Comments to Proposed Regulation under ERISA Section 408(b)(2)

February 11, 2008

Department of Labor

The American Society of Pension Professionals & Actuaries (ASPPA) and the Council of Independent 401(k) Recordkeepers (CIKR) appreciate the opportunity to comment on the Department of Labor's (Department) proposed revisions to its regulatory exemption for the provision of services to employee benefit plans (29 CFR § 2550.408b-2).

ASPPA is a national organization of over 6,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

The Council of Independent 401(k) Recordkeepers (CIKR) is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. As a consequence, the independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of $120 billion in assets.

Overview

ASPPA and CIKR strongly support the Department's current regulatory initiatives on improving the disclosure of compensation and fees paid by plans to the fiduciaries who are responsible for the plans. We commend the Department for the new disclosures required by the proposed revisions to DOL Regulation § 2550.408b-2 (Proposed Regulation). However, ASPPA and CIKR have a number of suggestions contained in these comments that we believe will strengthen the disclosure regimen, and we also strongly encourage the Department to provide greater clarity regarding its disclosure requirements in order to promote consistent disclosures among service providers.

We have provided detailed comments on the sections of the Proposed Regulation but also have a number of additional comments that are unrelated to a specific section:

1. **Uniform Disclosure.** ASPPA and CIKR encourage the Department to require compensation disclosure in three general categories: investment related fees and expenses; transactions related fees and expenses (*e.g.,* commissions); and recordkeeping and administrative fees and expenses. We also submit that this type of disclosure should be required of all providers, whether or not considered a bundled provider under the Proposed Regulation.

   In our view, such disclosure would be most helpful to the responsible plan fiduciary in that (i) it would be uniform, thus making comparisons among providers both possible and consistent; and (ii) it would provide the fiduciary with information in categories that are most relevant to its decision to engage or replace a service provider. Indeed, given the extensive disclosures that the Proposed Regulation will require, we submit that without uniform disclosure, the process of sifting through the information provided by competing service providers could prove more burdensome than helpful to plan fiduciaries.

   Information regarding the costs of the investments is relevant because these amounts have the most direct and significant impact on the account balances of participants. Information regarding transaction costs is relevant because it is perhaps the best indicator of conflicts or potential conflicts of interest of the service provider. Recordkeeping and administrative costs, separately disclosed, are relevant because they reflect the true cost of operating the plan. These costs are often buried in investment costs and enable providers to assert that there are no recordkeeping or administrative costs. We submit that this is misleading and is a disservice to the fiduciaries and ultimately to participants.

2. **Consolidated Disclosure.** ASPPA and CIKR also encourage the Department to require a consolidated form of disclosure for all service providers, even where other forms of disclosure are provided and additional documents are incorporated by reference. The reasons for this recommendation are similar to those for the categories of fees and expenses. That is, we submit that a consolidated summary of the information required by the Proposed Regulation would be more readily usable by a fiduciary than (for example) a stack of 25 or 50 prospectuses, even summary prospectuses, and would make the process of comparison of service providers both clearer and simpler.

   While such a consolidated summary may be unnecessary for large plans with sophisticated in-house benefits professionals and outside consultants, for small businesses, this type of disclosure would, in our view, be essential to provide the most meaningful disclosure to the decision makers.

   In addition, having a consolidated, standardized form would prove helpful to the service providers as well for two reasons. First, it would help ensure that a service provider does not inadvertently omit a disclosure item, thus thwarting the purpose of the Proposed Regulation; second, uniformity would make the process of compliance less burdensome for the service provider.

The summary would not, in our view, replace a formal service contract, but would supplement it. It might be presented in chart form, with each required item of disclosure addressed in the chart. Among other things, we submit that such a chart would help clarify the terms of an "arrangement" where no formal contract exists. We attach for your reference (Exhibit A) a sample form for the Department to consider as an illustrative example of how this chart might be presented.

3. **Transaction Fees.** ASPPA and CIKR also strongly support separate disclosure of transaction compensation and fees, even if they are within a bundled service arrangement and even if they are paid from mutual fund management or similar fees. It is obviously critical that the responsible plan fiduciary understands the aggregate cost being borne by the plan in order to make an informed fiduciary decision. We submit that it is equally critical for the responsible plan fiduciary to understand the transaction fees being paid to a service provider, especially in the context of the plan's investments.

   There are two principal types of transaction fees that are borne by a plan or the plan investments, one of which is generally a direct charge and the other of which is almost always indirect. The first is easiest to deal with, since it relates to specific transactions in which a participant may engage, such as loans or distributions. These fees are almost universally borne by the individual participant and are typically charged separately to the participant's account upon the occurrence of the specified event. The responsible plan fiduciary needs to understand these fees to verify that the charge being borne by the participant is reasonable and that the service provider is receiving no more than fair compensation for providing the service.

   The second (indirect) fee relates to the plan's investments. Disclosure of this type of compensation to a service provider is far more critical than the first because, as an indirect charge that is often embedded within the plan's investments, it is less obvious, has a substantially greater dollar impact than the first and is more pervasive. ASPPA and CIKR support the separate disclosure of this type of transaction fee for a number of reasons, but among the most critical are the following:

   - First, investment transaction fees bear a close and generally direct relationship to the conflict of interest issues addressed in the Proposed Regulation. What the financial consultant (or broker) to a plan is paid in connection with transactions in plan assets may have a significant impact on the recommendations that the financial consultant makes, even where the compensation is embedded within the investments and even though there may be no added cost to the plan. For example, suppose the consultant is entitled to a bonus payment from the investment provider at the end of the year based on the assets held by the provider for which the consultant is directly responsible. Or consider the situation in which the consultant is to receive a trailing commission or fee on assets that remain with a particular provider even though the consultant is providing no additional services. The responsible plan fiduciary must be in a position to evaluate the significance of such compensation in order to determine whether the compensation, overall, is reasonable. Even if we assume that the amount of compensation does not improperly influence the consultant's recommendations

and does not present unreasonable compensation, the responsible plan fiduciary would not be in a position to make a proper evaluation on either issue unless it understands the compensation the financial consultant is receiving.

- Second, if the primary bundled provider is required to separately disclose the investment transaction fees, especially where they are embedded in the cost of the investment, the responsible plan fiduciary will be better equipped to negotiate a reduction in the costs borne by the plan (through a recapture or reallocation of some of the embedded investment cost). Without specific transaction fee disclosure, this negotiation would not be possible.

Some may argue that, at least in the context of mutual funds, 12b-1 fees are adequately disclosed in the fund prospectus. Regardless of one's view regarding the clarity or adequacy of such disclosures, in the context of the Proposed Regulation, this argument breaks down. The whole focus of the Proposed Regulation is what compensation a service provider *receives*, not on cost a plan bears. The prospectus disclosure, on the other hand, focuses on the expense borne by the mutual fund shares but conveys no information about who will actually receive the payment. Thus, while presumptively valuable as a disclosure tool, the fund prospectus only goes part of the way, and the additional requirement in the Proposed Regulation for there to be disclosure regarding who actually gets the transaction fee is, in our view, essential.

4. **Payment by Plan Sponsor.** ASPPA and CIKR encourage the Department to restrict the application of the Proposed Regulation to situations in which costs are borne by the plan, such that where the plan sponsor bears all transaction and recordkeeping and administrative costs, for example, compliance with the Proposed Regulation as to those items would not be required. Investment related fees and expenses would presumably still be borne by the investments themselves (and thus by the plan) and would require disclosures that comply with the Proposed Regulation.

   ASPPA and CIKR submit, however, that when the plan sponsor bears costs that do not affect the plan's assets, regulatory intervention of the type contained in the Proposed Regulation is unnecessary and market factors should be permitted to govern the conduct of the parties.

