

DOL Issues Proposed Amendment Requiring a Summary Guide for Section 408(b)(2) Disclosures

The Department of Labor (“DOL”) issued a proposed amendment to the final regulations under Section 408(b)(2) of ERISA (the “Fee Disclosure Regulations”). The Fee Disclosure Regulations require that covered service providers to 401(k) plans and other ERISA covered retirement plans provide information to plan fiduciaries about the service providers’ compensation and potential conflicts of interest. The proposed amendment, if adopted, will require certain covered service providers to furnish a summary guide to the initial disclosures mandated by the Fee Disclosure Regulations if the disclosures are contained in lengthy or multiple documents.

Background

As background, Section 408(b)(2) of ERISA sets forth an exemption from ERISA’s prohibited transactions rules for the payment of compensation to providers for services necessary for the operation of the plan if both the contract and the compensation paid for such services are reasonable. Under the Fee Disclosure Regulations, covered service providers must provide responsible plan fiduciaries with specific information about the fees charged to or paid by the plan and certain other information regarding the services and compensation arrangements. These disclosures are intended to ensure that plan fiduciaries receive the information necessary to assess both the reasonableness of the compensation paid for services and any potential conflict of interests that may affect the performance of those services. The Fee Disclosure Regulations do not require that service providers disclose the information in any specific format and allow service providers to use different documents from separate sources to satisfy the disclosures as long as all the documents contained the required information.

Proposed Amendment

The proposed amendment will require covered service providers to furnish a summary guide with the initial disclosures if the initial disclosures are contained in multiple or lengthy documents. According to the DOL, the guide will assist the plan fiduciary by ensuring that the location of all information required to be disclosed is evident and easy to find. The DOL has reserved for comment the number of pages that will trigger the guide requirement even if the initial disclosures are contained in a single document.

According to the proposed amendment, the guide must specifically identify the document and page or other sufficient specific locator, such as a section reference, that enables the plan fiduciaries to “quickly and easily” find the following information required to be disclosed by the Fee Disclosure Regulation:

- ♦ Description of services to be provided to the plan;
- ♦ Statement concerning whether any services are provided as a fiduciary and/or registered investment adviser;

- ♦ Description of all direct compensation and indirect compensation, compensation that will be paid among related parties, compensation that will be paid for termination of the contract and compensation paid for recordkeeping services; and
- ♦ The required investment disclosures for fiduciary services and recordkeeping and brokerage services, including annual operating expenses and ongoing expenses.

The guide must be furnished as a separate document and must include the contact information of a person or office that the plan fiduciary may contact regarding the initial disclosures and the guide. The proposed amendment would require any changes to the guide be provided at least annually.

The proposed regulation does not include a model guide but the DOL indicated that the sample guide to the initial disclosures, posted on the DOL website (www.dol.gov/ebsa/pdf/408b2sampleguide.pdf), may be a useful example for service providers.

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