

Request for Information Regarding Model Fee Disclosure Form Under Investment Advice Prohibited Transaction Exemption ERISA §§408(b)(14) & 408(g)

Department of Labor

February 21, 2007

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the Department of Labor's (DOL) request for information (RFI) on the new prohibited transaction exemption under ERISA §§408(b)(14) and 408(g) for the provision of investment advice to participants and beneficiaries under §601 of the Pension Protection Act of 2006 (PPA). In particular, ASPPA is providing comments on the questions in the RFI relating to the model form for the disclosure of certain fees and other compensation paid to a "fiduciary adviser" or an affiliate as defined under new ERISA §408(g)(11)(A).

ASPPA is a national organization of approximately 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.

Comments

Under the new prohibited transaction exemption for investment advice,¹ the "fiduciary adviser" responsible for advice provided to plan participants and beneficiaries must furnish a written notification of all fees or other compensation that the fiduciary adviser, or any affiliate, is to receive, including third-party compensation that relates to the advice provided by the adviser. The statute directs the DOL to issue a model form to be used for this disclosure. In connection with developing a model disclosure form, ASPPA provides the following comments on the questions asked in the RFI relating to the model disclosure.

¹ ERISA §§408(b)(14) and 408(g).

Question 1: In general, what types of information relating to fees received by fiduciary advisers and their affiliates would be helpful to participants and beneficiaries in making their investment decisions?

Information regarding any adviser compensation that is based on (or calculated by reference to) the particular investments made by the participant would be helpful. Such information would give the participants and beneficiaries a basis to determine the extent to which the adviser could have a conflict of interest in providing its advice. Participants should also be informed how the fees are calculated; that is, whether the fees are based on a percentage of assets, a flat fee or an hourly fee.

Question 2: What types of fees and compensation (including those provided by third parties) would be encompassed by ERISA §408(g)(6)(A)(iii), which refers to “all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property”?

The fees and compensation covered by this provision would include any compensation that is based on the amount of assets invested in a particular investment or the investment itself, where an investment proposed by the adviser would result in either (a) a proportionate increase in the amount paid to the fiduciary adviser or its affiliate, such as an increased 12b-1 fee resulting from an investment in a mutual fund, or (b) a payment to the fiduciary adviser or affiliate that would not be made absent the investment, such as a sales commission.

Question 3: What challenges might be encountered in assembling and/or presenting the information on fees and compensation described in section 408(g)(6)(A)(iii) in a manner that is clear and understandable by the average plan participant? Are there any suggestions as to how these challenges can be addressed by the Department?

The challenge would be to clearly present to the participant the relationship between (1) the fees and compensation payable to the fiduciary adviser and its affiliates and (2) the participant’s investment decision. This could be accomplished by requiring the use of a table setting out the different possible investments covered by the advice and the total fees or other compensation payable with respect to each investment, giving the rate of fees or other basis for determining the compensation (but netting out any applicable offsets or reductions to minimize confusion). In addition, it could be helpful to provide a concrete example of what the fiduciary adviser or its affiliates would receive based on a hypothetical investment of \$1,000.

Participants should also be notified of compensation that the adviser receives that could result in a potential conflict of interest. This information should clearly indicate that the compensation is separate from the amount paid by the participant and is meant only to disclose potential conflicts of interest.

The biggest challenge may be explaining to participants that any indirect compensation received by the adviser does not affect or increase the amount paid by the participant. Participants need to understand the amount that they pay, directly or indirectly, but also that compensation received by plan advisers does not increase that amount. For example, if an

adviser receives a share of 12b-1 fees paid by a mutual fund, it does not increase the amount paid by the participant.

Question 4: Is there a form or format for presenting information on fees and compensation described in section 408(g)(6)(A)(iii) (e.g., narrative, chart, combination of both) that might be particularly suitable in giving participants a clear and understandable description of the fees and compensation received by a fiduciary adviser or its affiliates? Is there an optimal time frame, relative to when the advice is provided, for providing this information to participants and beneficiaries? What impact, if any, will the receipt of a model form have on investment decisions made by participants and beneficiaries?

As indicated in the response to Question 3, a table would be particularly suitable for this purpose. The information should be provided at the time the advice is given, so that it can be used with the advice. The model form should permit participants and beneficiaries to take into account the potential for conflicts of interest in considering whether to follow the advice, thereby enabling the participants to make more informed investment decisions.



These comments were prepared by ASPPA's DOL Subcommittee of the Government Affairs Committee, Debra A. Davis, Esq., APM, Chair, and were primarily authored by Donald J. Myers, Esq., APM. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

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