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COMPLIANCE



Advisers Still Headed for More Fee Transparency

Ellie Behling – 01/29/2009

Fee disclosure regulations did not make it into the Federal Register before the new administration stepped in, but that is not necessarily a signal for advisers to relax about fee disclosure.

In general, the industry is moving toward being more disclosure-oriented, said Roberta Ufford, principal at Groom Law Group, speaking with PLANADVISER.com. One of the drivers behind the move toward transparency is a fear of litigation from participants, she said. In general, the regulatory environment is shifting toward disclosure. "If you've been waiting for 408(b)(2) regulations to update your disclosures, stop waiting," Ufford said (see "IMHO: Executive Order"). It's still a good time to re-examine your fee disclosure.

Although the Department of Labor (DoL) finalized its rules requiring more detail to be reported about compensation paid to service providers on the Form 5500, the DoL did not finalize the other two parts of its three-part disclosure regulatory package, comprising the 408(b)(2) regulations, which stipulate greater disclosure from service providers to plan fiduciaries, and the third piece dealing with fee disclosure to participants. Both regulations had been waiting in the Office of Management and Budget, but were not approved before January 20. Then an executive order from the White House halted all proposed regulations until they could be reviewed by the new administration (see "White House Executive Order Snarers Fee Disclosure, Advice Regs").

Now 408(b)(2) rules are in limbo. It's not clear when the new administration will get to the rules, or how it will change them. "I think we can guess that once they review them, they're going to bring their own views to the regulations," Ufford said. She also predicted that they won't be put away, as there is a widespread sentiment that regulation of fee disclosures by service providers is likely to happen. However, she also doesn't expect them anytime soon. It's also possible that the legislative branch will step in to impose new disclosure requirements before the DoL acts on the regulation.

Meanwhile, a participant investment advice regulation did make it into the *Federal Register*, although it remains to be seen whether that regulation will be altered by the new administration (see "DoL Rule Gives More Advice Options"). Ufford said it surprised her that the investment advice made it through before the 408(b)(2) regulations, because fee disclosure seemed to have more widespread agreement.

Preparing for Fee Disclosure

Regardless of what form the 408(b)(2) regulations eventually take, Ufford noted that the existing proposal had some drawbacks. The proposal would have meant that plan sponsors would get more information, but "it's not good for plan sponsors if they're getting more information than they need" because complex disclosure can increase the overall cost of services. But since DoL only published a proposed regulation, no one is clear about just how expensive it could be to implement the fee disclosure requirements imposed by a final regulation, Ufford said. Also, the proposed regulation included hefty consequences for those who did not comply, which would be a problem if parts of the regulation were fuzzy about what was required. "There was ambiguity in the proposed regulations and we don't know how the DoL would have resolved those issues," Ufford said.

Service providers, including financial advisers, can expect some sort of regulation eventually, but should probably consider whether to beef up their fee disclosure now. Ufford noted that, without final regulations, there isn't a clear regulatory guidepost to follow in order to do this. One benchmark is the rules that DoL finalized for reporting service provider compensation on Schedule C of Form 5500. But the proposed 408(b)(2) regulations included other requirements, such as written agreements and information about possible conflicts, that are not part of the Schedule C-related requirements.

Ufford noted that fee-based advisers with written agreements in place with their clients are in a better position for what the proposed 408(b)(2) regulations would have required. Advisers getting paid through commission or who don't have a written contract would have had to do more to comply if the regulations had been finalized. And, even though the regulations were not finalized, commission-based advisers should make sure they are disclosing all of their compensation relating to a plan, including compensation paid by a third-party. She noted: "If they have compensation that's not plainly disclosed, they continue to run risk even without regulation."

Fee-based adviser AI Otto, CEO of OneFiduciary Group, LLC, said he is already embracing fee disclosure to his clients. He also said he holds providers accountable for their fees. His advice to advisers in terms of best practices is to be transparent and hold service providers to that same level of accountability. "As an adviser, you just need to be prepared for a level of openness around compensation

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that hasn't existed before," he said.

In light of economic events, such as the credit markets and the alleged \$50 billion Ponzi scheme of Bernard Madoff, Otto said Americans are undergoing an extreme breakdown of trust. Transparency is vital to the ongoing existence of the financial advisory profession, he said. "As retirement plan advisers, we are entrusted with the future assets of American workers, so transparency is critical," Otto said. "I was actually very disappointed that the regulation did not make it in to the *Federal Register*."

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