

Where Will It Lead?

DOL proposes a 408(b)(2) fee disclosure guide

After spending almost nine months at the Office of Management and Budget (OMB), the Department of Labor (DOL) published its long-anticipated proposed amendment to the regulation promulgated under Section 408(b)(2) of the Employee Retirement Income Security Act (ERISA) in March. Among several requirements, the proposal seeks to address when covered service providers (CSPs) would be required to furnish a guide to help responsible plan fiduciaries (RPFs) review their initial 408(b)(2) disclosures, but leaves open for comment the circumstances under which such a guide would be necessary.

Beyond its actual requirements, the proposal raises two issues for the regulated community. First, the OMB has determined that the proposal is not “economically significant,” though it represents a shift in costs from plan sponsors and others who select and monitor CSPs to the CSPs themselves. Second, some plan sponsors with limited time or the hope of avoiding legal expenses may come to rely on the summary disclosure documents rather than fully reading and understanding the underlying contracts. That may prove to be penny-wise but pound-foolish.

In 2012, the DOL published the regulation requiring that specific disclosures from a CSP be made to an RPF. The disclosures were designed to ensure the RPF had the information it needed 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.

The Proposal

Under the proposal, a CSP may, 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 be required only if the CSP used different documents or separate sources to satisfy its disclosure obligations or if the disclosure were in excess of a certain number of pages. The DOL asks commenters to suggest the number of pages that should trigger the guide requirement.

While this is not entirely clear from the language of the proposal, it is conceivable that CSPs who developed a separate document to discharge their initial disclosure obligations under

the regulation could nonetheless be deemed to have delivered that information through multiple documents where the stand-alone one refers to disclosures made in separate documents, such as fund prospectuses. The proposal is also unclear as to whether the DOL proposes to grandfather or otherwise provide transition relief for 408(b)(2) disclosures previously made.

New Requirements

The proposal also contains several notable additions only necessary if a guide must be provided, as well as one new requirement that may be intended to apply to all CSPs. Chief among these is a requirement to produce the guide as a separate standalone document. Currently, the regulation does not demand a separate standalone disclosure. Instead, a CSP could, if all the information was included, satisfy its 408(b)(2) obligations through a service contract or similar document. In our experience, many CSPs do provide a standalone disclosure; however, the regulation’s flexibility has provided protection from oversights in a disclosure as long as the information appeared elsewhere. The proposal would eliminate this flexibility.

Also new seems to be the DOL’s attempt to make the disclosure required under Section 408(b)(2) an annual requirement. The regulation currently tells a CSP to supply 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 must be updated annually, the regulation does not demand annual disclosure of most of the required information. The proposal introduces a requirement to “at least annually” make any changes to the information included in the guide.

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 CSPs identify a point person or office authorized and able to explain a CSP’s fee structure and status to an RPF—was not contemplated in the regulation.

Comments on the proposal may be submitted until June 10.

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