

## Disclosure of Fees

The DOL is working on a regulatory project, the so-called “408(b)(2) project,” to require full disclosure of fees and expenses by advisors and plan providers. It is possible that a proposed regulation, together with a disclosure form, could be published by the end of this year.

Our understanding is that the disclosure requirements would apply equally to all advisors and providers, regardless of whether their investment products are otherwise governed by the securities laws, insurance laws, or banking laws. We also understand that the disclosures would need to be provided, reviewed and approved by the plan’s fiduciaries prior to or at the point of sale. That is, the disclosure would need to be made before the plan sponsor/fiduciary agrees to “purchase” the package of investments and services.

With regard to advisors, we expect that the proposed regulation will require disclosure of all sources of compensation (including any items of value), whether direct or indirect. That is, advisors will have to disclose everything that they are receiving that is in any way, directly or indirectly, fixed or contingent, related to the sale of investments to the plan. For example, that might include finder’s fees, expense reimbursements, allowances, bonus payments, and so on.

Similarly, providers (such as recordkeepers) will need to disclose all revenue and other consideration, including revenue sharing.

Under the current state of the law, fiduciaries are required to obtain, understand and evaluate all of that information. However, ERISA does not impose a corresponding duty of disclosure on advisors—and particularly non-fiduciary advisors and consultants—or on providers.

While this will be a dramatic change for some advisors and providers, our belief is that full disclosure will ultimately benefit high quality advisors and providers. Further, we believe that it will accelerate the trend towards specialization among advisors because it will require greater knowledge and understanding of the marketplace and will impose additional compliance complexity.

While additional compliance burdens may have some negative aspects (such as adding some expense), we believe that, in the aggregate, the news is good. That is because, when equipped with better information, fiduciaries will be in a position to make informed and prudent decisions on behalf of their participants—thereby driving down plan expenses and increasing participant investment earnings.

From the advisors’ perspective, we recommend that, if they are not already using disclosure forms, they should be created and put to use immediately. If an advisor is already using a form, it should be reviewed to ensure reporting of all sources of revenue and other consideration.