

Proposed Amendment To Service Provider Fee Disclosure Rules

On March 12, 2014, the US Department of Labor (DOL) proposed an amendment to its fee disclosure regulation under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to require Covered Service Providers (as defined below) to provide plan fiduciaries with a guide specifying the location of each of the required disclosures.

Background

On February 3, 2012, the DOL issued a final rule (the Final Rule) amending its longstanding regulations interpreting the statutory exemption for the provision of plan services under Section 408(b)(2) of ERISA. The Final Rule became effective on July 1, 2012 for all new and existing service provider relationships covered by the Final Rule. The Final Rule requires certain Covered Service Providers that provide services to ERISA-governed retirement plans to provide additional disclosures as a condition of obtaining exemptive relief under Section 408(b)(2) of ERISA from the prohibited transaction rules under Section 406(a) of ERISA. The new disclosures were intended to help plan fiduciaries evaluate the reasonableness of the service provider's total compensation and whether the service provider is subject to conflicts of interest that may affect the service provider's performance.

The Final Rule specifies that the required disclosures must be provided in writing. It does not, however, require a service provider to provide the required disclosures in any specific

form or in a single document, as long as the required information is included in written materials delivered to the plan fiduciary.

In the Final Rule, the DOL reserved a paragraph entitled "Guide to Initial Disclosures" and, in the preamble, stated that it would engage in a separate rulemaking process to determine whether Covered Service Providers will be required to provide an additional disclosure document or a separate guide detailing where the initial disclosures can be found. The DOL included a "sample guide" as an appendix, but did not adopt it as a mandatory part of the Final Rule. However, the DOL strongly encouraged Covered Service Providers to offer plan fiduciaries a guide, summary or similar tool to assist them in identifying all the disclosures required under the Final Rule, particularly when service arrangements and related compensation are complex and information is disclosed in multiple documents.

Plans Covered by the Final Rule. The Final Rule applies only to service provider relationships with certain plans, including employer-sponsored pension and retirement plans (other than individual retirement accounts (IRAs), SIMPLE IRAs and simplified employee pensions) that are not otherwise exempt from ERISA (Covered Plans). It excludes from the definition of Covered Plans all, or that portion, of a Code Section 403(b) plan that consists exclusively of annuity contracts or accounts that were frozen prior to 2009. In order to be excluded, the contract or account must have

been issued before January 1, 2009, all of the rights and benefits under the contract or account must be legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer, and the individual owner must be fully vested in the contract or account.

Service Providers Covered by the Final Rule. The Final Rule only applies to certain service providers to Covered Plans. “Covered Service Providers” are service providers that expect to receive \$1,000 or more in direct or indirect compensation (including non-monetary compensation such as gifts, entertainment and travel, subject to a \$250 aggregate *de minimis* threshold)¹ in connection with providing such services, whether such services are actually performed or such compensation is actually received by the Covered Service Provider, an affiliate or a subcontractor.²

Proposed Amendment

The proposed amendment, upon adoption, would require Covered Service Providers to provide to plan fiduciaries a guide indicating the location of each of the initial disclosures required by the Final Rule if such disclosures are provided in multiple documents or in lengthy documents. The new guide requirement would apply with respect to existing service arrangements, as well as new arrangements. Plan fiduciaries receiving such guides should review the guides in connection with the initial disclosures they received. Accordingly, the proposed amendment will affect Covered Service Providers as well as plan fiduciaries.

If a Covered Service Provider already provided the required disclosures in a concise, single document, the Covered Service Provider may not be required to deliver a separate guide under the proposed amendment.

Lengthy Documents. The DOL has reserved for comment the number of pages that will trigger the guide requirement even if the initial

disclosures required by the Final Rule are contained in a single document.

Specificity. The proposed amendment requires that the guide provide a specific locator for the required information, including the identity of the document that contains such information (to the extent the initial disclosures are contained in multiple documents) and the location of the information within such document. The proposed amendment permits the Covered Service Provider to prepare the guide using a document identifier along with a specific page reference or another sufficiently specific locator, such as direct links to the required information on an internet web page or section references within an identified document. The DOL indicated it is seeking comments on the two alternative approaches to identifying the relevant disclosures within the documents. The goal is to enable the plan fiduciary to quickly and easily locate the initial disclosures required by the Final Rule.

Required Elements. If a guide is required, the Covered Service Provider will be required to specify the location of each of the following initial disclosure items:

- A description of services to be provided to the Covered Plan;
- A statement that in providing such services, the Covered Service Provider is acting as a fiduciary and/or as a registered investment adviser, if applicable;
- A description of all direct and indirect compensation that will be received by the Covered Service Provider or any of its affiliates or subcontractors in connection with the services provided;
- A description of any compensation that will be paid among related parties;
- A description of any compensation that will be received by the Covered Service Provider in connection with the termination of the contract or arrangement;

- A description of all compensation to be received by the Covered Service Provider for recordkeeping services (and/or reasonable estimate of the cost to the Covered Plan for such services); and
- A description of any compensation, annual operating expenses and ongoing expenses (or, if applicable, total annual operating expenses) with respect to a Covered Service Provider providing services as a (i) fiduciary to an investment contract, product or entity that holds plan assets or (ii) recordkeeper or broker to a defined contribution plan that makes designated investment alternatives available to participants through a platform.

