

Overall Response to Fee Rule Positive, Unbundling Requirement Biggest Challenge

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Overall Response to Fee Rule Positive,

Unbundling Requirement Biggest Challenge The overall response to the Labor Department's interim final regulation on disclosure of pension plan fees has been positive, with most benefit industry participants surveyed by BNA saying it will not cause any big changes, except for the new unbundling requirements for recordkeepers.

Jan Jacobson, senior counsel for retirement policy at the American Benefits Council, told BNA July 20, "DOL has done a good job in trying to get the information that fiduciaries need to them without overly complicating the process or increasing costs."

Larry Goldbrum, general counsel at the SPARK Institute, told BNA July 21, "So far our response is generally positive. We think that DOL was thoughtful of the comments that were received and struck a balance that reinforces why they were the appropriate party to take the lead in regulating this. We're still working through the details, but most of our comments will be in the way of asking for clarification."

Marcia Wagner, principal and founder of the Wagner Law Group in Boston, told BNA July 20, "It's about time. It's a good thing for everyone, especially for the mutual fund industry, recordkeepers, and [third-party administrators]."

An Investment Company Institute spokeswoman told BNA July 21, "We are pleased the Department of Labor has moved forward on retirement plan service provider fee disclosure regulations and soon will follow with new participant disclosure regulations. Although 401(k) disclosure reform will entail significant compliance costs for the retirement industry, ICI has long supported DOL's efforts because it is crucial that plan fiduciaries have the information necessary to oversee their 401(k) plans and that plan participants receive key, comparable information about their investment choices. While we are still reviewing the new rules, we expect to work with our members and others in the retirement industry to implement them."

The regulation was released July 15, with an effective date of July 16, 2011, and a 45-day comment period (135 PBD, 7/16/10; 37 BPR 1540, 7/20/10).

Unbundling Requirement a Big Change

The new regulation requires "unbundling," meaning that multiple service providers must disclose separately the cost to the plan of different services, such as recordkeeping services.

Wagner said the unbundling was a good idea. "Recordkeepers know how much money they are getting, they can disclose it," she said.

"SPARK was a proponent against unbundling but DOL's approach is similar to an approach that we said we could live with," Goldbrum said. "Our members are comfortable with what's there, and are trying to apply it to their specific products to see if they can comply with it without any problems." SPARK represents retirement plan service providers and investment managers.

Robert Liberto, senior vice president at Segal Advisors in New York, said the unbundling provision will require service providers to drill down further in the fee structure. This could require the service provider to do some programming to break out these different costs, he said.

Jacobson said the unbundling requirement was a major change that will force recordkeepers to do that kind of estimate.

In addition, all recordkeepers are responsible for disclosure of fee information for all the investments on their platform, Jacobson said.

This means recordkeepers have to get the information from the funds and give it to the plan fiduciary, which puts a fairly significant responsibility on the recordkeeper, she said. To the extent that there are any investment providers the recordkeeper has difficulty getting information from, they could be less inclined to put them on their platform, she added.

Biggest Concern

Jacobson said the biggest concern is that since these are interim rules, there could be changes. If there are significant changes to the regulations before the July 16, 2011, effective date, there would be less time to implement them, she said, adding that if additional requirements are tacked on, it becomes much more challenging.

Jacobson said the effective date is not only for new contracts, but also for pre-existing contracts. This means the disclosures for those pre-existing contracts need to happen before July 16, 2011, in order to be in place by the deadline, she said.

Many Service Providers Already Complying Liberto said the interim final regulation is not that different from the proposed regulation. Most of the service providers that Segal works with have already shared this information with plan sponsors on a quarterly basis, since they knew that at some point they would have to provide more information, he said. "As a consultant, we have always done that,"

Liberto added.

The regulation that everyone is really waiting for is the one expected to be released by the Labor Department in the fall, requiring disclosure of information from fiduciaries to participants, Liberto said (141 PBD, 7/23/08; 35 BPR 1745, 7/29/08). "We're concerned that too much detail could be a negative thing. Participants don't understand they can't compare their plan to another plan," he said.

Liberto said one result of the new regulation will be that costs will go down, especially for plan sponsors who have not used consultants to evaluate fees. The required information will give them an opportunity to get a cost structure, and that is good for the plan sponsor, he said.

Relief from Penalties

Jacobson said the prohibited transaction exemption, with its relief for errors and the de minimis exception, will help limit the potential cost of the new regulation by reducing the number of situations where the Labor Department could impose a penalty. In addition, these provisions will keep service providers from putting in expensive operational changes for cheap services, she said.

For example, in the de minimis exception, the regulation does not apply if a service provider gets less than \$1,000 directly or indirectly.

Thus, if a fiduciary hires a printer for a \$50 job, the fiduciary does not have to go through all these steps, Jacobson said.

Surprises

Wagner said she was a little surprised that the new regulation does not include the specific types of conflicts that needed disclosure in the proposed regulations. The proposed regulation had five types of conflicts that had to be disclosed. The Labor Department did away with this, she said.

Wagner said she was also surprised that the department carved out welfare plans as not requiring disclosure, but said it would have been hard for those plans to comply.

Goldbrun said the proposed regulations had emphasized the ability to use electronic delivery of

prospectuses with the disclosure information, but that was missing from the interim final regulation. There is now a question as to whether electronic delivery is permitted, he said.

By Andrea L. Ben-Yosef