February 11, 2008

Filed Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: 408(b)(2) Amendment
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Comment on Proposed 408(b)(2) Regulations

Dear Sir or Madam,

The American Benefits Council (Council) appreciates the opportunity to comment on the proposed regulations under section 408(b)(2) of the Employee Retirement Income Security Act (ERISA) which were issued in December 2007. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We would like to start by recognizing and commending the very significant efforts made by the Employee Benefits Security Administration (EBSA) in these proposed regulations. The Council shares EBSA's goal of ensuring that plan fiduciaries have the information they need to hire and monitor service providers for their employee benefit plans. The Council also appreciates that the benefits industry has changed significantly in the past 20 years and that EBSA is working diligently to provide guidance that balances the need for appropriate disclosure against potentially excessive costs and complexities of administration.

We provide below a number of suggestions for improving the regulation. As discussed below, one of our primary concerns is about the scope of the regulation and the need for a thorough vetting of all of the different types of arrangements that will be affected by the regulation. We also have questions about whether the regulation applies to certain basic arrangements, for example, whether the regulation applies to services that are provided to an investment fund purchased by a plan. In addition, we have comments on a number of more specific aspects of the proposed regulation.

Scope of the Regulation

As drafted, the proposed regulations would apply broadly to all employee benefit plans subject to ERISA sections 406 and 408. Thus, the proposed regulations would require disclosures with respect to defined contribution plans, defined benefit plans, and health and welfare plans. This scope is logical in a technical sense, since section 408(b)(2) has the same scope. Moreover, we recognize the public policy desire to address the disclosure issues with respect to all types of plans.

We are not urging you to narrow the scope of the proposed regulations. Rather, we urge you to finalize the proposed regulations in three separate components -- first defined contribution plan disclosure, then defined benefit plan disclosure, and finally health and welfare plan disclosure. Each component would be considered separately, and the next component would not be considered until the prior component was completed. Thus, for example, defined contribution plan issues would be considered first, with the other two sets of issues “reserved”.

Our reasons for this request are as follows. Each component is an enormous undertaking and very different from the other two components. Any attempt to deal with all three together in an expeditious fashion will, in our view, fail. This is particularly true with respect to the health and welfare arena. The publicity and public policy discussions regarding the fee issues over the last couple of years have focused on the defined contribution plan arena. Accordingly, the message that the proposed regulations apply fully to health and welfare plans is only beginning to spread among those service providers and plan sponsor personnel who are active in this arena. And most of those who have become aware of it have only begun to analyze the countless issues that would arise. In short, any finalization of the proposed regulations in the next several months would unfortunately be done without input reflecting the views of the overwhelming majority of those entities working in the health and welfare arena. Without such input, it is almost inevitable that the regulations will be flawed. No workable rules can be written in a vacuum, without input about how the area being regulated actually works.

The Department understandably wants to move quickly on the application of the proposed regulations to defined contribution plans. This is an enormous undertaking, as it will require a huge amount of interaction with the private sector and communication about the many different types of business arrangements in this sphere alone. Frankly, we have very significant concerns about moving too quickly with respect to defined contribution plans alone. Adding defined benefit plans and health and welfare plans to this fast-moving train -- without much input at all -- will detract from the time and resources available with respect to the defined contribution area, and the result will almost certainly be a lesser product with respect to all three areas.

We want to emphasize that each type of plan is sold and serviced very differently and the fee structures are entirely different. In addition, the legal structures are quite different. For example, generally health and welfare plans involve plan assets that are not held in trust. In this context, how would an employer determine whether plan assets are being used to pay for services, or whether the employer’s general assets are being used to pay for all services? Should this make a difference with respect to the application of the proposed regulation? We think that the answer is clearly yes. If correct, how can an employer design a system to determine, before a service contract is entered into, if fungible employer assets will be used for one purpose but not another?

In short, we urge you to separate this project into three pieces, each of which is moved separately, starting with defined contribution plans. In our view, not doing that jeopardizes the soundness and stability of the final regulations.