The proposed amendment did not include a requirement that the guide indicate where the description of the manner in which compensation will be received by the Covered Service Provider can be found.

The guide must identify a person or an office, including contact information, that the responsible plan fiduciary may contact with any questions regarding the disclosures or with requests for additional information.

The proposed amendment would require the guide to be furnished as a separate document.

Changes to the Guide. The proposed amendment would require that changes to the information provided in the guide be disclosed at least annually to responsible plan fiduciaries. The DOL is seeking comments as to whether the entire guide should be disclosed on an annual basis if changes occur, as opposed to merely including only the changes to information contained in the original guide. Note that a service provider's obligation to deliver changes to the guide is in addition to the obligation to notify plan fiduciaries of changes to any of the initial disclosures within 60 days of such change.

Model Guide. The DOL did not include a model guide with the proposed amendment. Instead, the DOL referred to the sample guide it

included as an appendix to the Final Rule. This sample guide is attached to this Legal Update as *Appendix A*.

Effective Date. Under the proposal, the amendment to the Final Rule will be effective 12 months after publication of a final amendment in the *Federal Register* and will apply to existing as well as new service arrangements.

Considerations for Covered Service Providers

The DOL explained that the Covered Service Providers are in the best position to identify the location of the information required to be disclosed because of their specialized knowledge and their ability to structure their disclosures so that the information will only need to be located once when preparing guides for a large number of clients. As discussed above, if a guide is required, the Covered Service Provider must disclose in the guide the location of most elements required as initial disclosures by the Final Rule.

Will All Covered Service Providers be Required to Send Guides? If a Covered Service Provider used the Final Rule's sample guide format when it distributed its initial disclosures, such Covered Service Provider may have already satisfied the requirements of the proposed rule. In such a case, under the proposed rule, the Covered Service Provider would only be required to provide annual updates to the guide to the extent the information included in the guide changes.

To the extent a Covered Service Provider's arrangement with the Covered Plan is embodied in a single agreement, such as a consulting agreement, an investment management agreement or a trust agreement, and such agreement contains all of the information required to be disclosed pursuant to the Final Rule, it is possible that such Covered Service Provider would not be required to provide a guide under the proposed amendment. In these

cases, the ultimate answer will depend on whether such agreement constitutes a “lengthy” document. As discussed above, the DOL is seeking comments on the definition of a lengthy document.

Under the proposed amendment, if a Covered Service Provider has not previously provided its Covered Plan clients with a guide, or a single disclosure document that satisfies the conditions set forth in the proposed amendment, such Covered Service Provider would be required to deliver a guide.

What Should a Covered Service Provider Do for New Covered Plan Clients? While waiting for the proposed amendment to become final, with respect to each new service provider relationship covered by the Final Rule, it may be efficient for Covered Service Providers to prepare a separate guide using specific locators for each element required to be disclosed initially under the Final Rule, if the information disclosed is contained in multiple documents. If all required disclosures are covered in a single service contract, the Covered Service Provider may decide to wait for the final amendment given that such Covered Service Provider may not be required to deliver a separate guide.

Considerations for Plan Fiduciaries

The DOL believes the guides will assist the plan fiduciaries in locating the information relevant to their analysis of the reasonableness of the compensation to be paid to service providers and potential conflicts of interest that may affect the performance of those services.

What Impact Will the Amendment, if Adopted, Have on Plan Fiduciaries? If the proposed amendment is adopted, plan fiduciaries will receive guides from existing and new Covered Service Providers. With respect to existing relationships, the plan fiduciaries will need to review the guides to confirm that they have located all of the required disclosures. As significant time may have passed from receipt of

the initial disclosures under the Final Rule, the plan fiduciaries may also have to go through the process of using the guide to locate the disclosures in the documents previously provided by the Covered Service Providers and reevaluate the reasonableness of the compensation to be paid to such service providers and the potential conflicts of interest that may affect the performance of services.

If an existing Covered Service Provider does not provide a guide to the plan fiduciary, the plan fiduciary would have to consider if the Covered Service Provider should have provided such a guide. As discussed above, the proposed amendment would not require a guide in certain situations. Accordingly, it may be difficult for plan fiduciaries to determine whether the Covered Service Provider should have delivered a guide. As the guide requirement would become part of the initial disclosure requirements under the Final Rule, the plan fiduciary would be required to request, in writing, that the service provider furnish the required information, unless the plan fiduciary reasonably believed that the service provider satisfied the disclosure requirements under the Final Rule. Similarly, with respect to new service provider relationships, the plan fiduciary will have to consider whether the Covered Service Provider should have delivered a guide with the initial disclosures required by the Final Rule, if such a guide is not provided.

