

Third in a Series

The DOL's 408(b)(2) Regulation: Impact on Broker-Dealers and Registered Representatives

By Fred Reish and Bruce Ashton

This is another in our series of bulletins about the impact on covered service providers of the Department of Labor's (DOL) "interim final" regulation under ERISA Section 408(b)(2). Prior bulletins addressed the changes between the proposal and final regulation [[http://www.reish.com/publications/pdf/DOLfinalfeedisc408\(b\)\(2\).pdf](http://www.reish.com/publications/pdf/DOLfinalfeedisc408(b)(2).pdf)], the general provisions of the final regulation [[http://www.reish.com/publications/pdf/408\(b\)\(2\)regoverview.pdf](http://www.reish.com/publications/pdf/408(b)(2)regoverview.pdf)] and the impact of the regulation on RIAs [[http://www.reish.com/publications/pdf/408\(b\)\(2\)impactonRIAs.pdf](http://www.reish.com/publications/pdf/408(b)(2)impactonRIAs.pdf)]. This Bulletin focuses on the impact of the regulation on broker-dealers and their registered representatives. (By broker-dealer (or B-D) we mean a firm that provides brokerage services to a plan and is not acting as an RIA; we use the term financial adviser (or FA) to refer to the individual registered representative of the B-D who actually services a plan, whether employed by, or acting as an independent contractor agent of, the broker-dealer. Except as otherwise noted, we have limited the discussion to B-Ds that are not dual-licensed or affiliated with an investment provider, e.g., a mutual fund complex, an insurance company, or a recordkeeper/plan provider.)

COMMENT: We are advising a significant number of broker-dealers about their disclosure obligations under the new 408(b)(2) regulation. This bulletin reflects some of our observations from that process—that is, it includes both legal and practical comments.

Even though this bulletin is relatively long, we have not included discussion of some of the more complex issues, including the use of individual brokerage accounts by pooled plans and for participant-directed accounts.

Also, these changes will involve decisions by B-Ds that go beyond 408(b)(2), such as conflicts of interest due to affiliated products, possible fiduciary status for advisers, and support for focused retirement plan advisors.

Background

Since we have previously described the new regulation in detail, we are including a brief summary of the key provisions: Under

DOL Speaks: The 2010 Employee Benefits Conference

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Fred Reish and Bruce Ashton will both be participating in this Conference, jointly sponsored by the US Department of Labor and various benefits organizations. The program will feature top officials from the DOL national and regional offices, who will provide updates on current regulatory and enforcement initiatives of the EBSA, and private sector speakers presenting industry and plan sponsor perspectives. Among the topics to be discussed will be 408(b)(2), with Fred as a featured speaker, Plan Governance issues, in which Bruce will participate, and other fiduciary issues, as well as developments in health care reform. For further information and to register for the conference, visit the ASPPA website at www.asppa.org and click on "conferences."

the prohibited transaction rules of ERISA and the Internal Revenue Code, contracts or arrangements between plans and service providers are prohibited unless the arrangement and the compensation paid to the service provider are "reasonable." (Because formal contracts between the parties are not required by ERISA, we refer to these as "arrangements.") The final regulation provides guidance on what is a "reasonable" arrangement, by requiring covered service providers to disclose important terms of the arrangement.

If a service provider fails to comply, it will engage in a prohibited transaction, resulting in excise taxes under the Code, and a requirement to correct the violation . . . which may mean refunding the service provider's compensation, as well as interest on that money. (An additional 20% penalty may be imposed if the DOL recovers the money for the plan from the service provider.)

Applicability

Covered Plans

The regulation applies to "covered plans," i.e., all ERISA-governed retirement plans other than SEP IRAs and SIMPLE

IRAs. (Individual retirement accounts are excluded since they are not ERISA plans.) Thus, all 401(k) plans, ERISA-covered 403(b) plans, defined benefit pension plans, and profit sharing plans, among others, are subject to the regulation (though our focus here is on participant-directed 401(k) and ERISA-covered 403(b) plans).

COMMENT: In a prior bulletin, we noted several reasons why a service provider might elect to comply with the new regulation for all plans it services, regardless of whether they are “covered plans.” The reasons: (1) having one disclosure approach for all plan clients may simplify compliance where the B-D serves multiple markets; (2) the ERISA and Code provisions requiring “reasonable” arrangements may be interpreted in a manner consistent with the new criteria even for non-covered plans; and (3) this may assist in complying with state law requirements that are substantially the same as or similar to ERISA.