5. **Conflicts of Interest.** The Proposed Regulation contains several provisions addressing the disclosure of conflicts of interest (subsections (c)(1)(iii)(C), (D) and (F)). Subsection (C) makes reference to the service provider acquiring "a financial or other interest" in a transaction in which the plan is involved. Subsection (D) references "any material financial, referral or other relationship" that "creates or may create a conflict of interest" for the service provider. While we agree that "interests" and "conflicts" should be disclosed, we are concerned that the description in the Proposed Regulation regarding the matters that a covered service provider is required to disclose is vague, indeed, sufficiently vague and open to interpretation that the service providers may inadvertently fail to comply with the regulation.

ASPPA and CIKR recommend, therefore, that the Department provide greater clarity regarding the types of relationships that it believes should be disclosed in order to assist covered service providers in meeting the requirements of the exemption. We believe that a listing of the principal types of transactions and relationships with which the Department is concerned would better achieve the Department's regulatory goal and would be of great assistance to the covered service providers who will be required to provide the disclosure.

We recognize, however, that it may not be possible to describe ever conceivable arrangement that might constitute an "interest" or create a "conflict." To address this possibility, we suggest that the Department consider including a statement similar to that found in subsection (b)(2)(B) of the 404c regulation related to the disclosure of information to participants, which states that the participant must be provided sufficient information to make an informed decision but will not be considered to have sufficient information unless specific items are provided to the participant. Similarly, the 408b-2 regulation could contain a statement that the service provider must disclose all transactions and relationships needed to enable the responsible plan fiduciary to make an informed decision but that the fiduciary would not be considered to have sufficient information unless the specific items were disclosed.

Discussion of Specific Comments

A. Applicability of Proposed Regulation

Proposed Regulation: The Proposed Regulation indicates that it applies to the following categories of service providers:

(A) A service provider who provides or may provide any services to the plan pursuant to the contract or arrangement as a fiduciary either within the meaning of section 3(21) of the Act or under the Investment Advisers Act of 1940;

(B) A service provider who provides or may provide any one or more of the following services to the plan pursuant to the contract or arrangement: banking, consulting, custodial, insurance, investment advisory (plan or participants), investment management, recordkeeping, securities or other investment brokerage, or third party administration; or

(C) A service provider who receives or may receive indirect compensation or fees, as described in paragraph (c)(1)(iii)(A)(1) of this section, in connection with providing any one or more of the following services to the plan pursuant to the contract or arrangement: accounting, actuarial, appraisal, auditing, legal, or valuation…[1]

[1] Prop. DOL Reg. § 2550.408b-2(c)(1)(i).

Comments:

1. The Proposed Regulation only applies to certain types of service providers (referred to for convenience as "covered service providers"). This raises several questions:

    a. How does the Proposed Regulation apply if some services are covered and others are not? Is the service provider required to comply with the Proposed Regulation with respect to all services or only the covered services? Stated somewhat differently, does the Proposed Regulation apply to all of the services provided by a service provider, whether or not they are specifically enumerated in section (c)(1)(i) of the Proposed Regulation? For example, if a covered service provider assists a plan sponsor in preparing a request for proposals (RFP) from prospective vendors and assists in evaluating the RFP responses, it is unclear whether this is a covered service or not. Arguably, it could be considered "consulting," though some service providers might argue that it is not.

        ASPPA and CIKR request that the Department clarify that the requirements of the regulation will not apply to a covered service provider with respect to services that are not described in section (c)(1)(i). Inasmuch as the consequences of a failure to comply cause the contract or arrangement to be a prohibited transaction, we submit that it would be unreasonable and a potential trap for service providers to require compliance with respect to non-covered services.

    b. Would a covered service provider that ceases to offer covered services continue to be subject to the Proposed Regulation until the contract or arrangement[2] expires or would these provisions cease to apply once the person was no longer in a covered category? For example, suppose an accountant was receiving indirect compensation,[3] but then the third party who was paying the compensation stopped the payments.

        ASPPA and CIKR request that the Department confirm that once the service provider no longer falls into a covered category, the Proposed Regulation ceases to apply immediately. Again, the rationale for this position is that a service provider that is not actually covered by the Proposed Regulation should not be subject to the penalties that attend a failure to comply.

    c. What is meant by the terms "consulting," "insurance" and "banking" in relation to covered services? These terms can have various meanings, and it is not clear how the Department is using them in the Proposed Regulation.

        ASPPA and CIKR request that the Department clarify what it means by these terms as applied to covered services, perhaps by way of example in the preamble to the final regulation.

2. Some brokers receive payments from investment providers that are not explicitly in connection with services to a particular plan but rather are based on the overall relationship the broker has with the provider. For example, consider the case of a broker that sells the

[2] For ease of reference, we use the term "contract" to refer to a contract or arrangement, unless otherwise indicated.
[3] For ease of reference, we use the term "compensation" to refer to compensation or fees, unless otherwise indicated.

products of a mutual fund family to plan and non-plan clients and receives a bonus payment at the end of the year based on the dollar volume of the entire book of business it has with the provider. Often, the service provider does not know whether it will receive such a bonus payment until the end of the year, since the payment is based on annual production or client retention goals, and generally would have no idea of the amount it would receive.

ASPPA and CIKR request that the Department clarify that (i) the Proposed Regulation would apply in a situation like that described above only to the extent of the compensation that is related to plan clients, (ii) that the service provider be permitted to use a reasonable allocation method in determining amount attributable to plan clients and (iii) that the service provider be permitted to disclose the possible receipt of such compensation generically and without a requirement to ascribe a dollar amount or formula to the amount of the compensation.

3. The Proposed Regulation raises an issue about its impact on the investment managers of mutual funds and the extent to which the investment management fees paid to them must be disclosed under the regulation, if at all. Most 401(k) plans invest directly or indirectly in mutual funds. As a result, the actions of the investment manager and the amounts paid to it have a material impact on the assets of the plan. Thus, from a practical standpoint, the mutual fund manager is indirectly providing services to a plan.

   Based on this premise, since the fund manager is a fiduciary under the Investment Advisers Act of 1940, it would seem to be a covered service provider under category (A). Further, it would appear that a fund manager would also fall under category (B) as a provider of investment management services. However, under ERISA Section 3(21)(B), neither the mutual fund or its investment manager is considered a fiduciary or party in interest to a plan merely by reason of the plan's investment in the mutual fund, and under Section 401(b)(1), the underlying assets of a mutual fund are not plan assets.[4] (There are exceptions in Section 3(21)(B) for mutual fund managers with respect to their own plans and where they would be considered fiduciaries or service providers because of other factors in their relationship with a plan. *See*, for example, Interpretive Bulletin 75-3 as to the latter point. As a result, if affiliates of a mutual fund manager are serving as a recordkeeper, trustee and/or consultant to a plan, generally under a bundled arrangement, the mutual fund complex would clearly be a covered service provider in that instance, in spite of Section 3(21)(B).)

   Nevertheless, the shares of the mutual fund owned by a plan are clearly plan assets. (This is true even if the shares are held in an insurance company separate account, since the assets in that account are considered plan assets – *see, e.g.,* Reg. § 2550.401c-1(a)(1).) The management fee and any other compensation paid directly or indirectly to the fund manager or its affiliates has a direct impact on the net asset value of the mutual fund shares and thus on the value of plan assets. Therefore, the services provided by the fund manager have a direct and significant impact on a plan's investments even if the fund manager is not considered to be a party in interest to the plan.

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[4] The Internal Revenue Code contains parallel provisions under section 4975(e)(8) and (g). Further, the Department's plan asset regulation (Reg. § 2510.3-101) essentially confirms Section 401(b)(1) in stating that for purposes of both Title I and Code section 4975, the underlying assets of mutual funds are not considered plan assets.

Thus, there is a tension between ERISA and the practical reality of the market place.

The question of the status of mutual fund investment managers and the extent of required disclosure related to their compensation is significant in that it impinges on the obligations of other service providers, such as recordkeepers that include mutual fund shares on their platforms. That is, to what extent would the recordkeeper be required to make disclosures about the compensation of the mutual fund manager as part of its overall disclosure obligation to a plan client?

