/extensionofapplicabilitydatesfinalrule.pdf>.

[2] See [Memorandum](#) to Pension Members No. 26-11, Operations Members No. 11-11, Bank, Trust, and Recordkeeper Advisory Committee No. 31-11, and Transfer Agent Advisory Committee No. 41-11 [25237], dated June 1, 2011. For our comment letter on the proposed extension, see [Memorandum](#) to Pension Members No. 32-11, Operations Members No. 12-11, Bank, Trust and Recordkeeper Advisory Committee No. 34-11, and Transfer Agent Advisory Committee No. 46-11 [25279], dated June 14, 2011.

[3] For a description of the interim final regulation, see [Memorandum](#) to Pension Members No. 29-10, Bank, Trust and Recordkeeper Advisory Committee No. 21-10, Operations Committee No. 18-10 and Transfer Agent Advisory Committee No. 37-10 [24432], dated July 16, 2010. The Institute filed a comment letter on the interim final regulation which discussed the need for an extension if the final regulation imposes new obligations on service providers. See [Memorandum](#) to Pension Members No. 36-10, Bank, Trust and Recordkeeper Advisory Committee No. 30-10, Transfer Agent Advisory Committee No. 52-10 and Operations Committee No. 24-10 [24520], dated August 30, 2010.

[4] The Institute's comment letter on the proposed extension indicated our concern that the proposed extension to January 1, 2012 may not be sufficient if the final 408(b)(2) rule imposes new obligations.

[5] For a description of the final regulation, see [Memorandum](#) to Pension Members No. 49-10, Transfer Agent Advisory Committee No. 76-10, Bank, Trust and Recordkeeper Advisory Committee No. 49-10, Broker/Dealer Advisory Committee No. 56-10 and Operations Committee No. 37-10 [24702], dated November 11, 2010.

[6] See [Memorandum](#) to Pension Members No. 29-11 [25262], dated June 8, 2011. The Institute also included this request in our comments responding to the DOL RFI on electronic delivery. See [Memorandum](#) to Pension Members No. 30-11 [25270], dated June 9, 2011.

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