Covered Service Providers

The regulation applies to “covered service providers” that reasonably expect to receive \$1,000 or more in direct or indirect compensation and that provide “covered services.” (It appears that the \$1,000 threshold is measured over the life of the arrangement, though this is not altogether clear.) For purposes of this Bulletin, we assume this threshold is met.

1. Categories That Apply to B-Ds Generally

There are five categories of “covered services,” three of which relate to fiduciary services (and which, presumably, would not apply to B-Ds and FAs, though this is addressed later). (By “fiduciary services,” we are referring to services as an ERISA fiduciary and as an RIA fiduciary under the securities laws.) The two categories that are the most likely to “cover” B-Ds and FAs are the following:

- Brokerage services provided to a covered plan that meets all three of the following requirements: (i) it is an “individual account plan,” *i.e.*, a 401(k), profit sharing or ERISA-governed 403(b) plan; (ii) participants are permitted to direct the investment of their accounts; and (iii) one or more “designated investment alternatives” are made available to the participants in connection with the brokerage services. Note that this category would not apply to a defined benefit pension plan or to a pooled or trustee-directed profit sharing plan.

A “designated investment alternative” is any investment option offered by a plan (i) that has been selected by a fiduciary and (ii) into which participants may direct the investment of assets held in or contributed to their individual accounts. This would include the investments generally considered to be the “core” lineup in a 401(k) plan. The DOL says that this does not include brokerage windows, self-directed brokerage accounts and the like, under which a participant is able to select investments other than those specifically designated by the fiduciaries.

- “Consulting” and “securities or other investment brokerage services” if the service provider reasonably expects to receive “indirect compensation” (as defined in the regulation and discussed later in this Bulletin). (There are other types of

services included in this “indirect compensation” category; however, as a general matter, they would probably not apply to B-Ds.) “Consulting” services are those that relate to the development or implementation of investment policies or objectives or the selection or monitoring of service providers or plan investments. Since these services may be rendered in a manner that does not result in the service provider being considered a fiduciary, we presume this is why the DOL included this category.

Impact on B-Ds and FAs: Most B-Ds and FAs that routinely operate in the 401(k) or ERISA 403(b) markets will be covered service providers under one or both of the “covered services” definitions. They fall under the first category because, by definition, they provide brokerage services. The plans they serve are individual account plans. Most probably permit participant direction of deferrals—and in most instances, company matching and other contributions as well. (In our experience, pooled or trustee directed 401(k) plans are rare, and we do not see trustee-directed 403(b) plans at all.) So, unless a participant-directed plan offers no designated alternatives and only has brokerage windows or self-directed brokerage accounts, the B-D or FA dealing with the plan will be a covered service provider under the first category.

And even if the plan does not meet these criteria, B-Ds will fall under the second category (“securities or other investment brokerage”), since their compensation is, in virtually all cases, going to be indirect. (In light of this, there would seem to be little value in marketing plans that only offer self-directed brokerage accounts in an effort to avoid having to comply with the new regulation, because the B-D will likely be covered under the second category of covered service provider in any case.) Further, many FAs also provide the specified types of consulting services—such as providing information to assist the fiduciaries in monitoring a plan’s investments.

This “indirect compensation” category also includes investment advisory services to plans and/or participants. We find that confusing since investment advice is generally considered to be a fiduciary activity, and ERISA fiduciaries are separately—and automatically—covered by the regulation. That suggests that the DOL believed that “investment advice” could be rendered in both a fiduciary and a non-fiduciary manner. As a result, it is possible that this category covers generic investment advice, which is commonly referred to as investment education.

Also, a B-D whose FAs provide assistance to individual participants through a brokerage window would be covered service providers so long as they receive indirect compensation. We anticipate that some B-Ds may have difficulty in identifying these accounts. Assuming they are able to do so, they will then have to identify the plan fiduciary to whom disclosures must be made and provide the disclosures...even though they have no relationship with the plan sponsor.

There are a number of other issues for B-Ds who use brokerage

accounts and mutual fund windows as investment vehicles for both pooled plans and participant accounts. Because of the complexity of these issues, we have not discussed them in this bulletin.