ASPPA and CIKR request that the Department clarify that even though investment managers of mutual funds in which a plan invests are not considered parties in interest to a plan (except where the recordkeeper, trustee or other service providers to a plan are affiliated with the fund manager), they are providing an indirect service to the plan and that direct and indirect compensation of the fund manager would have to be disclosed.

At the same time, the Department will need to recognize that a service provider must rely on the information it is given and that, in some instances, it may not even be possible for the service provider to obtain information from the mutual fund manager. Therefore, we have two recommendations. First, to the extent a recordkeeper is able to obtain the information from the mutual fund manager, it has no obligation to verify the accuracy or completeness of the information and is only required to pass the information on to the plans that invest in the mutual funds. Second, to the extent the recordkeeper is unable to obtain the information after making reasonable attempts to do so, its only obligation would be to so inform the responsible plan fiduciary.

If the Department were to adopt the approach we have suggested, it appears that a prohibited transaction class exemption, similar to that proposed for responsible plan fiduciaries, would be required for recordkeepers in connection with obtaining information from fund managers. That is, the recordkeeper should be exempt from the excise taxes under Internal Revenue Code section 4975 if the fund manager fails to provide accurate or complete information.

B. Bundle of Services

Proposed Regulation: The Proposed Regulation indicates that if a service provider offers "a bundle of services that is priced as a package, rather than on a service-by-service basis," then

> "only the service provider offering the bundles of services must provide the disclosures required by this paragraph (c)(1). The service provider must disclose all services and the aggregate compensation or fees to be received, directly or indirectly, by the service provider, any affiliate or subcontractor of such service provider, or any other party in connection with the bundle of services."[5]

The Proposed Regulation then goes on to provide that

[5] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(A)(3).

> "[t]he service provider shall not be required to disclose the allocation of such compensation or fees among its affiliates, subcontractors, or other parties, [with two exceptions]…"[6]

In discussing this provision, the Preamble states that "the bundled provider generally is not required to disclose the allocation of revenue sharing or other payments among affiliates or subcontractors within the bundle."

The first exception to the non-disclosure of the allocation compensation is the following:

> "except to the extent such party receives or may receive compensation or fees that are a separate charge directly against the plan's investment reflected in the net value of the investment…."

The Preamble adds the following examples to this exception:

> "…such as management fees paid by mutual funds to their investment advisers, float revenue, and other asset-based fees such as 12b-1 distribution fees, wrap fees, and shareholder servicing fees if charged in addition to the investment management fee."

Comments:

1. As noted, the Proposed Regulation provides that this exception applies if "a service provider offers a bundle of services to the plan that is priced as a package, rather than on a service-by-service basis..." This language appears to be very broad. For example, it appears that an independent recordkeeper that offers mutual funds from a particular fund family on its recordkeeping platform and receives revenue sharing from those funds could be considered a bundled service provider which would not need to disclose revenue sharing received from the mutual funds.

   ASPPA and CIKR recommend that the Department confirm that the language in the regulation describing a bundle of services would include an independent recordkeeper that does not offer proprietary funds, but makes available a platform of investment options, and that prices the services as a package.

2. The Proposed Regulation requires the allocation of "compensation or fees…that are set on a transaction basis, such as finder's fees, brokerage commissions, and soft dollars (research or other products or services other than execution in connection with securities transactions)." The examples imply, but do not state, that the Department was contemplating investment-type fees charged on a transaction basis. These examples do not mention other types of fees that are set on a transaction basis, such as participant loans and distributions.

   ASPPA and CIKR recommend that the Department clarify that this provision applies to other types of fees charged on a transaction basis, such as participant loans and distributions. That is, ASPPA and CIKR recommend that covered service providers be required to disclose

[6] *Id.*

any fee which is a discrete charge and that the service for which such a discrete charge is imposed be considered a separate "service" under the Proposed Regulation.

3. There would appear to be two possible interpretations of the language for the first exception noted above:

   a. One interpretation is that a bundled provider does not have to disclose revenue sharing payments within the bundle because the amounts that are received are not "separate fees charged directly against the plan's investments [that are] reflected in the net value of the investment…" This interpretation is based on the view that what the provider receives is not a direct pass-through of the amount charged as an expense item by the mutual fund against the assets of the fund but rather is a payment made by the investment provider out of its own funds for services performed by the bundled provider on behalf of the investment provider.

   b. A second interpretation is that the bundled provider would have to disclose the amount of revenue sharing to the extent the provider or an affiliate or subcontractor receives compensation of the type listed in the preamble (*i.e.,* distribution fees, wrap fees, and shareholder servicing fees), regardless of the source of the funds.

      Consider the example of an independent recordkeeper, that is, one that does not have proprietary investment products. All the funds on its platform are managed by others and all of them may make revenue sharing payments to the recordkeeper for the service it provides in maintaining the records of who owns what investment. Similarly, a "traditional" bundled provider, that is, one that offers proprietary investments, will often also offer non-proprietary funds on its platform. This provider will receive revenue sharing from the non-proprietary funds for the same reason as the independent recordkeeper – *i.e.*, it is keeping track of who owns what for the non-proprietary funds.

   ASPPA and CIKR submit that the requirements of the Proposed Regulation should apply to both of the providers in this example in exactly the same way and that the disclosure standard is the same for all "bundled services." We further request that the Department clarify which of the interpretations set out above is correct and confirm whether or not revenue sharing within the bundle under such circumstances is required to be disclosed

4. The Proposed Regulation contains a second exception to the disclosure rule in bundled service arrangements for "compensation or fees…that are set on a transaction basis, such as finder's fees, brokerage commissions, and soft dollars (research or other products or services other than execution in connection with securities transactions)."[7] However, the Proposed Regulation does not define the term "transaction." As a result, service providers may not be able to determine whether a particular fee is set on a transaction basis. For example, some brokers may seek to characterize their activities as a "service" rather than a "transaction" and thereby avoid disclosure, which we submit would be contrary to what we perceive to be the intent of the Proposed Regulation.

[7] *Id.*

ASPPA and CIKR recommend that the Department define the term "transaction" as a situation in which there is a discrete, one-time event that leads to a fee being paid, such as a finder's fee, rather than a fee that is paid to a service provider for on-going efforts, such as enrollment services, investment advice, etc.

5. Some service providers that provide bundles of services receive multiple types of compensation.

   ASPPA and CIKR request that the Department clarify that unless the compensation falls within the non-allocation exception discussed above, all bundled service providers would be required to describe each distinct service for which it receives separate compensation and the amount of the compensation being received for each.

6. ASPPA and CIKR understand that mutual funds may pay commissions in connection with transactions involving the assets of the fund. We understand that such commissions are often paid to an affiliated broker-dealer that processes the transactions and that these commissions are not included in the fund's expense ratio and are not otherwise currently required to be disclosed in the fund's prospectus. It appears that such commissions, which presumably have some impact on the value of the mutual fund's assets, would constitute transaction fees that would fall under the second exception related to reporting of compensation in a bundled service situation. Further, it also appears that the payment of such commissions would constitute a transaction or relationship that would have to be reported under the conflict of interest requirements of the regulation.

   ASPPA and CIKR recommend that the Department require that such commissions be disclosed under the "transaction fee" exception and that the relationship between the mutual fund investment manager and its affiliated broker-dealer be disclosed under the conflict of interest requirements of the regulation.

7. The Proposed Regulation covers both a direct service provider and its affiliates. Further, in the bundle of services context, it also covers subcontractors of the primary service provider. In both instances, a service provider is required to disclose various items of information to the best of its knowledge. One of the questions these requirements, taken together, raises is the extent to which knowledge of an affiliated entity or of a subcontractor is imputed to a service provider, especially in the bundled context.

   We recognize that this is a difficult issue. One approach might be to state that information known to one service provider is not imputed to another, but this might be too broad a statement in a highly integrated organization with multiple entities that work closely together. Further, we do not want to suggest that a provider could simply chose to ignore information or chose to take no steps to find out information that is relevant to the services being provided.

   Another approach might be to state that anything known to one member of an affiliated group or a bundled service group would be attributed to the others, or at least to the primary service provider. But this approach would, in our view, be too broad, in that there could be situations in which the primary provider has no reasonable way of knowing information that is known to an affiliate half-way across the country or to a subcontractor.

