

accepted by all the states for State registration purposes. Electronic availability of registration information will also support better and more transparent decision making with respect to the appointment of investment managers, which ultimately benefits the participants and beneficiaries of the plans involved.

Discussion

The proposal would benefit plan fiduciaries that wish to appoint an investment manager pursuant to section 402(c)(3) of ERISA. Under section 405(d)(1) of ERISA, plan fiduciaries are not liable for the acts or omissions of the investment manager, and have no obligation to invest assets subject to management by the investment manager. The centralized source of readily accessible registration information offered by the IARD will help plan fiduciaries more efficiently locate information needed to determine whether advisers they may consider appointing are eligible to be an investment manager under ERISA. The source and format of information will no longer differ based on the size or principal business location of the adviser.

Uniform use of the IARD for all advisers who wish to be or remain as investment managers under ERISA will benefit these advisers as well. The change to electronic filing will not change the incentives for investment advisers to become investment managers under ERISA, but should promote increased efficiency for doing so. Advisers are not required to be an investment manager to conduct advisory activities for any customer. The Department assumes that an adviser's decision whether to meet the definition of investment manager under ERISA is based on factors unrelated to the form or format of their registration. It is therefore expected that those state-registered advisers who filed paper copies of their state registration forms with the Secretary chose to do so to gain an advantage in securing appointments by plan fiduciaries.

In any case, this proposed regulation will not change the content of the filings for these advisers because all states accept the joint SEC and state filing form (Form ADV) for state registration, and with certain exceptions, all of the copies submitted to the Secretary were made on Form ADV.⁷ Mandatory use of

the IARD will, however, change the format and manner in which the information is transmitted. While the Department expects advisers to incur a cost to establish a procedure for electronic filing through the IARD plus an annual fee, the change to an electronic format and transmission method is expected to be more efficient and less costly over time. Use of the IARD will reduce the paper handling, filing, and mailing costs associated with providing copies to the State or States as well as to the Secretary, and reduce handling to obtain and reproduce signatures. The SEC cited similar efficiency gains in its regulatory impact analysis of the final rule implementing mandatory electronic filing for federally regulated advisers. Securities and Exchange Commission, *Electronic Filing by Investment Advisers*; Final Rule, 65 FR 57438, Sept. 22, 2000.

The proposed regulation will directly affect only those investment advisers who wish to become or remain as investment managers under section 3(38) of ERISA, who generally have \$25 million or less under management and consequently do not register with the SEC, and who register only in states that do not mandate use of the IARD to satisfy state registration requirements. Copies of registration forms submitted to the Secretary by State-registered investment advisers indicate that about 500 State-registered advisers have registered in only a non-IARD state.⁸ Prior to the implementation of the IARD and many States' decisions to mandate use of the IARD to meet state adviser registration requirements, about 1,500 advisers provided paper copies of their state registration forms to the Secretary. Based on the data contained in those filings, about 1,000 of these already have the capability to file electronically because they are required to register in states that mandate use of the IARD. The Department therefore assumes that this proposed regulation would affect only those advisers that register only in non-IARD states.

Under existing requirements, State-registered advisers incur a State registration filing fee with every State in which they are required to register, plus postage and handling fees for their submissions. Such fees vary by State. Most if not all of the 500 advisers potentially affected by this proposed regulation now register in only one state. When advisers registered only in non-IARD States register through the

IARD, the appropriate state registration fee will be forwarded to the state, such that there will be no net change in state filing fees.

The Advisers Act and Form ADV allow for the requirement that states be provided registration statements. To facilitate state registration, the registrant checks the appropriate boxes on the form for each applicable state, and the IARD then distributes the required information electronically to those states. States will be unaffected because they will continue to receive existing fees, although they will be transmitted in a different manner.

These advisers would, however, newly incur the IARD initial filing fee of \$150 for advisers of the size under consideration here, and an annual filing fee of \$100. It is also expected that the 500 state-registered advisers will incur a cost for the set-up of the electronic filing capability, and an expenditure of time to adjust internal procedures and put existing information into an electronic format. Filing fees for the first year are expected to total \$75,000 in the first year and \$50,000 in each subsequent year for these advisers.

The cost of the electronic filing set-up is not known. The SEC did not quantify the cost of set-up in the final rule cited above that pertained to mandatory use of the IARD for registration with the SEC. However, for the purpose of this discussion, the cost for establishment of electronic filing capability has been estimated to be \$500, or \$250,000 for the 500 advisers affected. This is a one-time cost based on available information on annual fees charged to SEC registrants by commercial providers of service in the industry.⁹ An examination of a sample of the 500 individual filings showed that many of the advisers in question already use the software of a single provider for completing their Form ADV. Because this provider performs services to IARD filers who are currently SEC registrants as well, we have assumed that their range of services includes a method of facilitating electronic filing. It is also assumed that all advisers make use of electronic technology in the normal course of business and will not be required to make substantial technological changes as a result of this proposal.

A one-time cost is also estimated for the time required for the adviser to adjust its internal procedures to input data electronically, if necessary. A comparison of a sample of the paper

⁷ Several exceptions were observed; in those cases, the adviser submitted a copy of the State's action on their registration, such as a license or approval form, rather than the registration form itself. In each case, other advisers' filings for the

same State were examined to confirm that the state did accept Form ADV filings.

⁸ California, Florida, Kentucky, South Carolina, and West Virginia at the time of this writing.

⁹ Such fees are used here as a proxy only; the fees do not pertain specifically to electronic set-up or transmission.