2. *The Fiduciary Category*

One of the other types of covered services is fiduciary services under ERISA §3(21), which are provided directly to a covered plan. (The other two fiduciary categories are probably not relevant to B-Ds or FAs.) In general, brokerage services and even consulting services of the type just described are not fiduciary services so, at first blush, we could ignore this category. Unfortunately, we cannot, because the ERISA definition of a fiduciary is a “functional” one, at least partially, in that it considers how a person acts and not the label under which the person operates.

Section 3(21)(A)(ii) says someone is a fiduciary if he provides investment advice for compensation. Under a DOL regulation, investment advice is defined to include advice or recommendations regarding the purchase, sale or holding of securities or other property that is individualized, based on the particular needs of the plan (or a participant). If an FA (and thus, his B-D) is providing recommendations of designated investment options to be selected by a plan that takes into account the needs of the participants and the demographics of the workforce, the FA is likely operating as a fiduciary and would be a covered service provider under this category as well.

Impact on B-Ds and FAs: In light of the fact that B-Ds and FAs are almost certainly covered service providers under the first two categories, is it really relevant to consider whether they are covered under a third category of the regulation? Yes, but only partially.

While every covered service provider must comply with the basic disclosures of the regulation, fiduciary service providers and those providing brokerage services for participant-directed plans with designated investment alternatives have additional disclosures they need to make, so it is important to understand the category of service that applies.

Specific Requirements

1. *Disclosure Must Be in Writing*

The regulation requires a covered service provider to disclose specified information to the “responsible plan fiduciary” (a defined term) in writing and reasonably in advance of the arrangement being entered into.

COMMENT: The regulation does not specify whether electronic delivery of the information is acceptable, but it would appear that it is (and there is language in the preamble which suggests that electronic delivery is acceptable). However, there is a question of whether the disclosure must be “delivered” or

whether it is acceptable to just provide internet links to where the responsible plan fiduciary may access the information on one or more websites. These issues will likely be clarified by the DOL, either formally or informally.

The requirement of written disclosure is a significant departure from the proposed regulation, which specified that there had to be a written contract or arrangement between the plan and the service provider.

Certain disclosures, required for B-Ds providing brokerage services to participant-directed plans, may be made by providing disclosure materials developed by unaffiliated third parties (*e.g.*, mutual fund prospectuses or fact sheets prepared by recordkeepers). As a practical matter, though, we believe that recordkeepers will satisfy those particular requirements and there will be little, if any, burden on B-Ds to provide the investment materials to fiduciaries. However, the disclosure of B-D services and status will fall squarely on the shoulders of the B-D. With regard to B-D disclosure of compensation, we believe that different B-Ds may adopt different practices (*e.g.*, disclosure notices versus service agreements).

Impact on B-Ds and FAs: There are two significant aspects of the written disclosure requirement.

First, in our experience, B-Ds and FAs working in the 401(k) and ERISA 403(b) markets have not historically used service agreements. The proposed regulation’s requirement of a written contract would have imposed a significant change in how B-Ds and FAs operate in these markets.

We continue to believe, however, that a well-crafted service agreement that provides the required disclosures and describes the specific services to be provided (and limitations on those services) would be beneficial from a risk management perspective.

Second, the written disclosure requirement will require B-Ds to modify their internal operating and supervisory procedures to ensure that the proper disclosures are being made on a timely basis. They will also need to decide how the disclosures are to be made. For example:

- Will the B-D prepare a standard form of disclosure document—something akin to a summary prospectus—that contains the necessary information? (The DOL has asked for comments on whether it should require a short summary of the disclosures with a roadmap to where more detailed information can be found, though this is not currently a requirement of the regulation. Based on the comments filed with the DOL, though we believe that it is more likely than not that the regulation will be amended to add a summary and roadmap.)
- Will the B-D seek to comply by providing the prospectuses of designated investment alternatives, on the theory that the prospectus describes the amounts that will be paid to a

broker-dealer such as 12b-1 fees and revenue sharing—and possibly describes the B-D’s services? (We are aware of at least one mutual fund complex that takes the position that providing a fund prospectus complies with the disclosure requirement for “eligible indirect compensation” for Schedule C purposes, which is very similar to the requirements of the 408(b)(2) regulation. We have reviewed the prospectuses for such a fund and have found them lacking in certain critical regards—in terms of describing broker-dealer compensation from a 408(b)(2) perspective.) Also, in reviewing a number of prospectuses and statements of additional information (SAIs), we have yet to find information that adequately describes a B-D’s services to the particular plan for, *e.g.*, the 12b-1 fees and/or the revenue sharing. (In our experience, B-Ds and FAs are usually providing more than distribution and marketing services and/or dealer services.)