ASPPA and CIKR request that the Department clarify the extent to which knowledge of an affiliate or subcontractor is imputed to other members of the group. In so doing, we recommend that knowledge not be imputed so long as the service provider has exercised reasonable diligence to find out information that is relevant to the services being provided.

8. In most instances, the primary provider in a bundled service group will make the disclosures required by the Proposed Regulation. In so doing, it will need to rely on disclosures obtained from other members of the group, some of which will not be affiliates (and thus not controlled by) the primary provider. This raises the issue of what happens when one member of the group fails to provide needed information and, through the exercise of reasonable diligence, the primary provider did not discover the omission. In other words, is the entire bundled arrangement a prohibited transaction? And who within the bundled service group is responsible for correction and any resulting excise taxes?

   ASPPA and CIKR recommend that the Department clarify that to the extent there is a failure to comply with the regulation as a result of the omission by one member of a bundled service group, the entire arrangement is not a prohibited transaction but only the portion of the transaction that relates to the services being provided by the breaching member of the group. Further, we recommend that the Department clarify that only the breaching member is responsible for correction and liable for any resulting excise taxes.

C. Effective Date

Proposed Regulation: The Proposed Regulation states that it is effective 90 days after the final version of the regulation is published in the Federal Register.

Additionally, the Proposed Regulation indicates that a contract with certain types of service providers would not be reasonable unless specified conditions are satisfied. The Proposed Regulation states:

> No contract or arrangement to provide services to an employee benefit plan, nor any extension or renewal of such contract or arrangement, by [certain types of service providers] is reasonable within the meaning of section 408(b)(2) of the Act and §2550.408b-2(a)(2) unless the requirements of paragraphs (c)(1)(ii) through (vi) of this section are satisfied.[8]

The Proposed Regulation does not specify whether it applies prospectively to contracts entered into, extended or renewed after its effective date, to all contracts in existence on that date, or both.

Comments:

1. Service providers will need to create or modify their contracts or arrangements in order to be able to satisfy the conditions of the Proposed Regulation. Especially for service providers that have hundreds or even thousands of clients, compliance with the Proposed Regulation will undoubtedly require more than 90 days.

[8] Prop. DOL Reg. § 2550.408b-2(c)(1)(i).

ASPPA and CIKR recommend that the Department make the final version of the regulation effective for new and renewal contracts as of the later of: (i) January 1, 2009; or (ii) 120 days after the final version of the regulation is published.

2. Many service providers already have contracts but it is unlikely that any of them meet the requirements of the Proposed Regulation. Many of these contracts are "evergreen" arrangements, *i.e.,* contracts with no set expiration or termination date (though they are terminable on notice by the plan in compliance with the existing requirements of Regulation 2550.408b-2(c)). It is unclear when the Proposed Regulation would apply to these arrangements or how a covered service provider would comply.

   ASPPA and CIKR request that the Department make several revisions to the final version of the regulation. First, we recommend that for existing contracts where there is no "renewal" or material change, the covered service provider is not required to modify its contract to come into compliance with the final version of the regulation until January 1, 2010 or later.

   Second, we recommend that the regulation provide that service providers with existing written agreements will be deemed to comply with the disclosure requirements by providing a written supplement and are not required to obtain the acknowledgement or consent of the responsible plan fiduciary. (We recognize that the final regulation cannot dictate whether such disclosure would comply with state law requirements governing the amendment of contract, but we submit that the Department can address whether such a disclosure would satisfy the requirements of the prohibited transaction exemption.)

   Third, the Proposed Regulation requires that disclosures be made "before the contract or arrangement was entered into (or extended or renewed)…" This is clearly impossible for existing contracts. This is another reason for the extension of the compliance date for contracts that are not being extended or renewed to a later date. Further, we request that the Department provide guidance regarding when a revision to an existing contract is considered an "extension" or "renewal," which would trigger an earlier compliance date.

3. The requirement in the Proposed Regulation that disclosures be made "before the contract or arrangement was entered into" raises another issue. In certain situations, especially an "open architecture" arrangement (in which a plan is not limited to a select group of mutual funds through an investment provider but may chose from a much broader array offered on a platform of an independent recordkeeper), meeting this requirement with respect to all items of compensation would be unworkable as a practical matter; and the issue is not limited to the open architecture structure.

   The reason for this is that a significant amount of indirect compensation is derived from services provided to mutual fund affiliates. Thus, the recordkeeper's compensation will depend on what investment elections the client makes from among the investment options on the platform. Often, investment elections are determined well after a service agreement is signed because the plan fiduciaries select the provider first and then, working with the provider, select the investment options. There also are other aspects of a service offering that may be priced separately that a client might not select until after a service agreement is signed.

In considering this issue, the Department should recognize that in many instances retirement plan service agreements have an effective date that is later than the date the contract is "entered into." At times, the period between the two events may be as long as 30 days but in others it may be as short as 10 days or two weeks.

ASPPA and CIKR recommend that the Department modify this requirement to provide some flexibility in this area. For example, one alternative might be to require disclosures no later than a reasonable period before the effective date of a contract. Another approach might be to permit service providers to provide estimates at the time a contract is entered into and then provide additional disclosure (to the extent the actual results differ from the estimates) within a reasonable period before the effective date of the contract. The "reasonable period" should take into account the period of the delay between execution and effectiveness of the contract. Further, if there is no such delay, then the standard set out in the Proposed Regulation would apply.

D. Contract Must Be in Writing

Proposed Regulation: The Proposed Regulation states "The terms of the contract or arrangement shall be in writing."[9]

Comments:

The Proposed Regulation does not define the term "arrangement." As a result, it is unclear whether an agreement between the responsible plan fiduciary on behalf of the plan and a service provider that is reduced to writing, but not signed by the parties, would constitute an "arrangement" for this purpose. At the recent Los Angeles Benefits Conference, one official from the DOL suggested that the term would apply to a situation in which the service provider is unable to obtain the signature of a client to a contract amendment. Presumably, if that is one of the intended applications of the term, it is not the only one. For example, we are aware that in situations involving a broker, the only documentation of the arrangement is an account opening application or perhaps even nothing more than a "broker of record" letter. Further, there may be situations in which a party is receiving payments (such as trailing commissions paid to a broker) but has no direct contract or arrangement with the plan or plans with respect to which the payment is being made. This could arise, for example, in a situation where a broker refers a plan to a third party administrator (TPA) which has a relationship with an investment provider. Without pre-arrangement with the TPA or the plan – indeed, often without their knowledge – the investment provider may make a payment to the broker because of the broker's introduction of the plan to the TPA with which the provider has a relationship.

ASPPA and CIKR request that the Department define the term "arrangement," or at least provide some addition information regarding its intended meaning in the context of the regulation. Perhaps this could be done by way of examples that will help service providers understand the scope of the term. For example, would the investment of plan assets in a mutual fund be an "arrangement" and the delivery of a prospectus an adequate disclosure of the terms of the arrangement?

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[9] Prop. DOL Reg. § 2550.408b-2(c)(1)(ii).

In particular, we request that the Department confirm that an account opening application or a broker of record letter is sufficient to constitute an arrangement.

Further, we also request that the Department confirm that a situation involving payments to a party who has no direct contact with a plan is not an "arrangement" for these purposes.

Finally, ASPPA and CIKR also request that the Department clarify that an arrangement does not need to be signed by the responsible plan fiduciary and the service provider.

E. To the Best of the Service Provider's Knowledge

Proposed Regulation: The Proposed Regulation states that the "terms of the contract or arrangement (including any extension or renewal of such contract or arrangement) shall require the service provider to disclose in writing, to the best of the service provider's knowledge, the information set forth in this paragraph (c)(1)(iii)…"[10]

Comments:

We believe that the language, "to the best of the service provider's knowledge" requires amplification. Based on a simple reading of the words, it appears that the service provider would not be required to make any effort to acquire information it did not have. We presume that the DOL did not intend to convey this and that service providers are expected to disclose information that they would reasonably be expected to know or that they could discover through ordinary commercially reasonable efforts.

