

Ask Kidder.®

With the DOL's proposed 408(b)(2) regulations on hold, what's next?

As discussed in prior newsletters, the Department of Labor (DOL) worked diligently in 2007 and 2008 to draft proposed disclosure regulations regarding fees, recognition of fiduciary status and conflicts of interest for all qualified plan service providers. The DOL assured the retirement industry that these regulations would be finalized by the end of 2008 or early in 2009. As a result, service providers across the country (Kidder included) spent considerable amounts of time and money to prepare for implementation. The final regulations were nearing DOL approval for entry into the Federal Register, when – suddenly – they were put on hold.

On January 20, White House Chief of Staff Rahm Emanuel sent a memo to the heads of Executive Departments and Agencies stating “President Obama has asked me to communicate to each of you his plan for managing the Federal regulatory process ... Therefore, at the direction of the President, I am requesting that you immediately ... Withdraw from the OFR all proposed or final regulations that have not been published in the Federal Register so that they can be reviewed ... Consider extending for 60 days the effective date of regulations that have been published in the Federal Register but have not yet taken effect ... for the purpose of reviewing questions of law and policy raised by those rules ... ”

This means the DOL, under President Obama's new Labor Secretary, Hilda Solis, must choose whether to withdraw, finalize or leave the regulations in their proposed form for some period of time. It is possible the DOL will reconsider the proposed regulations. Meanwhile, House Education and Labor Committee Chairman George Miller (D-California) has announced his intentions to introduce new legislation that would mandate disclosure of service provider compensation. Although that issue was already addressed in the proposed regulations, any new fee disclosure legislation in Congress will pressure the DOL to consider withdrawing the proposed regulations completely.

The purpose of the regulations is to assist plan fiduciaries in fulfilling their obligations to the plan and plan participants. Plan fiduciaries need to have sufficient and consistently prepared information to make educated decisions. We believe that full fee disclosure is good for the long term success of the qualified plan market and for assisting plan fiduciaries.

So what will happen?

We expect that the work and information already gathered for this project will continue to drive Congress and/or the DOL toward a similar end result. Although we do not know what any new legislation or new proposed regulations will look like, we are certain that more disclosure will be required.

While some service providers have chosen to wait until regulations are finalized before redrafting plan documents, Kidder began identifying and drafting potential changes in 2008, based on the proposed DOL regulations. We plan to implement these changes during 2009 (regardless of whether or not Congress or the DOL acts), since we always endeavor to provide plan sponsors and plan fiduciaries with the details needed to make well-informed decisions. Plus, we are confident that it will be easy to make minor modifications (as necessary), if and when the new law or regulations become final.

On the bottom line, you can expect us to be providing even more information to you in the future. Our Service Engagement Agreements, although quite comprehensive already, will be slightly longer. We will offer additional information related to our fees, describe conflicts of interest (if any) and provide disclosures regarding fiduciary status. Some of this information will be required for 2009 Form 5500 filings.

How does this affect other pending regulations?

We expect that the proposed participant disclosure regulations under ERISA Section 404(a) will also be held back and eventually withdrawn. This disclosure (also discussed in a prior newsletter) centered on what participants will see on their plan statements – including how expenses are calculated and a uniform presentation of investment returns.

As the disclosure drama continues to intensify, count on us to keep you informed.

If you have any questions in the meantime, just Ask Kidder!

NOTICE- Any tax advice expressed in this communication (including any attachments) is not intended to be used, and cannot be used, for the purpose of avoiding penalties imposed on the taxpayer by any government taxing authority or agency. If any such tax advice is made available to any person or party other than the party to whom the advice was originally directed, then such advice is to be considered as being delivered to support the promotion or marketing of the transaction or matter discussed or referenced. Each taxpayer should seek specific tax advice based on the taxpayer's circumstances from an independent tax advisor.