Written Comments

The DOL is accepting comments to the proposed amendment through June 10, 2014. As noted above, the DOL is seeking comments with respect to setting a threshold as to the number of pages that will trigger the requirement to deliver a guide along with the initial disclosures even if such disclosures are contained in a single document. In addition, commenters were asked to address whether standards must be included to prevent manipulations of the page number limit and whether any alternative standards exist

that would be more beneficial to plan fiduciaries reviewing lengthy documents.

The DOL expressed a particular interest in receiving comments regarding the anticipated costs associated with preparing a guide that includes specific page numbers or other sufficiently specific locators. Commenters are encouraged by the DOL to break down costs into the constituent elements, such as the cost of the guide requirement associated with each specific disclosure item. The DOL would also be interested in receiving explanations as to whether currently available technology can or cannot reduce such costs.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

Herbert W. Krueger

+1 312 701 7194

hkrueger@mayerbrown.com

Lennine Occhino

+1 312 701 7966

locchino@mayerbrown.com

Erika Gosker

+1 312 701 8634

egosker@mayerbrown.com

Liz Dyer

+1 312 701 8581

edyer@mayerbrown.com

or arrangement in determining compliance with the *de minimus* threshold.

² For a more complete summary of the Final Rule, please see our February 21, 2012 Legal Update, “US Department of Labor Issues Final Rule on Service Provider Fee Disclosure,” available at <http://www.mayerbrown.com/publications/US-Department-of-Labor-Issues-Final-Rule-on-Service-Provider-Fee-Disclosure-02-21-2012/>.

Mayer Brown is a global legal services organization advising many of the world’s largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world’s largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit our web site for comprehensive contact information for all Mayer Brown offices. www.mayerbrown.com

IRS CIRCULAR 230 NOTICE. Any advice expressed herein as to tax matters was neither written nor intended by Mayer Brown LLP to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed under US tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then (i) the advice was written to support the promotion or marketing (by a person other than Mayer Brown LLP) of that transaction or matter, and (ii) such taxpayer should seek advice based on the taxpayer’s particular circumstances from an independent tax advisor.

Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the “Mayer Brown Practices”). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe – Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Taulil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. “Mayer Brown” and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.

© 2014 The Mayer Brown Practices. All rights reserved.

Endnotes

¹ The DOL noted in the Final Rule that the focus is on whether \$1,000 is expected to be received as compensation in connection with providing the services, regardless of whether the compensation is expected to be received in a particular year or during the term of the contract. Furthermore, the DOL cautioned parties against structuring contracts for ongoing services specifically to avoid the \$1,000 threshold and indicated that the DOL will look to the substance, rather than the form, of the contract

Appendix A

DOL'S SAMPLE 408(B)(2) DISCLOSURE GUIDE*

The following is a guide to important information that you should consider in connection with the services to be provided by ABC to the XYZ 401(k) Plan.

Should you have any questions concerning this guide or the information provided to you concerning our services or compensation, please do not hesitate to contact [*enter name of person and/or office*] at [*enter phone number and/or email address*].

REQUIRED INFORMATION	LOCATION(S)
Description of the services that ABC will provide to your Plan	Master Service Agreement § 2.4, p. 1
A statement concerning the services that ABC will provide as [an ERISA fiduciary] [a registered investment adviser].	Master Service Agreement § 2.6, p. 2
Compensation ABC will receive from your Plan (“direct” compensation).	Master Service Agreement § 3.2, p. 4
Compensation ABC will receive from other parties that are not related to ABC (“indirect” compensation).	Master Service Agreement § 3.3, p. 4 Stable Value Offering Agmt § 3.1, p. 4
Compensation that will be paid among ABC and related parties.	Master Service Agreement § 3.5, p. 6
Compensation ABC will receive if you terminate this service agreement.	Master Service Agreement § 9.2, p. 11
The cost to your Plan of recordkeeping services.	Master Service Agreement § 3.4, p. 5
Fees and Expenses relating to your Plan’s investment option. *Total Annual Operating Expenses	<p>(1) Capital and Income Fund Trans. Fees: InvestCo Prospectus, Fund Summary, p. 2 TAOE: *InvestCo Prospectus, Fund Summary, p. 2</p> <p>(2) International Stock Fund Trans. Fees: www.weblink/ABCProspInv2/trans.com TAOE: www.weblink/ABCProspInv2/taoe.com</p> <p>(3) Small Cap Fund Trans. Fees: www.ABCweblink/ProspInv3/trans.com TAOE: www.weblink/ABCProspInv3/taoe.com</p> <p>(4) Bond Market Index Fund Trans. Fees: www.weblink/ABCProspInv4/trans.com TAOE: www.weblink/ABCProspInv4/taoe.com</p>

REQUIRED INFORMATION	LOCATION(S)
	<p>(5) Stable Value Fund Trans. Fees: Stable Value Offering Agmt, § 2.4, p.3 TAOE: Stable Value Offering Agmt, § 2.3, p.3</p> <p>(6) Money Market Fund Trans. Fees: www.weblink/ABCProspInv6/trans.com TAOE: www.weblink/ABCProspInv6/taoe.com</p>

*Published as exhibit to DOL's Final Rule on 408(b)(2), *see* 77 Fed. Reg. 5633, 5659 (Feb. 3, 2012).