Law Offices of
Geoffrey M. Strunk, LLC
ERISA / Employee Benefits Law

DOL Proposes Supplementary Guide to 408(b)(2) Disclosures

P.O. Box 138, Glen Mills PA 19342

Phone: 484-200-5149 Fax: 484-206-4132

www.gmsERISAlaw.com

DOL Proposes Supplementary Guide to 408(b)(2) Disclosures

On March 12, 2014, the Department of Labor ("DOL") issued a proposed amendment to its service provider fee disclosure regulations under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). For those of you keeping track, the DOL issued "Interim Final" 408(b)(2) regulations in 2010. Then, in 2012, it issued "Final" 408(b)(2) regulations which many industry professionals jokingly referred to as the "Final, Final" version of the regulations. However, the 2012 Final, Final 408(b)(2) regulations included a section that was blank and reserved for future rulemaking entitled "Guide to initial disclosures". The recently proposed amendment is intended to complete this previously reserved section of the Final, Final 408(b)(2) regulations. Which forces me to wonder if we are now presented with an amendment that will ultimately result in the creation of the "Final, Final, Final" 408(b)(2) fee disclosure regulations. All kidding aside, the remainder of this article summarizes the newly proposed amendment and raises several areas of concern that will hopefully be addressed during the process of finalizing the proposed amendment.

Summary of Proposed Rule

As suggested by the title "Guide to initial disclosures", the proposed amendment would require that, in certain circumstances, service providers subject to the 408(b)(2) fee disclosure obligations must issue a "guide" to the disclosure documents themselves ("Guide"). More specifically, if the fee disclosure was too lengthy or the requisite information was issued within multiple documents, the Guide requirement would be triggered. The Guide would then operate similar to an index and identify the location of several of the specific items that are required to be communicated through the disclosure.

To clarify, the Guide would not need to summarize any specific information, it would only need to identify where such information is located within the disclosures. The items whose location would need to be specifically identified within the Guide are:

1. the description of the services to be provided;
2. the statement indicating whether the services provided are done so as an ERISA fiduciary or "registered investment advisor";
3. 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; and

4. 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.

When triggered, the Guide also must identify "a person or office, including contact information" available to provide additional information regarding the disclosures. Finally, under the proposed amendment, any changes to the guide would need to be provided at least annually.

The proposed amendments will not become effective until at least 12 months after a final version (Or is that final, final? Do I hear final, final, final?) of the amendment is published in the Federal Register. This built-in one year delay combined with the DOL's request for practitioner / industry focused comments on the proposed amendment strongly suggest that the Guide requirement will not be effective prior to January 1, 2016.

Outstanding Issues of Concern

So the description above tells us what the proposed amendments require when invoked. However, more importantly, what *don't* the proposed rules tell us? First and foremost, the DOL has not yet decided what constitutes a disclosure that is "too long" thereby triggering the Guide requirement. Although the DOL has indicated that excessive length will be determined by the number of pages of the disclosure, it reserved all sections of the proposed amendment where a specific number of pages are intended to be referenced. In order to assist in this determination process, the DOL both specifically requested comments on this issue and stated its intent to create small employer, fiduciary "focus groups" to consider this among other Guide related issues. Therefore, it remains to be seen what the subjective term "too many" means in this context.

On a related note, it will be interesting to see whether the DOL will also impose "page layout" requirements for the disclosures intended to work in conjunction with the page number limitations. For example, without rules regulating the selection of font, font size, page margins, word count, etc., the disclosure documents might be "creatively" formatted in order to avoid triggering a Guide requirement based on page count.

Other interesting considerations exist in connection with the Guide requirement being triggered by "multiple documents". It would seem that the generation of multiple documents in and of itself is not necessarily indicative of an excessively lengthy or confusing fee disclosure communication. It would also appear that this requirement could easily be avoided by the disclosing entity simply by copying certain text from one document and inserting it into another.

For example, consider a "third-party retirement plan administrator" ("TPA") who receives a "revenue sharing" payment from a financial company which constitutes "indirect compensation" under the 408(b)(2) regulations. Let us assume that the TPA has prepared a concise summary of its fee structure for its clients in general satisfaction of the fee disclosure requirement and that disclosure is reasonably formatted on two pages. Then, in addition to the two page disclosure, the TPA attaches a copy of a single page produced by the entity that pays the revenue sharing amount which describes how the revenue sharing payment is calculated. If we can agree to assume that the "too long" trigger will be an amount in excess of three pages, this three page TPA disclosure would trigger the Guide requirement exclusively because more than one document was provided. Presumably, the goal of this aspect of the Guide requirement was to avoid creating a confusing "treasure hunt" for fee disclosure information among multiple lengthy documents. However, it would seem that the example above illustrates a situation where the proposed rule would unnecessarily require a Guide where none is needed. This unnecessary application of the rule could potentially be avoided by creating an exception to the multiple document requirement in connection with multiple documents that, in aggregate, do not exceed a specific number of pages.

Another interesting question in the context of the triggers for the Guide requirement concerns a general failure to adequately distinguish between electronic and paper delivery of 408(b)(2) documents. Although the DOL does acknowledge the existence of this distinction within the preamble to the proposed amendment, it nonetheless appears that the DOL adopted an assumed "paper delivery" mindset in evaluating whether a single or multiple documents are provided as well as in determining how many pages a document may be. As a result, it is unclear how to evaluate the requisite information if it is posted on a website. In that context, a single web page could contain an almost infinite amount of written text which would appear to inappropriately *not* trigger the Guide requirement based on either a number of pages or multiple document evaluation process.

A final issue of concern for purposes of this article involves bundled service providers. What if a single entity providing both recordkeeping and TPA services to the same plan provides one fee disclosure associated with the provision of recordkeeping services and a separate disclosure with respect to TPA services. This segregation of fees by service might present the information in a much more easily understandable format that would also more easily facilitate a comparison of the fees associated with each service. However, here the proposed rule has the potential to trigger the Guide requirement as a result of the provision of multiple documents thereby "punishing" the provider for supplying what might ultimately be more easily understood fee disclosure documents.

The issues discussed above illustrate a few of the items that need to be carefully considered before the amendment to the regulations is finalized. Although the intent of the rules is admirable, the resolution of issues such as those considered above will have a significant impact on how well the regulations function and whether they actually achieve their goals.