ASPPA and CIKR request that the Department clarify that a service provider would not be required to make any effort other than ordinary commercially reasonable efforts to acquire information it did not have.

F. Specification of Services

Proposed Regulation: The Proposed Regulation would require the disclosure of "All services to be provided to the plan pursuant to the contract or arrangement and, with respect to each such service, the compensation or fees to be received by the service provider…"[11]

Comments:

The Proposed Regulation does not state the level of specificity that must be disclosed regarding the services provided. However, in describing the categories of service providers covered by the Proposed Regulation, the Department uses the term "services" broadly.

The term "services" could be used either broadly or narrowly. For example, a TPA could either describe that he provides third party administration services or that he calculates contribution amounts, determines key and highly compensated employees, performs top heavy testing, minimum coverage testing, excess deferral testing, annual contribution limit, non-discrimination

[10] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii).
[11] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(A).

testing, and employer deductibility testing, draft of summary annual report, annual government filings, benefit distribution election packages and custodian transmittal forms, etc.

ASPPA and CIKR request that the Department clarify what it means in using the term "services." We understand from informal conversations with individuals at the Department that the concepts described with respect to Schedule C to the 2009 Form 5500 apply for purposes of the Proposed Regulation and vice versa. We submit that such an interpretation would be too broad for these purposes and that service providers not be required to make disclosures of the types of services beyond (i) the broad categories of services used in describing covered service providers or (ii) the categories of services for which the service provider receives a specific fee, such as a fee received by a recordkeeper or third party administrator for processing and documenting a loan or distribution. If the term is intended to be broader, then we request that the Department provide examples to help guide service providers.

Finally, we also request that the Department confirm that a description of services that is more extensive than that mandated by the Proposed Regulation will not trigger other disclosure obligations (such as the fee attributable to specific services) under the Proposed Regulation. For example, RIAs may include in their service agreement a description of their services that breaks out recommendations regarding the selection of an investment provider and recordkeeper, assistance with development of an investment policy statement, assistance with the selection of the investment options to be offered to participants, assistance with the selection of a QDIA, monitoring services, educational services to the plan fiduciaries and participants, etc. At the same time, the RIA may charge a single annual fee covering all of these services. We submit that if the RIA elects to provide this type of disclosure that it not be required to break down the fee it receives to apply an amount to each service.

G. Compensation

Proposed Regulation: "Compensation or fees" is defined in the Proposed Regulation as "money or any other thing of monetary value (for example, gifts, awards, and trips) received, or to be received, directly from the plan or plan sponsor or indirectly (*i.e.*, from any source other than the plan, the plan sponsor, or the service provider) by the service provider or its affiliate in connection with the services to be provided pursuant to the contract or arrangement or because of the service provider's or affiliate's position with the plan."[12]

Comments:

1. It is unclear under the Proposed Regulation how the investment expenses for assets would be disclosed for a mutual fund window or a personal brokerage account. For a personal brokerage account, the provider can disclose what it costs to set up the account and any per transaction charges and/or "wrap" fees. However, in many instances, the participant selects his or her own broker, investment adviser or investment manager for the account. Thus, it would not be possible to disclose the brokerage or advisory costs, unless there is a captive or designated broker or adviser. Furthermore, if the plan has a list of core options and a mutual fund window, a service provider could disclose the management fees for the plan's core options, but it would be administratively impracticable for the service provider to disclose the

[12] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(A)(1).

fees for all of the funds available through the mutual fund window. Additionally, a single broker is used for some plans, while other plans allow participants to select their own brokers. In the latter situation, a service provider may not be able to disclose all of the commissions that are being paid to the brokers selected by participants. However, we acknowledge that presumably the brokers would be service providers who would also have to make disclosures.

ASPPA and CIKR recommend that the Department create an exception for mutual fund windows and personal brokerage accounts if the plan otherwise meets the broad range requirements of the Department's regulation to ERISA section 404(c), that is 29 CFR § 2550.404c-1, and if the amount is charged only to the individual participant's account and cannot be assessed against other participants.

2. The Proposed Regulation does not appear to require special disclosures to be made with respect to non-monetary compensation. However, some practitioners have questioned whether the regulation would require the separate disclosure of non-monetary compensation, such as trips, attendance at seminars and the like. Indeed, in many instances, the service provider will not know whether it will receive this type of compensation at the outset of the arrangement with the plan (because eligibility for the compensation will depend on factors such as new business, business retention, etc.), will not know the amount it will receive in the aggregate and will not know the amount that is attributable to plans covered by ERISA as opposed to non-plan clients, much less the amount attributable to an individual plan.

   ASPPA and CIKR request that the Department clarify that the regulation does not require special disclosures for non-monetary compensation. Additionally, ASPPA and CIKR request that the Department clarify that a service provider could provide a generic description of the types of compensation it might receive, but without including a description of the eligibility factors that would affect whether it will become entitled to the compensation or the formula for how the compensation is determined. If this type of disclosure were permitted, we request that the service provider be permitted to disclose only that the compensation would not exceed a specified dollar amount.

   Further, we request that the service provider be permitted to use any reasonable method for allocating the compensation among its plan clients and not be required to disclose the method used to make the allocation except on request of the responsible plan fiduciary. Finally, even in that event, we request that the service provider be permitted to disclose the methodology in summary fashion rather than through a detailed accounting.

3. The Proposed Regulation provides that "'Compensation or fees' include money or any other thing of monetary value (for example, gifts, awards, and trips) received, or to be received…indirectly *(i.e.*, from any source other than the plan, the plan sponsor, or the service provider)…" The language describing an indirect payment as being from a source other than the plan appears sensible. While we propose that payments from a plan sponsor be excluded from the operation of the Proposed Regulation entirely (see our Overview Comment No. 3), if that suggestion is not adopted, we also understand the reason for stating that an indirect payment is from a source other than the plan sponsor. However, the exclusion of payments from the service provider is unclear, since it seems to exclude payments by the service provider from itself.

ASPPA and CIKR request that the Department clarify what is meant by the exclusion from the description of indirect compensation any payments from the service provider. If it is intended for this to refer to payments from an affiliate of the service provider, this should be clarified, but we presume that is not the intent because such payments may need to be disclosed under other provisions of the Proposed Regulation (such as the exceptions in the context of bundled service arrangements).

4. The Proposed Regulation leaves unchanged the requirement that, in addition to the required disclosures of compensation and conflicts, a contract or arrangement between a plan and a service provider be "reasonable" and that the plan be able to terminate the contract without penalty on reasonably short notice. The regulation indicates that a payment designed to enable the service provider to recoup reasonable start up costs is not considered a penalty. A number of contracts contain charges that arise only if the contract is terminated, referred to as surrender charges, contingent deferred sales charges and the like. Contracts that promise a guaranteed fixed rate of return often contain "market adjustment" features which permit the investment provider to reduce the principal amount of the investment if the contract is surrendered at a time when interest rates have increased above the guaranteed rate. In most cases, these back-end charges or adjustments do not constitute penalties and thus do not violate the existing regulation. However, we are aware of situations in which the back-end charge is perpetual and applies to each new dollar invested by the plan; thus, they do far more than reimburse the provider for its reasonable start up costs.

   The issue for purposes of the new proposed disclosure requirements is that nothing in the Proposed Regulation appears to require disclosure of these types of charges.

   In addition, in order to prevent market timing, mutual funds and other investment providers impose redemption fees that apply in certain instances. It does not appear that anything in the Proposed Regulation requires disclosure of these charges (though perhaps this will be addressed in the Department's anticipated guidance on disclosure to participants).

   ASPPA and CIKR recommend that the Department expand the regulation to require disclosure of both of these types of charges.