Interaction with Section 4975 of the Internal Revenue Code

The proposed regulation is silent on whether it applies to arrangements that are covered by the prohibited transaction rules of section 4975 of the Internal Revenue Code, but not by ERISA.[1] Section 4975 imposes a prohibited transaction regime that closely parallels the regime imposed under sections 406 and 408 of ERISA. Section 4975 includes a prohibited transaction exemption for reasonable services arrangements that is identical in all material respects to section 408(b)(2) of ERISA. Under the ERISA Reorganization Plan, the Department has interpretive authority for the reasonable services exemption in section 4975 as well as ERISA. The parallel statutory language and the Department's broad interpretive authority raise a question about whether the new disclosure requirements in the proposed regulations are intended to be requirements of the reasonable services exemption of section 4975.

This question has enormous significance because of the very significant categories of arrangements that are subject to the prohibited transaction provisions of section 4975 but not of ERISA. These arrangements include individual retirement accounts and annuities (collectively, "IRAs"), tax-qualified retirement plans that are exempt from ERISA because they cover only non-employee business owners, health savings accounts ("HSAs"), and Coverdell education savings accounts ("ESAs"), and cover millions of Americans.

The Council strongly recommends that the Department clarify in the final regulations that IRAs, HSAs, ESAs, and owner-employee plans are not subject to the disclosure requirements of the proposed regulations. There is little question that the Department has the authority to interpret the prohibited transaction rules of ERISA and the Code differently, and we very much believe that this is right answer.

There are a number of compelling reasons for why the disclosure requirements of the proposed regulation should not apply to non-ERISA arrangements. First, IRAs and other non-ERISA arrangements subject to section 4975 arise in contexts in which individuals understand that they are acting in their own stead in determining which service providers to engage and what investment decisions to make. There is no sense in which IRA owners and business owners are relying on an employer or other fiduciary to act on their behalf. In this regard, for example, it seems clear that a sole proprietor that

[1] The Council assumes that a failure by a service provider with respect to an ERISA plan to satisfy the proposed regulation would result in a prohibited transaction under both the Code and ERISA.

engages a service provider with respect to his or her retirement plan has a clear alignment of interests in ensuring that fees for services are reasonable.

Second, the type of disclosure that is contemplated by the proposed regulation has the capacity to overwhelm the owners of IRAs and other individual savings arrangements, like ESAs and HSAs. Different types of disclosure are necessary for plan fiduciaries relative to plan participants. There is a far greater likelihood that individual participants will be overwhelmed by extensive disclosures than plan fiduciaries. The Department has recognized this very point by pursuing distinct fee initiatives for participant-level fee disclosure and service provider-to-plan fee disclosure. IRA and other individual arrangement owners are far more like individual plan participants than plan fiduciaries and it would be inappropriate to impose the service provider-to-plan disclosure requirements on non-ERISA arrangements.

For these reasons, the Council recommends clarifying that non-ERISA plans, such as IRAs and owner retirement plans, are not subject to the proposed regulation. If the EBSA does not make this clarification, at an absolute minimum, we urge the EBSA to at least request comments and reserve on the issue. To date, very few in the regulated community have focused on the possibility that these rules may apply to non-ERISA programs, such as IRAs, and it is critical that an issue of this magnitude gets fully vetted before any new requirements are imposed.

Fiduciary Safe Harbor and Correction Mechanism

The Council's plan sponsor members generally take very elaborate precautions, including extensive review processes, to make sure that they are entering into reasonable arrangements for services to and investments offered under their 401(k) plans. In addition, our service provider members are committed to working very hard to provide substantial and meaningful disclosure to plan fiduciaries in accordance with the regulations under section 408(b)(2). However, even these diligent entities are concerned about potential interpretations of the proposed regulations and the potential for resulting prohibited transaction excise taxes and/or fiduciary liability to plan participants. The Council believes these concerns could be alleviated, in large part, by the following modifications to the proposed regulations.