- Whatever the form of disclosure, how will the B-D police the process of making sure the disclosures are made to the right person at the proper time?

In deciding how to make the disclosures, B-Ds must consider the fact that the regulation defines a prohibited transaction exemption. This requires strict observance of the rules in order to ensure compliance and imposes the burden of proving compliance on the service provider. As such, B-Ds are faced with practical issues that must be addressed in their documents and procedures.

In addition, and as mentioned earlier, we think that there is more than a 50% chance that the regulation will be amended to require a short summary of the services and compensation, with a “roadmap” to the associated documents. For example, the roadmap could describe the information in the prospectuses and point the fiduciary to the specific sections that should be reviewed.

2. Compliance Effective Date

The regulation requires that service providers comply with the disclosure requirements for *all* covered plans before July 16, 2011. This means that, prior to that date, the disclosures will need to be given to all of the B-D’s existing covered plan clients, as well as to all new, or extended or renewed arrangements entered into after that date. Thus, there are no “grandfathered” clients to whom the disclosures will not need to be made.

Impact on B-Ds: The effective date presents a challenge to B-Ds to identify all covered plan clients—since the disclosure rules apply to all clients being serviced on the effective date, *i.e.*, July 16, 2011, as well as all new relationships developed on or after that date—develop the disclosure materials, modify practices and procedures, including supervisory procedures, and then educate their supervisory and field forces on how to make the disclosures.

3. Services

The regulation requires the service provider to describe the services it will provide under the arrangement. The regulation does not specify how the services are to be described, indicating only that the level of detail will vary depending on the needs of the responsible plan fiduciary. Also, the format of the disclosure is not specified by the DOL.

Impact on B-Ds: This requirement may present a bigger issue for B-Ds than might appear on its face. That is, what services do the B-D and the FA actually provide? Clearly, they provide brokerage services, *i.e.*, facilitating the purchase of the investments by the plan. But once the plan is in place, and trades are directed by the participants and effected by the custodian/recordkeeper for the plan, to what extent are the B-D and FA continuing to provide “brokerage services”—and what is the value of those services on an ongoing basis?

This raises significant issues because of the requirement that the compensation paid to a service provider be reasonable in relation to the services being provided. How does a B-D or FA justify an on-going trailing commission or 12b-1 fees (or whatever the replacement will be once the SEC modifies the rules) for “brokerage services”?

As a partial answer to that question, in our experience, FAs often assist in a plan’s enrollment process and may, among other things, assist the plan fiduciaries by assembling investment monitoring information. Those with more experience and a focus on the 401(k) market may also assist in vendor searches or in consulting about plan design issues. These on-going services may be sufficient to justify the on-going fees received by the B-D and FA; but in that case, the requirement to describe the services being provided by the B-D and FA takes on added importance.

The requirement to describe the services being provided may also impact whether the B-D seeks to comply by delivering fund prospectuses to covered plan clients. Consider, for example, the prospectus for a large, well-known mutual fund. It contains a table showing the operating expenses of the fund by share class. One of the line items is “distribution and/or service (12b-1) fees” and then shows a percentage for each share class. Some might argue that this is an adequate description of the services being provided by the B-D, but in our view, there are several problems with this approach. First, the term “distribution” is vague in the context of ERISA plans and may not be sufficiently specific to enable a fiduciary to understand the services for which the B-D is being paid. Second, it does not address the on-going service issue. Third, it does not indicate to whom the fees will be paid for the service being provided. (Note that, in the future, mutual funds may revise their prospectuses to better assist B-Ds with their new disclosure requirements.)

As a result, B-Ds will need to assess how they describe their services and in what format.

4. Compensation

The covered service provider must describe the direct and indirect compensation to be received by the service provider and its affiliates and subcontractors. “Compensation” means anything of monetary value, such as money, gifts, awards and trips, but excluding non-monetary items of \$250 or less received during the term of the arrangement. There are four categories of compensation that must be disclosed (plus a fifth that applies to those providing brokerage services to participant-directed plans with designated investment alternatives):

- Direct compensation, which means “compensation” received directly from a plan.
- Indirect compensation, which means “compensation” that is received from any source other than the plan, the plan sponsor, the covered service provider, an affiliate of the service provider or a subcontractor of the service provider. Note that compensation paid by the plan sponsor is neither direct nor indirect and thus is not technically required to be disclosed.

