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DOL Proposes a 408(b)(2) Fee Disclosure Guide; But Where Will It Lead?

The Department of Labor (the “DOL”) published a long anticipated¹ proposed amendment to the regulation promulgated under section 408(b)(2) of ERISA on March 12, 2014. The proposal addresses circumstances under which covered service providers would be required to furnish a guide to assist “responsible plan fiduciaries” (“RPF”) in their review of the initial disclosures required under the DOL’s final regulations under section 408(b)(2) of ERISA (the “Regulation”). However, the proposal leaves open for comment the circumstances under which such a guide would be required. In addition to the guide, the proposal also adds three notable requirements to the existing regulation that could alter some “covered service providers” (“CSP”) existing disclosure processes. Finally, DOL also signals in the proposal a willingness to impose requirements on electronic communications between plan service providers and plan fiduciaries – something that it has not done before.

Background

In 2012, DOL published the Regulation requiring specific disclosures from a CSP be made to an RPF. The disclosures were designed to ensure that the RPF had the information it needs (generally regarding the CSP’s services, compensation and fiduciary status) to meet its fiduciary obligations to select and monitor service providers for the plan. Neither the Regulation nor the proposals that preceded it required CSPs to disclose the required information in any particular format. In fact, the preamble to the proposed regulation specifically noted that CSPs could use different documents from separate sources to satisfy their disclosure obligations, provided that all of the documents, collectively, contained the required information. In our experience, many CSP disclosures cross reference services agreements, prospectuses and other documents.

In the Regulation, DOL noted that it intended to publish in a separate rulemaking, a guide or similar requirement to assist RPFs’ review of the required disclosures. The proposal is the start of that separate rulemaking.

The Proposal

Under the proposal, a CSP may, in order to satisfy its 408(b)(2) obligations, be required to furnish a guide “specifically identifying the document and page or other sufficiently specific locator, such as a section, that enables the [RPF] to quickly and easily find” the required information. A guide would only be required if the CSP used different documents or

¹ DOL submitted the proposal to the Office of Information and Regulatory Affairs (OMB) more than 8 months ago for a regulatory review that generally must be completed in 3 months or less. The extended regulatory review may explain the particularly detailed economic analysis that accompanies the proposal.

separate sources to satisfy its disclosure obligations or if the disclosure was in excess of a certain number of pages. In the proposal, DOL asks commenters to suggest the number of pages that should be used to trigger the guide requirement.

While not entirely clear from the language of the proposal, it is conceivable that CSPs who developed a separate document for purposes of discharging their initial disclosure obligations under the Regulation, could nonetheless be deemed to have delivered that information through multiple documents where the stand-alone document contained references to disclosures made in separate documents, such as fund prospectuses.

The proposal is also not clear on whether DOL proposes to grandfather or otherwise provide transition relief for 408(b)(2) disclosures previously made with respect to ongoing covered service relationships or whether CSPs might be under an obligation to refresh those previous disclosures through the delivery of guides.

If a guide is required, the CSP must direct the RPF to the place in the disclosure documents where the RPF can find:

- The description of services to be provided;
- A statement concerning services to be provided as a fiduciary and/or as a registered investment adviser;
- The description of: all direct and indirect compensation, any compensation that will be paid among related parties, compensation for termination of the contract or arrangement, as well as compensation for recordkeeping services;
- The required investment disclosures for fiduciary services and recordkeeping and brokerage services, including annual operating expenses and ongoing expenses, or if applicable, total annual operating expenses.

As noted, the proposal would require the inclusion of a reference to the document and page number or other sufficiently specific locator, such as a section reference, for purposes of facilitating the RPF's easy access to information. CSPs such as investment platform providers who may have included general references to prospectus and other investment option disclosure documents should consider the potential burdens that could be associated with providing specific page or section references for each available investment.

New Requirements

In addition to the guide, the proposal contains several notable additional requirements that are not imposed unless a guide must be provided, and one new requirement that may be intended to apply to all CSPs. Chief among these is a requirement to provide the guide in a separate standalone document. Currently, the Regulation does not require a separate standalone disclosure. Instead, a CSP could, provided all of the information was included, satisfy its 408(b)(2) obligations through a service contract or similar document. While many CSPs provide a standalone disclosure, the Regulation's flexibility provided some protection from oversights and other foot faults in a disclosure as long as the information was otherwise disclosed. The proposal would eliminate this flexibility.

A second new requirement seems to be an attempt by DOL to make the 408(b)(2) an annual, rather than a periodic, disclosure. The Regulation currently requires a CSP to provide a 408(b)(2) disclosure reasonably in advance of the date a contract is entered into, extended or renewed. Although changes to certain investment disclosures have to be updated annually, the Regulation generally does not require annual disclosure of most of the required information. Instead, any changes to the information must be provided to an RPF on an ongoing basis. The proposal, however, introduces a requirement to provide "at least annually" any changes included in the guide itself as well as to any

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changes in the information required by paragraphs (c)(1)(iv)(E) and (F) of the Regulation, the disclosures concerning certain investment disclosures. Although this provision can be read not to change the Regulation's existing requirements, the proposal's preamble makes it clear that DOL believes that "a periodic requirement to disclose any changes to the information contained in the guide will be more beneficial to plan fiduciaries and less burdensome to covered service providers than ongoing and sporadic disclosure each time a change to one component of the guide occurs."

Finally, the proposal requires the guide to include the identity and contact information of a person or office the RPF could contact regarding the 408(b)(2) disclosures. This requirement, that CFPs identify a point person or office authorized and capable of explaining a CSP's fee structure and status to an RPF, was not contemplated in the Regulation.

Electronic Disclosure

DOL includes a footnote in the proposal acknowledging that its current electronic disclosure regulation does not extend to disclosures from third parties to plan fiduciaries. However, DOL also asks the commenters to weigh in on whether RPFs would benefit if CSPs were required to provide a notice, comparable to the notice required by DOL's existing electronic disclosure regulation, when sending the guide electronically. This request could signal DOL's interest in exploring a separate rulemaking establishing an electronic disclosure regulation governing disclosures from third parties to plan fiduciaries.

Comments on the proposal can be submitted until June 10, 2014. DOL has also announced its intention to conduct 8-10 focus group sessions with approximately 70-100 fiduciaries to small pension plans regarding the proposal.