First, the Council greatly appreciates the "innocent" plan fiduciary class exemption that was proposed in connection with the proposed regulation. It is appropriate that the responsibility for disclosure fall largely on plan service providers, and that plan fiduciaries have protection from the consequences of a prohibited transaction where a service provider fails to provide the requisite information. The proposed class exemption, however, only provides protection from prohibited transaction consequences. The Council believes that additional protection for fiduciary consequences is appropriate. We recognize that receiving the requisite disclosure from a service provider will not fully satisfy a plan fiduciary's obligations with respect to selecting and monitoring service providers. However, the final regulation could confirm that these disclosures serve as an adequate factual predicate to understanding the proposed service arrangement. A plan fiduciary would need to ensure that a proposed service arrangement was appropriate by taking into account the broader market place, quality of services, etc., but EBSA should consider providing a safe harbor for plan fiduciaries as it relates to quantitative information about a proposed service arrangement. Although this would not preclude a plan participant from filing a lawsuit, it would provide plan fiduciaries with a level of comfort that they could point to the regulatory safe harbor in response to a relevant lawsuit.

Second, the proposed regulations imply that any violation of the requirements, no matter how minor, will result in a prohibited transaction excise tax. This structure would benefit greatly from a correction mechanism that provides a means of dealing with reasonable errors without draconian penalties. Some examples of just a few potential problem areas that would benefit from a correction mechanism include (1) a reasonable belief that the plan is a non-ERISA plan which turns out to be wrong, (2) a service provider failing to list all services, (3) a reasonable error in determining fiduciary status, and (4) assets being transferred before the parties are finished negotiating the agreement (failure by the service provider to accept the conversion of assets results in assets out of the market).[2] Providing a correction mechanism would help alleviate concerns that diligent plan fiduciaries and service providers will face a lot of "gotchas". Without a correction mechanism, we fear that the consequences associated with a failure will be so severe that some will actually choose to keep their "heads in the sand," rather than ferret out and correct errors.

Third, there are many circumstances in which it may not be clear to a plan service provider whether an arrangement is in fact subject to ERISA. This is very common in the context of health and welfare plans where ERISA coverage often depends on a facts and circumstances evaluation of the line between a payroll deduction arrangement and a plan. In these contexts, it is important that plan service providers be entitled to rely on the employer's representation regarding the status of its program under ERISA. Given that the consequences of a failure to satisfy the proposed regulation will fall entirely on the plan service provider, it would be inappropriate to make the service provider responsible for a threshold determination that it is not in a position to make.

Fourth, there will be times when the bundled service provider is unable, despite diligent efforts, to obtain the information needed for disclosure from the other parties to its bundle. For example, in some situations, unbeknownst to the bundled provider, the information provided by the outside party may be inaccurate. The Council recommends that EBSA create a class prohibited transaction exemption for such situations similar to the prohibited transaction exemption provided for plan fiduciaries unable to obtain necessary information from their service providers. This class exemption could establish minimum standards of conduct for a bundled service provider, such as making reasonable efforts to obtain the information. The key notion, however, is that just as EBSA has provided relief for innocent plan fiduciaries, relief should be provided for innocent bundled service providers.

Investment Providers

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[2] This may arise where a plan has trust agreement but may not have a finished recordkeeping agreement.

The proposed regulation provides an exemption from the prohibited transaction rules of section 406(a) of ERISA. These rules generally prohibit transactions between a plan and a party in interest. The key category of parties in interest for purposes of the proposed regulation is plan service providers. In this regard, the relief in section 408(b)(2) and the proposed regulation is not needed if a person entering into a transaction with a plan is not a service provider.