For indirect compensation, the regulation also requires identification of (i) the services for which it will be received and (ii) the payer of the indirect compensation.

- Compensation paid among related parties. This requires disclosure of compensation paid among the covered service provider, an affiliate or a subcontractor if it falls into one of the following categories:
 - It is set on a transaction basis, *e.g.*, commissions, soft dollars, finder’s fees or other similar incentive compensation based on business placed or retained; or
 - It is charged directly against the plan’s investments and is reflected in the net value of the investment, *e.g.*, 12b-1 fees.

Like indirect compensation, this category also requires disclosure of the services for which the compensation is being paid and the payer and recipient of the payment, and must include a description of the status of either party as an affiliate or subcontractor. The regulation specifies that this disclosure is required even if it is also being disclosed under the fifth category (for brokerage service providers) below.

Impact on B-Ds: The rules on related entities require that there be separate disclosure of compensation received by affiliates or subcontractors where that compensation is:

- transaction based; or
- charged direction against the investments (*e.g.*, 12b-1 fees).

Based on the definitions in the regulations, it appears that a registered representative who is an independent contractor would be an affiliate or subcontractor. Thus, to the extent the adviser’s compensation is transaction based, it would need to be separately disclosed. The DOL may not have intended this result, but it is the literal interpretation of the regulation. Perhaps that will be clarified by the DOL.

- Compensation for termination of a contract or arrangement. This would not, in most cases, apply to B-Ds or FAs.
- Brokerage services providers. For those who provide brokerage services to participant-directed plans with designated investment alternatives, they must also include a description of the following for each designated investment alternative:
 - Any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, transfer or withdrawal from the investment (*e.g.*, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchanges fees, account fees, and purchase fees); and
 - The annual operating expenses (*e.g.*, expense ratio) if the return on the investment is not fixed (which means that fixed return investments are excluded from this requirement); and
 - Any ongoing expenses in addition to annual operating expenses (*e.g.*, wrap fees, mortality and expense fees).

The B-D may at least partially comply with this requirement by delivering a current prospectus (or other disclosure materials), so long as the issuer is not an affiliate of the B-D, the disclosure materials are regulated by a state or federal agency, and the B-D does not know that the prospectus is incomplete or inaccurate. However, the regulation is not clear about the method of compliance for affiliated investments.

How do you comply with this requirement if the investment alternatives under the plan have not been designated at the time the arrangement is entered into? The final regulation addresses this (which is a welcome addition, since the proposed regulation did not). In this case, the disclosures must be made as soon as practicable, but in any case, not later than the date the investment is designated by the responsible plan fiduciary.

Note that the definition of compensation includes both money and “any other thing of monetary value.” For non-monetary items, the proposal does not specify how to disclose the value. However, as a general premise, service providers must disclose compensation as a dollar amount, a formula based on plan assets, a per participant charge, or a combination of those.

The regulation also requires that a service provider disclose the manner of payment, *e.g.*, whether it will bill the plan or whether it will deduct fees from plan accounts or investments.

Impact on B-Ds: In our experience, B-Ds usually receive only indirect compensation, typically in the form of 12b-1 fees, and they do not receive *additional* compensation for enrollment services, assistance in providing monitoring information and the like.

Thus, for the most part, they will need to be concerned only with the disclosure requirements affecting indirect compensation. The disclosure may be relatively simple: the B-D could provide a list of the plan’s investments, the investment provider and the compensation it receives on that investment from the fund. As

noted earlier, it is not clear and may be an aggressive approach to only provide prospectuses with the objective that they would be adequate to satisfy this requirement without additional explanation of the compensation to be received by the B-D for the specific plan it is serving (including identification of the share classes of the designated alternatives).

A bigger issue will arise, however, if the B-D also receives other forms of compensation, such as revenue sharing from a mutual fund family or non-monetary items such as payment of the expenses of attending conferences or other events based on criteria (such as the number of cases or dollar amounts with the fund family). This type of indirect compensation will need to be disclosed, along with the services for which the B-D is receiving the compensation and the identity of the party paying it. In other words, generic disclosure that some parties may have used in the past will no longer suffice.

