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DOL Sends Message to Plan Fiduciaries: Know What You Are Paying for

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As most retirement plan sponsors are keenly aware, U.S. Department of Labor final regulations require service providers to deliver specific fee information to responsible plan fiduciary clients. Those 2012 rules reserved a paragraph for future guidance on a guide to help plan sponsors understand the potentially voluminous disclosures. Well, that proposed guidance has arrived, so this column explains what DOL is proposing and how plan sponsors can provide more input before the guidance is finalized.

Background

DOL issued the final rules on fee disclosures in February 2012. They provide that covered service providers (those that reasonably expect to receive \$1,000 or more in compensation, direct or indirect, in connection services provided to the plan) must deliver specific information about fees to the responsible plan fiduciaries (those with authority to cause the plan to enter into, or extend or renew, the contract or arrangement).

On March 12, DOL issued an Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) — Fee Disclosure (see related story on p. 6). The proposed rules on service-provider disclosures did not include a model notice, but did refer to the sample guide provided with the 2012 final regulations.

Concurrent with the proposed regulations, DOL issued a Proposed Information Collection Request Submitted for Public Comment: Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements. The purpose of this effort is to examine current practices as well as the effects of the 408(b)(2) disclosures, especially on smaller plans.

Why Such Focus on ERISA Section 408(b)(2)?

As this expected request for disclosure guides for plan sponsors indicates, ERISA Section 408(b)(2) fee disclosures continue to be an area of DOL focus (refer to articles in our June, July and September 2010 newsletters, as well as stories in April, March and February 2012 newsletters and ¶526 in the *Handbook*).

As described in ¶524, ERISA Section 408(b)(2) permits the payment of reasonable plan expenses from plan assets. Plan fiduciaries must receive and review specific information relating to plan expenses and the services provided for those fees, to determine whether the fees are reasonable.

In addition, plan fiduciaries should review the disclosures for any potential conflicts of interests related to the service provided. Failure to assess reasonableness and potential conflicts of interest could result in a prohibited transaction. (See ¶910 for more information on prohibited transactions.) DOL's intent is clear, in preambles to the previous regulations as well as in this amendment: fiduciaries should understand what they are paying for, and are expected to review their fee disclosure information. But sometimes it is not that easy.

DOL found that the required disclosures were often provided in lengthy, complex documents. Smaller employers do not have the resources and or expertise to read the documents and find the specifics related to fees. DOL believes some kind of road map or guide for plan sponsors is necessary.

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DOL has said that a “guide will provide responsible plan fiduciaries with the confidence that they have found the relevant information in the covered service provider’s disclosures to fulfill their ERISA fiduciary responsibility to determine whether a contract or arrangement is reasonable.” The agency stresses that the guide will be especially important to small plan fiduciaries as they analyze their providers’ disclosures.

What Is the Proposed Amendment About?

DOL is proposing that a guide be provided with initial fee disclosures if these are lengthy or exceed a certain number of pages (this number is yet to be determined; DOL is asking for comments on it).

The guide should be specific and clearly indicate where plan fiduciaries can quickly find required information. The guide should be a separate disclosure, and specify the document and page or other “sufficiently specific locator” where the plan fiduciary can find a description of:

- services;
- direct compensation;
- indirect compensation;
- any compensation that will be paid among related parties;
- any termination fees;
- all recordkeeping fees; and
- any compensation, annual operating expenses and ongoing expenses including total operation expenses.

In addition, the guide should:

- give a statement regarding services to be provided as a plan fiduciary or registered investment adviser; and

- identify a person or office, including contact information, which the responsible plan fiduciary may contact regarding the disclosures in the guide.

Covered service providers are responsible for locating the information and preparing the guide. It is important to note that if the service provider already provides the required disclosures in a “concise, single document,” a separate guide will not be necessary. Nothing prevents the service provider from delivering the information electronically on an accessible website, as long as the plan fiduciary is notified how to access the information.

DOL believes that, over time, issuers of investment products will provide the required information to the plan’s recordkeeper or a third-party database. The recordkeeper will then consolidate or receive the information from that database and incorporate it into the information the recordkeeper provides. DOL estimates that “seven hours is more than adequate to perform this function.”

It will be interesting to hear DOL’s reaction to the potential costs involved in changing technology requirements to obtain, consolidate and verify this information. It is possible that after a few years, the process will become less intensive. However, establishing the procedures and controls necessary to ensure that correct information is received, consolidated and provided to each plan sponsor based on their plan’s investment specifics is no easy task. Developing a simple guide could be a very costly undertaking.

Changes to the guide driven by revisions in fees or changes in required information would be provided to the plan fiduciaries at least annually. The guide should contain a locator that will enable the fiduciary to not only find the correct document containing needed information (in the case of multiple documents) but also will point out where the information is contained in that document.

Suggestions from DOL include page numbers with a “direct unambiguous point of reference to the specific places” where the information is located. Another potential locator could be a direct interactive link to the required information. However, the link must specifically point directly to the relevant information. The key criterion is that the fiduciary be able to quickly and easily locate the data.

DOL is requesting comments on the proposed rule no later than June 10. DOL notes that it is possible that the comment period may be reopened because the focus groups’ results (see below) will not be available until after June 10. The regulation will be effective

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12 months after publication of the final regulations in the *Federal Register*.

What Comments Are Being Requested

DOL is interested in comments relating to:

- the number of pages that would trigger the need for a guide and whether standards should be included to prevent formatting pages to prevent manipulation (for example, reducing font size) related to a specific number of page criteria;
- two alternative locators, the first being a document and page number locator, and the other being a “sufficiently specific” locator such as a section — DOL is particularly concerned with the cost and difficulty of including a specific page reference; and
- the Information Collection Request (see following section).

EBSA to Conduct Focus Groups

As noted above, DOL’s Employee Benefits Security Administration issued an Information Collection Request

on the effectiveness of existing 408(b)(2) disclosures. EBSA intends to conduct eight to 10 focus group sessions, with a total of 70 to 100 plan fiduciaries. The information to be collected relates to:

- the role of the responsible plan fiduciary;
- number of plan service providers;
- understanding of the 408(b)(2) regulations;
- whether plan fiduciaries receiving the disclosures are able to find fee and service information, and whether their ease in doing so had an impact on their decision making about hiring a service provider; and
- whether the covered service provider already provides a guide or similar tool and if such a tool is or would be useful.

EBSA intends to use the focus group information to assess the effectiveness and understandability of the disclosures, and to examine the experiences of the plan fiduciary who’s receiving the information. EBSA will evaluate how a summary, guide or something similar would help fiduciaries better understand fee disclosures. ❖



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