One of the most basic issues in the proposed regulation is the extent to which it applies to investment providers. At times, it has been suggested that the disclosure requirements of the proposed regulation apply to service providers to an investment company registered under the Investment Company Act of 1940 (a "mutual fund") if a plan invests in the fund. This interpretation, however, does not appear to be supported by ERISA, which expressly provides that the investment adviser or principal underwriter to a mutual fund is not to be considered a plan fiduciary or a party in interest. Similarly, this would run contrary to the Department's plan asset regulations which treat only a plan's interest in a mutual fund as a plan asset, and not any of the underlying assets of the fund. More generally, the disclosure requirements of section 408(b)(2) appear to be unnecessary in this context given the extensive disclosure obligations imposed on mutual funds by the SEC.

The Council recommends that the disclosure requirements apply with respect to investments only to the extent the underlying assets of the investment are plan assets. Under this approach, for example, an investment adviser to a pooled separate account or collective trust would be subject to the disclosure requirements because the adviser would be performing services with respect to plan assets. This is also appropriate given that the pooled separate account would not be subject to the same level of regulation by the SEC as a mutual fund.

A related issue is the extent to which a service provider to a plan should disclose compensation that it receives in connection with services that are rendered to a mutual fund, for example, a recordkeeper that has an affiliate that serves as an investment adviser to the fund. In these situations, the Council agrees that certain compensation that the recordkeeper or affiliate receives from a mutual fund, such as 12b-1 fees or subtransfer agency fees, should be disclosed to the plan fiduciary. However, there may be types of transactions where any possible compensatory element of what the recordkeeper receives does not, in the judgment of the Securities and Exchange Commission, require disclosure. We urge you not to require disclosure of such types of transactions as that would be, contrary to the judgment reflected in other laws and regulations.

The disclosure that investment products must provide to their investors is often governed by other laws, regulations, or guidance. For example, as noted, disclosures for mutual fund offerings are governed by several laws and extensive regulations from the Securities and Exchange Commission. Insurance company products are often covered by Department of Labor class exemptions that provide disclosure guidelines regarding product sales (which may involve the provision of incidental services such as responding to participant product questions). Products that are already subject to extensive disclosure obligations should not have another level of disclosure layered on top that requires disclosure of additional types of transactions.

A particularly challenging circumstance will likely be brokerage windows in individual account plans that permit participant investment control. In these contexts, there are any number and types of fees that could be imposed depending on the investments selected by participants. The Council recommends that EBSA require disclosure of annual fees, direct commissions and loads, etc. on setting up and maintaining the brokerage account and a schedule of common commissions and charges that could result from investment transactions within the account. Any further disclosures should be more than adequately covered by applicable securities laws.

The SEC has vast experience with ensuring that meaningful and appropriate information about mutual fund fees are disclosed to investors. The Council sees little if any logic behind layering an additional level of disclosure onto many products and, for this reason, we urge EBSA to rely on existing disclosure requirements.

Fully Insured Products

As discussed above, the Council strongly believes that the Department should defer consideration of the appropriate standards of disclosure for health and welfare plans. The Council's members have, however, been particularly concerned about the potential application of the proposed regulations to fully insured products or plans, including health and welfare plans, and we would be remiss if we did not at least share this particular concern.

The concern arises because one category of covered services is "insurance" services. In contrast, the preamble to the proposed regulation indicates that the purchase of insurance is not, in and of itself, compensation to a service provider. The Council believes that the issuers of traditional insurance policies should be exempt from the disclosure requirements.

There are a number of reasons for exempting insured plans. First, the Department has long treated fully insured arrangements differently from other plans, including for Form 5500 annual reporting purposes. Second, the line between a plan service and a plan benefit blur in the context of insured products. The Department has long recognized that the issuance of insurance standing alone does not cause an issuer to be a service provider. Third, insurance products are highly regulated by state insurance laws and do not require further regulation. Fourth, there are a number of existing disclosure requirements that are common with respect to insurance, including, among others, Class Exemption 84-24. These existing disclosure requirements include many of the standards that are expressed in the proposed regulation and so the need for an expansion is much more modest in this context.