H. Definition of Affiliates

Proposed Regulation: The Department defines an "affiliate" as "any person directly or indirectly (through one or more intermediaries) controlling, controlled by, or under common control with the service provider, or any officer, director, agent, or employee of, or partner with, the service provider."[13]

Comments:

1. In similar contexts, the Department has used 5% annual income and 5% ownership tests to determine whether an entity is controlled by another entity. For example, in determining

[13] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(A)(1).

whether a financial interest exists, the Department will consider whether the fees paid by the hiring company exceed 5% of the investment advisor's annual gross income.[14]

ASPPA and CIKR request that the Department provide additional information regarding the term "affiliate." Inasmuch as the 5% tests noted above have become levels of compensation or ownership below which one party is considered independent of the other, we suggest that this standard be used, at least as a safe harbor if not the exclusive means of determining whether one party is an affiliate of another.

I. Use of Formulas, Etc.

Proposed Regulation: The Proposed Regulation indicates that the use of formulas and other methods of expressing compensation are optional as long as the fiduciary can evaluate the reasonableness of the fees. The Proposed Regulation states that:

> Compensation or fees may be expressed in terms of a monetary amount, formula, percentage of the plan's assets, or per capita charge for each participant or beneficiary of the plan. The manner in which compensation or fees are expressed shall contain sufficient information to enable the responsible plan fiduciary to evaluate the reasonableness of such compensation or fees.[15]

Comments:

1. Under some circumstances, the service provider may not know the exact amount or formula that they will receive as compensation. However, the service provider may know that it will receive compensation within a particular range. The service provider may not even know whether it will qualify to be eligible to receive the compensation. For example, the compensation may be based on whether the service provider generates a certain amount of new business, which it may not be able to predict at the outset of a contract with a new client.

   ASPPA and CIKR request that the Department clarify that disclosure indicating that the amount of compensation received would not exceed a specified amount (or in the case of a formula that has changes at various asset breakpoints, that the compensation would not exceed a specified amount at each breakpoint) would satisfy this requirement of the regulation.

2. Many service providers charge an hourly rate. However, the Proposed Regulation states "Compensation or fees may be expressed in terms of a monetary amount, formula, percentage of the plan's assets, or per capita charge for each participant or beneficiary of the plan."

   ASPPA and CIKR request that the Department clarify that the language in the Proposed Regulation represents examples of types of compensation rather than the only types of compensation that may be paid. ASPPA and CIKR request that the Department state in the regulation that service providers can describe compensation in terms of a monetary amount,

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[14] *See, e.g.,* AO 2001-09A, AO 2003-07A, PTCE 84-14, 68 FR 33185 (Jun. 3, 2003).
[15] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(A)(2).

formula, percentage of the plan's assets, per capita charge, hourly rate, or any other reasonable method. If not, ASPPA and CIKR request that the Department clarify whether an hourly rate would be considered a formula and, if not, under which category in the Proposed Regulation hourly rates would be included.

J. Use of Separate Documents

Proposed Regulation: The preamble indicates that the disclosures can be made in separate documents. It states:

> All of the required disclosures need not be contained in the same document, as long as all of the required information is presented to the responsible plan fiduciary in writing before such fiduciary enters into the contract or arrangement. Written disclosures may be provided in separate documents from separate sources and may be provided in electronic format, as long as these documents, collectively, contain all of the elements of disclosure required by the regulation. For example, a prospectus required by Federal securities laws, or a Form ADV required to be filed by a registered investment adviser, may include some of the indirect fee or conflict of interest information that a service provider would be required to disclose under this proposal. In these circumstances, the contracting parties are free to incorporate such materials by reference. The Department expects that the service provider will clearly describe these additional materials and explain to the responsible plan fiduciary the information they contain.[16]

Comments:

1. The preamble indicates, but the Proposed Regulation does not require, a service provide to incorporate by reference any materials provided in separate documents and describe any materials that are provided in a separate document. We understand that the Department intends for this to be a condition of providing the disclosures through multiple documents. Furthermore, the Proposed Regulation does not specify the degree of specificity that would be needed if a service provider incorporates by reference.

   ASPPA and CIKR recommend that the Department provide for a consolidated form of disclosure, perhaps in summary form, as indicated in our Overview Comment No. 2. Further, to the extent the Department retains the concept of incorporation of other documents by reference, we recommend that the service provider be required to describe any additional materials and explain the information they contain in a summarized format. Finally, we also recommend that the Department require that when documents are incorporated by reference, such as a prospectus, the service provider be required to explain with specificity the information being incorporated.

2. Some disclosures currently given by service providers are provided using technical terms or "industry jargon" that may be difficult for plan fiduciaries to understand.

[16] *Id*.

ASPPA and CIKR recommend that the Department require the disclosures to be made using plain English and in an easy-to-understand format.

K. Fiduciary Status

Proposed Regulation: The Proposed Regulation would require a service provider to disclose "to the best of the service provider's knowledge…[w]hether the service provider (or an affiliate) will provide any services to the plan as a fiduciary either within the meaning of section 3(21) of the Act or under the Investment Advisers Act of 1940…"[17]

Comments:

1. The Proposed Regulation does not state if a service provider would be required to state if it is *not* a fiduciary. The Proposed Regulation also does not state whether a service provider is required to distinguish between its status as a fiduciary under ERISA or under the Investment Advisers Act of 1940 (the "'40 Act") or both.

   In some instances, a service provider may provide investment related services that do not constitute "investment advice" under the definition in Regulation § 2510.3-21(c) but which closely mirror such services. Thus, a plan fiduciary (especially in the small plan market) may be mistakenly conclude that its service provider is serving as a fiduciary when, in fact, it is not.

   ASPPA and CIKR recommend that the Department clarify that a service provider that is not serving in a fiduciary capacity under ERISA make an affirmative statement to that effect. Further, we recommend that the service provider be required to state the law under which it is a fiduciary. That is, if an RIA will not be providing investment advice of the type described in Regulation § 2510.3-21(c), then it would state that it is a fiduciary only under the '40 Act, but if it were providing such investment advice, it would state that it is a fiduciary by reason of both laws.

2. The Proposed Regulation does not specify whether a fiduciary has to indicate which services it is performing as a fiduciary if it is performing both fiduciary and non-fiduciary services. For example, an RIA may be providing ERISA fiduciary investment advice but also non-fiduciary participant education services that fall under the definitions in Interpretive Bulletin 96-1.

   ASPPA and CIKR recommend that service providers be required to specify, in broad terms, the services for which they will act as a fiduciary and those for which they are not.

3. It is not always clear whether a service provider is acting as a fiduciary. For example, the service provider may not believe that he is exercising sufficient discretion to cause him to become a fiduciary.

[17] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(B).

ASPPA and CIKR request that the Department clarify that a service provider who reasonably believes that he is acting in a non-fiduciary capacity would be considered to have satisfied this condition even if he later is deemed to have acted as a fiduciary.

4. Service providers would also have to disclose whether affiliates are serving in a fiduciary capacity. A service provider may reasonably believe that the actions taken by an affiliated entity could potentially cause it to be a fiduciary, but may not have sufficient information to confirm whether the affiliate would be a fiduciary and the affiliate denies that it is a fiduciary. For example, some brokers are providing investment advice, but claim that they are only providing investment education. An affiliated service provider may have received anecdotal information that would cause it to believe that some brokers are providing investment advice, but it may not have any evidence.

   ASPPA and CIKR request that the Department clarify that a service provider who is uncertain as to whether an affiliate is acting as a fiduciary could disclose that to the responsible plan fiduciary and that this would satisfy the requirements of the regulation. ASPPA and CIKR also request that the Department clarify that if the service provider fails to disclose that the services of an affiliate are being rendered as a fiduciary, only the fiduciary services would be considered a prohibited transaction and not all of the services being provided.

L. Financial or Other Interest

Proposed Regulation: Service providers would also need to disclose "[w]hether the service provider (or an affiliate) expects to participate in, or otherwise acquire a financial or other interest in, any transaction to be entered into by the plan in connection with the contract or arrangement…"[18]

Comments:

It is not always clear whether a relationship whether relationships between service providers would need to be disclosed. The example provided in the preamble, involving a service provider participating in the sale of property, is an uncommon situation, especially in the small plan market. Another example that may be more realistic would be a situation in which an investment provider expects to sell its proprietary investments in connection with its arrangement with a plan (or even requires that a certain number of proprietary investments be selected).