We also anticipate that the fifth category of compensation disclosure, which is imposed on those providing recordkeeping services, as well as on B-Ds serving the participant-directed plan market, will generally be provided by the recordkeeper.

5. *Timing of Disclosure*

The regulation requires that the disclosures be made “reasonably in advance of the date the contract or arrangement is entered into, and extended or renewed....”

Impact on B-Ds: In the absence of a written contract, which arguably establishes the date on which a contract is entered into, this requirement may present a challenge to B-Ds. When is an “arrangement” to provide brokerage services entered into? Is it when the mutual funds are selected? Or does it happen earlier when the plan fiduciaries ask the FA to assist them in finding a provider and investments for their plan? Obviously, the disclosures must be made before the plan has made a financial commitment or any legal obligations have attached due to the arrangement.

B-Ds will need to evaluate the sales process to determine when the arrangement comes into effect and then design procedures to ensure that FAs are sensitive to the requirement to deliver the required disclosures and have the information available to them to do so. The addition to the final regulation permitting later disclosure of information relating to investment alternatives that are not designated when the arrangement is entered into will be beneficial, but will also require that B-Ds and FAs be especially attentive to make certain that the required information is provided “not later than the date the investment alternative is designated.”

6. *Fiduciary Status*

The regulation requires a service provider to disclose whether it, or an affiliate or subcontractor, *reasonably expects* to provide any services to the plan as an ERISA fiduciary (as defined under ERISA §3(21)(A)).

Impact on B-Ds: This requirement could be a trap for the unwary or uninformed B-D. Notwithstanding any policies adopted by the B-D firm at the entity level prohibiting their FAs from providing investment advice or serving as a fiduciary, if an FA does, in fact, provide such advice (as defined by the DOL), the FA and the B-D become functional fiduciaries to the plan. And while this status may be unintended, the requirement nonetheless exists for the service provider to acknowledge fiduciary status, once it is aware (or, perhaps, should be aware) of that status. (See the discussion below about change notices).

B-Ds will need to assess whether they are willing to assume that role or whether they need to revise their operating and supervisory procedures to ensure that they do not take on that role. The latter decision may have important competitive implications for the B-D.

7. *Other Disclosure Issues*

Changes in Information: A service provider must disclose any change to the required information as soon as practicable, but in any case no later than 60 days from the date on which the service provider acquires knowledge of the change. This is different from the requirement related to disclosures for newly designated investment alternatives. Note also that the requirement applies to any change in the information, regardless of whether it is material or not.

Impact on B-Ds: This could have a serious impact on B-Ds, since they will need to monitor the information that is disclosed and then ensure that, if there is a change, they go back to existing clients to make the new disclosure. This could be especially troublesome as plans change their investment options, which results in a change in the indirect compensation (*e.g.*, 12b-1 fees and revenue sharing) being received by the B-D.

Reporting and Disclosure Information: The regulation requires a service provider to disclose, upon written request, any other information relating to compensation received in connection with the arrangement to enable the plan to comply with the reporting and disclosure requirements of ERISA. The information must be provided not later than 30 days after receipt of a written request (or as soon as practicable if the disclosure cannot be made due to extraordinary circumstances beyond the service provider’s control). Note that this is not limited to information required to complete the Schedule C to the Form 5500 for large plans, though we presume that is the context in which the request will most often arise.

Impact on B-Ds: We do not anticipate that this requirement will prove troublesome for B-Ds, except to the extent they must identify non-recurring or non-monetary types of indirect compensation. However, B-Ds must develop procedures so that any requests for information are routed to the appropriate personnel.

Disclosure Errors: The final regulation includes a welcome addition: it specifies that no arrangement will be considered unreasonable—*i.e.*, a prohibited transaction—solely because the service provider makes an error or omission in disclosing the information—if the service provider has been acting in good faith and with reasonable diligence and it discloses the correct information as soon as practicable, but not later than 30 days from the date on which the service provider knows it made the error or omission. This will protect service

providers from innocent mistakes that otherwise could have caused their contract to constitute a prohibited transaction.

Conclusion

The final regulation will require B-Ds to assess (i) the way they do business in the plan marketplace and make changes to their internal processes and procedures, (ii) how they educate and supervise their FAs and, potentially, (iii) the services they provide to these clients.

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