



AMERICAN BENEFITS COUNCIL

December 14, 2007

COUNCIL SUMMARY: DOL PROPOSED 408(B)(2) REGULATIONS ON FEE DISCLOSURE

The Department of Labor (DOL) has released proposed regulations detailing the disclosure required for a plan service agreement to constitute a “reasonable contract or arrangement” under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). The proposal would require a plan service provider to disclose the compensation it will receive, directly or indirectly, and any potential conflicts of interest that may arise in connection with its services to the plan.

Following are a few highlights from the 408(b)(2) proposal:

- Disclosure requirements would apply to arrangements for plan services from service providers service providers who:
 1. provide services as a fiduciary (under ERISA or under the Investment Advisors Act of 1940),
 2. provide banking, consulting, custodial, insurance, investment advisory (plan or participants), investment management, recordkeeping, securities or other investment brokerage, or third party administration services, *or*
 3. receive any indirect compensation in connection with accounting, actuarial, appraisal, auditing, legal or valuation services.
- Requirements apply to health and welfare plans as well as retirement plans. However, they do not apply to contracts or arrangements with entities that are merely providing plan benefits to participants and beneficiaries, rather than providing services to the plan itself.
- The contract with the service provider must be in writing, must specifically require the service provider to provide written disclosure of the information required by the proposed regulations, and must include a representation by the service provider that all required information has been provided to the responsible plan fiduciary. If part of the information is contained in other documents such as a prospectus, the service provider should describe the additional materials and explain what information they contain.

- The service provider must disclose all direct and indirect compensation it will receive in connection with the services, and compensation is broadly defined to include money and any other thing of monetary value received by the service provider or its affiliate in connection with the services provided to the plan or the financial products in which plan assets are invested. An extensive list of examples is included. Indirect compensation includes fees that service providers receive from parties other than the plan, the plan sponsor, or the service provider.
- If a service provider cannot disclose compensation in terms of a specific dollar amount, then the service provider can disclose compensation by using a formula, a percentage of the plan's assets, or a per capita charge for each participant or beneficiary.
- For bundled arrangements, the bundled service provider must disclose information concerning all services to be provided in the bundle, regardless of who provides them, and the aggregate direct compensation, as well as all indirect compensation from third parties that will be received by the service provider, its affiliates or subcontractors within the bundle.
- Generally, the bundled provider is not required to break down this aggregate compensation or fees among the individual services comprising the bundle. However, the bundled provider must separately disclose (1) compensation of any party providing services under the bundle that receives a separate fee charged directly against the plan's investment reflected in the net value of the investment, such as management fees paid by mutual funds to their investment advisers, float revenue and other asset-based fees (if paid in addition to the investment management fee), and (2) compensation on a transaction basis, such as finder's fees, brokerage commissions, or soft dollars (even if paid from mutual fund management fees or similar fees).
- The service provider must identify whether it will provide services to the plan as a fiduciary.
- Other requirements are intended to inform the plan fiduciary of the service provider's relationships or interests that could result in conflicts of interest for the service provider in its performance of services for the plan.
- Service providers must notify fiduciaries of any material changes within 30 days of the service provider's knowledge of the change.
- The DOL anticipates that the proposed regulation will apply broadly to relationships between service providers and employee benefit plans even if the plans are not subject to ERISA's reporting requirements.

- The consequences of failing to satisfy the proposed regulations would be that the contract or arrangement would not be “reasonable” and would, therefore, be a prohibited transaction.
- The DOL also published a proposed prohibited transaction class exemption which would not hold the fiduciary liable, providing certain conditions are met, if the service provider, unbeknownst to the fiduciary, fails to satisfy its disclosure obligations. Among the conditions required would be a written request for the missing disclosures to the service provider and a notice to the DOL if the disclosures are not provided within 90 days of the written request.

Written comments on both the proposed regulation and the proposed class exemption are due February 11, 2008. The proposed regulations and class exemption are expected to be effective 90 days after publication of the final versions in the Federal Register.