ASPPA and CIKR request that the Department clarify, by way of example, the most common situations in which the Department anticipates that this will arise.

M. Other Relationships or Arrangements

Proposed Regulation: The Proposed Regulation would also require a service provider to disclose "[w]hether the service provider (or an affiliate) has any material financial, referral, or other relationship or arrangement with a money manager, broker, other client of the service provider, other service provider to the plan, or any other entity that creates or may create a

[18] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(C).

conflict of interest for the service provider in performing services pursuant to the contract or arrangement …"[19] The preamble explains "If the relationship between the service provider and this third party is one that a reasonable plan fiduciary would consider to be significant in its evaluation of whether an actual or potential conflict of interest exists, then the service provider must disclose the relationship."[20]

Comments:

1. It is unclear what it means for a relationship or arrangement to be "material" or what a reasonable plan fiduciary would consider to be "significant." For example, some service providers receive compensation from third parties if they change providers or custodians. However, they do not view this payment to create a conflict of interest.

   ASPPA and CIKR request that the Department provide examples and/or other clarification regarding what would constitute a material financial, referral, or other relationship or arrangement.

2. It is also unclear what the Department means by a "referral" relationship. For example, if a third party administrator recommends to its clients that they engage a registered investment adviser to provide investment advice but receives no direct or indirect payment from the RIA, is that a material referral relationship? If so, which of the parties must disclose the relationship, the party that makes the referrals or the party receiving the referrals or both? Would it matter whether the recommendation is to only one client or would the relationship only be "material" if there were more than one recommendation, and if more than one, how many? If a referral relationship requires that there be a payment by one party to the other, would the payment element be met if the RIA refers clients back to the TPA even though no direct or indirect payment is made by the TPA to the RIA?

   ASPPA and CIKR request that the Department clarify what it means by a referral relationship. We recommend that such a relationship only require disclosure where there is some form of payment by one party to the other and only if the amount of the payment exceeds 5% of the annual revenues of the party receiving the payment (similar to the "control" concept in the SunAmerica Advisory Opinion).

N. Ability to Affect Own Compensation

Proposed Regulation: A service provider would also need to disclose "Whether the service provider (or an affiliate) will be able to affect its own compensation or fees, from whatever source, without the prior approval of an independent plan fiduciary, in connection with the provision of services pursuant to the contract or arrangement…"[21] The Department provides "incentive, performance-based, float, or other contingent compensation" as examples.

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[19] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(D).
[20] *Id*.
[21] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(E).

Comments:

1. The Department has indicated that service providers may be able to avoid affecting their own compensation by using a process described in Aetna advisory opinion.

   ASPPA and CIKR request that the Department confirm that service providers can use the "negative election" process described in the Aetna advisory opinion to avoid having the ability to affect their own compensation and, if they did so, would not have to make a disclosure (since they would not have the ability to affect their own compensation).

2. The Department provides examples of the types of compensation or fees that a service provider might receive if it is able to affect its own compensation. One of the examples is compensation received as a result of "float." In our experience, the term "float" is not one that has a universally agreed-upon common meaning. In other words, the term can be applied in a number of different settings.

   ASPPA and CIKR request that the Department define what it means by "float" for purposes of the regulation. This might be accomplished, for example, by reference to the description provided in FAB 2002-3, in which the Department discusses two situations: earnings resulting from the anticipated short-term investment of funds held pending the receipt of investment instructions; and funds transferred to a general account of a financial institution in connection with issuance of a check to make a plan distribution or other disbursement.

3. As mentioned above, some service providers receive compensation from third parties if they make a change in the entities that provide other services to a plan client, such as if an independent recordkeeper were to enter into an arrangement with a new custodian.

   ASPPA and CIKR request that the Department clarify that if a service provider receives compensation from a third party in connection with a change in a subcontractor or other party that provides services to a plan client, the service provider would not have to disclose that it is able to affect its own compensation in so doing.

4. In some situations, the result of consulting advice given by a service provider may result in the receipt of additional compensation by that service provider. Consider the example of a broker or RIA that provides consulting services to a 401(k) plan in addition to its other services. Assume that its fee is based on a percentage of plan assets. If it recommends that the plan sponsor adopt automatic enrollment and as a result of the adoption of that feature, plan participant increases from 50% of eligible employees to 90% of eligible employees, the service provider will receive additional compensation simply because more funds are going into the plan. The formula for its compensation will have been disclosed in the context of its compensation arrangement, but arguably, the service provider would also have to disclose that it could affect its own compensation as a result of the consulting advice it gives. Presumably, this is not what was intended by the Department, especially since it appears that public policy supports greater participation and deferrals in 401(k) plans.

   However, consider the example of 401(k) plan enrollers who receive extra compensation if they are able to encourage participants to direct their assets into certain investments.

Presumably, this arrangement should be disclosed by the provider that employs the enrollers, even if the actions of the enrollers do not constitute investment advice under ERISA.

ASPPA and CIKR request that the Department clarify that situations of the type described in the first example above would not be covered by the requirement to disclose the circumstances under which the service provider could affect its own compensation. However, we request that the Department clarify, possibly by way of example in the preamble to the final regulation, that situations of the type described in the second example would have to be disclosed in connection with this item (and possibly others).

5. The Department does not define the term "independent plan fiduciary."

   ASPPA and CIKR request that the Department use the term responsible plan fiduciary rather than "independent plan fiduciary" or that it provide a definition of the latter term.

O. Policies to Address Conflicts of Interest

Proposed Regulation: The Proposed Regulation would require the disclosure of "[w]hether the service provider (or an affiliate) has any policies or procedures that address actual or potential conflicts of interest or that are designed to prevent either the compensation or fees described in [the Proposed Regulation] or the relationships or arrangements described in [the Proposed Regulation] from adversely affecting the provision of services to the plan pursuant to the contract or arrangement…."[22]

Comments:

The Proposed Regulation appears to be referring to both written and unwritten policies and procedures.

ASPPA and CIKR request that the Department clarify whether it is referring to only written policies and procedures or both written and unwritten policies and procedures. ASPPA and CIKR also request that the Department clarify that this provision would not require a service provider to adopt these types of policies and procedures if they do not already use them.

P. Material Changes

Proposed Regulation: The terms of the contract must require the service provider to "disclose to the responsible plan fiduciary any material change to the information required to be disclosed in paragraph (c)(1)(iii) of this section not later than 30 days from the date on which the service provider acquires knowledge of the material change."[23]

Comments

1. This timing is problematic where the service provider is responsible for the change. For example, a service provider may decide a significant amount of time before the beginning of the calendar year to increase its fees. Under the Proposed Regulation, it would be required to

[22] Prop. DOL Reg. § 2550.408b-2(c)(1)(iii)(F).
[23] Prop. DOL Reg. § 2550.408b-2(c)(1)(iv).

notify the fiduciary no later than 30 days from the date it "acquires knowledge of the material change," that is, the date it decides to change its fees, even though the change would not be effective for a significant period of time.

ASPPA and CIKR recommend that the Department clarify that a service provider would not be required to disclose its decision to make a material change within 30 days after it makes that decision and that it may make the disclosure at a date that is closer in time to when the change would become effective.

2. Some types of charges, such as management fees and expense ratios, change frequently. For a plan that allowed participants to invest in a large number of mutual funds, these disclosures would have to be made very often, potentially every month.

   ASPPA and CIKR recommend that the Department allow a service provider to give the responsible plan fiduciary an annual notice instead for regularly recurring changes to avoid the financial burden on the provider of giving the notification and the burden on the fiduciary of having to consider new information that may have little immediate impact on its decision to retain the service provider or replace it with another.

   ASPPA and CIKR also recommend that Department clarify that service providers do not have to get something signed by the client when they notify the client of a material change unless it fundamentally changes the terms of the contract.