Employer Payments

The proposed regulation can be read to suggest that its disclosure requirements apply not only where a plan pays for services but also where an employer pays for services out of its general assets. The prohibited transaction rules of ERISA, however, generally apply to transactions involving plan assets.

It is very common for employers to pay for plan services out of their general assets. For example, many health and welfare plans are entirely unfunded and the employer will pay for administrative services. Similarly, rather than use plan assets to pay for recordkeeping and other administrative services for individual account plans, some employers pay a plan-level fee to compensate the plan service provider.

The focus in the reasonable compensation context is on the loss of plan assets if more than reasonable compensation is paid for services. It is not a concern that an employer will pay too much for services out of its own general assets. That is, ERISA does not regulate the amount that an employer pays for services; it regulates the amount that a plan pays for services. For these reasons, the Council strongly recommends clarifying that the proposed regulation does not apply where plan services are paid for entirely out of the employer's general assets.

The Council appreciates that there are situations where the plan has the legal obligation to pay for plan expenses, except to the extent paid by the employer. The Council believes that the proposed regulation should not apply to the extent an employer commits contractually to be responsible for specified plan fees. The key distinction is between fees that are and are not regulated by ERISA.

Bundled Service Providers

The proposed regulation allows a service provider that "offers a bundle of services to the plan that is priced as a package" to report aggregate compensation with a couple of exceptions. The Council understands the difficulties involved in trying to address this issue while balancing competing goals. We simply request specific clarification on how the bundling exception would work in a couple of common situations.

First, some arrangements that appear to be "bundled" arrangements involve investments selected by the plan fiduciary prior to (or outside of) entering into the bundled arrangement. In effect, plan fiduciaries may request that the recordkeeper agree to recordkeep a particular investment option selected by the fiduciary outside of the investment offerings included in the recordkeeper's platform. Such investments include accounts managed by investment advisers with no relationship to the recordkeeper. In these situations, the recordkeeper is often unaware of the proposed investment until after the plan fiduciary has selected the investment option for the plan. Under these circumstances, the plan fiduciary will often be in a better position to obtain information from the sponsor of the investment than the bundled service provider. The Council recommends that the disclosures from the "bundled" service provider exclude any arrangements that involve separate negotiations between the plan fiduciary and another service provider.

Second, the Council urges EBSA to clarify the definition of a "bundled" arrangement because the current proposal could lead to duplicate reporting. For example, an insurance company may enter into agreements in which the responsibilities for serving a small retirement plan are split between the insurance company and an unaffiliated third party administrator (TPA). The division of services may vary but the insurance company commonly compensates the TPA for services provided for the insurer and the TPA may also bill for other services rendered directly to the plan or have those charges deducted from plan assets. Each of the parties provides a bundle of services and may feel compelled, absent clarification, to separately compile all of both parties' compensation information for the plan fiduciary (which may be difficult to obtain). The regulations should clarify that multiple bundlers are only responsible for reporting the compensation under their bundled arrangement to preclude double reporting and confusion among plan fiduciaries.

A third issue has to do with whether a service provider renders services for the plan or for a service provider. In this regard, many plan service providers engage other entities in connection with plan services, such as printers to prepare plan information and programmers to develop computer systems, that do not have a contractual relationship with the plan. In our view, such other entities are vendors providing services to the "bundler", not to the plan. The special rules for bundled service providers in the proposed regulation are very helpful in that they do not require an unwieldy and artificial allocation of fees among such entities. It should be further clarified that identification of such entities is not necessary. Otherwise, a bundler could be faced with the pointless and burdensome task of identifying perhaps thousands of its vendors.

Scope of Services

The proposed regulations require service providers to disclose "all services" provided to the plan pursuant to the agreement between the plan and the service provider. Council members are concerned that this requirement could be interpreted to mean identification of every single service in minute detail. One workable system would require disclosure based on categories of services such as nondiscrimination testing, participant distribution administration (notices, calculating amounts, triggering the check, reporting, etc.) and participant service center (live persons answering participant questions on any number of matters).

