

Fact Sheet



U.S. Department of Labor
Employee Benefits Security Administration
December 2007

Proposed Regulation Relating to Service Provider Disclosures Under ERISA Section 408(b)(2)

Background

- In recent years, changes in the way services are provided to plans have resulted in complexities that make it difficult for plan fiduciaries to understand how service providers are compensated and whether they have possible conflicts of interest that may affect their performance.
- Under ERISA, plan fiduciaries are obligated to act prudently in selecting service providers and ensure that no more than reasonable compensation is paid for services provided to plans, taking into account the direct and indirect compensation received by the service provider.
- Thus, a plan fiduciary must have sufficient information regarding fees and compensation that the service provider receives and whether there are relationships or interests on the part of the service provider that may call into question the objectivity of the service provider in providing services to the plan.
- The Labor Department's Employee Benefits Security Administration (EBSA) has proposed amending the regulation under section 408(b)(2) of the Employee Retirement Income Security (ERISA), which provides an exemption from the prohibited transaction rules, to clarify what constitutes a reasonable contract or arrangement and to require more comprehensive written disclosure concerning plan contracts with service providers.

Overview of Proposed Regulation

- The proposed regulation focuses on disclosure of the direct and indirect compensation received by service providers and potential conflicts that may affect their objectivity.
- The proposed regulation affects only certain service providers whose contracts or arrangements are most likely to raise concerns about the receipt of indirect compensation, the fiduciary nature of the services to be provided, or conflicts of interest that might affect the provision of services.

- In addition, the Department is proposing a class exemption that would provide relief to a plan fiduciary who enters into a contract that is not “reasonable” because, unknown to the plan fiduciary, the service provider failed to comply with its disclosure obligations under the proposed regulation.
- The Department believes the benefits will outweigh the costs of compliance with the proposal, which generally fall on service providers that must create and provide additional disclosures. The cost of the proposed regulation is estimated to be \$52 million in the year of implementation, falls to approximately \$36 million in the second year, and varies slightly with changes in market size thereafter. Benefits accrue due to possible lower fees paid by plans, possible increased efficiency in plan-service provider relationships and reduced costs incurred by plans to evaluate potential service providers.
- The proposal applies to:
 - fiduciary service providers;
 - providers of banking, consulting, custodial, insurance, investment advisory or management, recordkeeping, securities brokerage, or third party administration services; or
 - providers who receive indirect compensation for accounting, actuarial, appraisal, auditing, legal, or valuation services.

Disclosure Requirements

- *Disclosure of Services and Compensation*

The terms of the contract must require that the service provider disclose information regarding all services to be performed and all compensation that will be received either directly from the plan or indirectly from parties other than the plan or plan sponsor. The proposal includes a definition of “compensation or fees” and rules for bundled service providers and for estimating the amount of prospective compensation.
- *Disclosure of Conflicts of Interest*

Service providers also must disclose information about relationships or interests that may raise conflicts of interest for the service provider in performing plan services. Specifically, service providers must describe:

 - any participation or interest of the service provider in transactions to be entered into by the plan pursuant to the contract;
 - any material relationships with other parties that may create conflicts of interest;

- any compensation the service provider may receive that it can affect without prior approval by an independent fiduciary; and
- any policies or procedures in place to address potential conflicts of interest.
- *Ongoing Disclosure Obligations*
The proposal includes ongoing disclosure obligations relating to:
 - **Material Changes:** During the term of the contract, a service provider must disclose material changes to information previously furnished within 30 days of such changes.
 - **Reporting and Disclosure Requirements:** Service providers must disclose compensation or other information related to the contract or arrangement that is requested by the responsible plan fiduciary or plan administrator in order to comply with ERISA's reporting and disclosure requirements.
 - **Actual Performance:** The proposal also includes an explicit requirement that service providers actually make the required disclosures.

Contact Information

For questions about the proposed regulation, contact EBSA's Office of Regulations and Interpretations at (202) 693-8500. Comments on the proposed regulation should be directed to the U.S. Department of Labor, Employee Benefits Security Administration, Room N-5655, 200 Constitution Ave., N.W., Washington, D.C. 20210, Attention: 408(b)(2) Amendment; or electronically to e-ORI@dol.gov or www.regulations.gov.