3. The 30-day time frame condition would be difficult for a large service provider to satisfy if it receives incomplete or questionable information from subcontractors or affiliates. The service provider would need time to obtain the information from its affiliate or subcontractor, investigate the accuracy and completeness of the information, decide how to respond, draft communications to its clients and deliver the communications. This would likely take a minimum of 60 - 90 days.

   ASPPA and CIKR recommend that the Department lengthen this time frame to 90 days.

Q. Reporting Assistance

Proposed Regulation: The Proposed Regulation would require a service provider to disclose "all information related to the contract and any compensation received thereunder" if it is requested by the responsible plan fiduciary or plan administrator in order to comply with ERISA's reporting and disclosure requirements. We note that in the proposed prohibited transaction class exemption that accompanied the release of the Proposed Regulation, the Department provided that the responsible plan fiduciary is required to notify the department if information is not provided within 90 days following a written request to the service provider.

Comments:

The Proposed Regulation does not specify when a service provider would be considered to have engaged in a prohibited transaction as a result of failing to provide information upon request to a fiduciary.

ASPPA and CIKR recommend that the Department clarify that a failure to provide the information within the 90 day period after a written request specified in the proposed prohibited transaction class exemption be the standard applied in the Proposed Regulation. Also, we recommend that the Department clarify that the arrangement with the plan would be considered a prohibited transaction only as of the date when the service provider failed or refused to provide the information.

R. Correction or Remedies

Proposed Regulation: The Proposed Regulation states "No contract or arrangement to provide services to an employee benefit plan, nor any extension or renewal of such contract or arrangement…is reasonable within the meaning of section 408(b)(2) of the Act and §2550.408b-2(a)(2) unless the requirements of paragraphs (c)(1)(ii) through (vi) of this section are satisfied."[24]

Comments:

1. The failure to satisfy any of the elements of the final version of the regulation would appear to indicate that the service provider could not rely on the exemption.

   It is unclear what the correction would be for a prohibited transaction for the provision of services that were necessary for the operation of the plan, did not involve excess compensation and were pursuant to a reasonable arrangement, except for the fact that one or more of the requirements with respect to an item of compensation or a particular relationship with a third party were not made to the responsible plan fiduciary.

   ASPPA and CIKR request that the Department provide a "cure" provision in the regulation. Many commercial contracts provide that a party is not considered to be in default even if it commits a breach of a contract provision so long as it corrects the breach within a specified time period. We submit that a similar provision should be built into the regulation to enable a service provider to retroactively correct a failure to provide the required disclosures to the responsible plan fiduciary. Such correction would only be permitted if the failure were discovered on a self-audit or after a request by the responsible plan fiduciary, but not after the fiduciary had notified the Department under the prohibited transaction class exemption. Further, the failure would be deemed cured only if the service provider obtains a confirmation that the fiduciary would have approved the transaction had the information been provided before the plan entered into, renewed or extended the agreement. Under these circumstances, the arrangement would not be considered a prohibited transaction.

2. A service provider may inadvertently fail to provide some of the necessary disclosures, such as an item of compensation.

   ASPPA and CIKR request that the Department allow a "good faith effort" exception to the prohibited transaction consequences. Additionally ASPPA and CIKR request that the Department allow a de minimis exception to the regulation, such as where the service provider failed to disclose an item of compensation if the amount was less than 1 basis point

[24] Prop. DOL Reg. § 2550.408b-2(c)(1)(i).

or 5% of the total compensation received by the service provider (the latter being the threshold for "control" under prior Department guidance such as the SunAmerica Advisory Opinion).

ASPPA and CIKR also request that the Department provide that correction of the failure to disclose an item of compensation would only require returning the compensation the service provider received, rather than having to disgorge all of the compensation the service provider received. In this context, we refer you to our comment in item B.8 above regarding correction in a bundled service environment.

Finally, ASPPA and CIKR also request that the Department provide additional information on correcting prohibited transactions. For example, would a service provider that remedied the failure to have a written contract be able to rely on the exemption prospectively? What if the contract had a retroactive effective date? Is there any way to remedy other types of failures retroactively, particularly if they are relatively minor (such as when a service provider discloses all of the necessary information, but fails to represent that he will do so)?

These comments were prepared by ASPPA and CIKR and were primarily authored by the Reish Lufman Reichter & Cohen law firm. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
ASPPA Executive Director/CEO

/s/
Tommy Thomasson, Chair
Council of Independent 401(k) Recordkeepers

/s/
Teresa T. Bloom, Esq., APM
ASPPA Chief of Government Affairs

/s/
Robert M. Richter, Esq., APM, Co-chair
ASPPA Gov't Affairs Committee

/s/
Debra A. Davis, Esq., APM, Chair
ASPPA/CIKR Fee Disclosure Task Force

Exhibit A

ABC Company 401(k) Plan

XYZ Service Provider Disclosure -- Expected Plan Expenses
For Plan Year Beginning January 1, 2008

The following expenses may be charged to to the plan. Some of these expenses may reduce the value of participant accounts. Some plan expenses may be paid by the plan sponsor.

I. Investment Expenses - The investments offered by the plan have related expenses. The amounts listed below are the annual percentage that will be charged based on the amount the participant placed in the particular investment.

EXAMPLE: If the fee is 0.50% and a participant placed $1,000 in that investment for one year, the participant's account would pay $5 for that type of expenses for that investment.

Investment Option	Investment Management Fees[1]	Administrative & Recordkeeping Fees[2]	Selling Costs & Advisory Fees[3]	Total
AAA Investment	0.50%	0.20%	0.25%	0.95%
BBB Investment	0.42%	0.20%	0.25%	0.87%
CCC Investment	0.20%	0.20%	0.25%	0.65%
DDD Investment	0.60%	0.20%	0.25%	1.05%
EEE Investment	0.35%	0.20%	0.25%	0.80%

II. Other Asset Based Fees - These fees are assessed on the total assets in the plan and are not investment specific.

Type of Fee	Investment Management Fees	Administrative & Recordkeeping Fees	Selling Costs & Advisory Fees	Total
Plan Level Fee		0.20%		0.20%
Investment Advisory Fees			0.40%	0.40%
- Plan Expense Reimbursement		-0.20%	-0.25%	-0.45%
Net Fees on Total Plan Assets		**0.00%**	**0.15%**	**0.15%**

III Fees Paid Directly by Plan Sponsor - These fees are paid by the plan sponsor and are not paid out of plan assets.

Type of Fee	Investment Management Fees	Administrative & Recordkeeping Fees	Selling Costs & Advisory Fees	Total
Plan Sponsor Paid Fees		$1,000		$1,000

IV. Total Fees - These are the total fees based on estimated assets of $1 million and 20 participants. The fees assessed on investments are based on the allocation of investments by the 20 participants in the plan as of 90 days prior to the date of this notice. These amounts do not include transactional expenses (see below).

Type of Fee	Investment Management Fees	Administrative & Recordkeeping Fees	Selling Costs & Advisory Fees	Total
Total Expenses on Investments	$4,140	$2,000	$2,500	$8,640
Total Asset Based Fees			$1,500	$1,500
Total Fees Paid by Plan Sponsor		$1,000		$1,000
Total	**$4,140**	**$3,000**	**$4,000**	**$11,140**

V. Transactional Expenses - These fees are only charged when participants request the services described below.

Service	Fee
Brokerage Account	$60 per year
Participant Loan Origination Fee	$50 per loan
Distribution	$35 per distribution (including rollovers)

VI. Conflict Statement

All of the investments are provided by unaffiliated parties. XYZ Service Provider receives revenue sharing from all investments for recordkeeping and administrative services, and for advisory services, which is used to offset fees otherwise charged for such services as disclosed in Section II. above.

[1] Investment management fees are the portion of the expense ratio allocated to investment management expenses.
[2] Administrative and recordkeeping is the portion of the expense ratio attributable to administration and recordkeeping plus any additional administrative and recordkeeping charges attached to the investments.
[3] These include 12b-1 fees and other related selling costs and advisory fees attached to the investments.