Both plan fiduciaries and service providers are concerned about the interpretation of this requirement because failure to disclose the services in the level of detail required would be a violation of 408(b)(2), apparently subject to the prohibited transaction excise tax (although it is not clear how the amount of the tax would be calculated). Even the requirement of notifying the fiduciary of any changes causes concern because the regulation does not limit the notice to material changes or the disclosure to material services. Service providers should know what they are required to disclose and when they are required to update that disclosure. In addition, plan fiduciaries should be able to rely on service providers to update them appropriately and not be required to ask for updates.

Fiduciary Status

The proposed regulations require that plan service providers indicate whether they will be performing services as a fiduciary. Some plan service providers are clearly plan fiduciaries and some are clearly not fiduciaries. The Council agrees with EBSA that it would be helpful to plan fiduciaries for service providers that are not clearly identified as plan fiduciaries to self identify but it does raise some issues.

First, many service providers are only plan fiduciaries with respect to a portion of their services. For example, a recordkeeper might provide administrative services that include making determinations for the appeal of benefit claims for the plan's claims process. All of the other services provided by the recordkeeper may be ministerial in nature but the claims determinations may make the company a plan fiduciary but only with respect to the claims process. The final regulations should clarify that the required fiduciary representation can provide that the service provider is a fiduciary only with respect to certain aspects of their services.

Second, the final regulations should provide guidance regarding the consequences, for both plan fiduciaries and the service provider, if the service provider makes a reasonable error in incorrectly identifying its fiduciary status. EBSA has long held that a simple representation of non-fiduciary status does not preclude a later finding of fiduciary status based on meeting statutory and regulatory requirements for fiduciary status. Similarly, a service provider should not become subject to litigation aimed at fiduciaries simply because it was incorrectly identified as a fiduciary during the disclosure process. Finally, as noted above, the prohibited transaction excise tax should not be triggered by a reasonable error in fiduciary classification in the required disclosures.

Conflicts of Interest

We are quite puzzled by Proposed Regulation § 2550.408b-2(c)(1)(iii)(D) and (E). Subclause (E) requires disclosure of "whether the service provider (or an affiliate) will be able to affect its own compensation or fees, from whatever source, without prior approval of an independent plan fiduciary…" It is our understanding that if a service provider can use its powers in a discretionary manner to affect its own compensation, such service provider (1) is functioning as a fiduciary, and (2) has committed a prohibited transaction under ERISA section 406(b). See, e.g., Field Assistance Bulletin 2002-3. If this is correct, what must be disclosed under subclause (E)? Only prohibited transactions under section 406(b)? That hardly seems to be the intent, yet that is one of two possible interpretations of subclause (E).

Under the other possible interpretation, subclause (E) could be read as implicitly overruling the Department's prior position that a service provider's ability to affect its own compensation is a prohibited transaction. Arguably, the regulation could be read to stand for the proposition that such an arrangement can be "cured" through disclosure. We very strongly doubt this was intended.

Neither of the possible interpretations of subclause (E) seems appropriate. Accordingly, we urge the deletion of subclause (E).

Subclause (D) requires the disclosure of any relationship "that creates or may create a conflict of interest for the service provider in performing services pursuant to the contract or arrangement". Again, this is puzzling. A conflict of interest can only arise where a service provider is acting as a fiduciary in providing a service, such as advice, with respect to which the service provider could be seen to have divided loyalties or interests contrary to the plan's interests. In such cases, the existence of a conflict of interest generally gives rise to a prohibited transaction. Where the service provider is not acting as a fiduciary, the service provider is simply selling a service in an arm's length transaction; no fiduciary duty of loyalty to the plan exists and accordingly no conflict of interest can exist.

For example, assume that a bundled service provider offers a set of 100 investment options, some of which are proprietary and some of which pay varying amounts of revenue sharing. This is simply the package of services and investment options offered by the service provider. The service provider does not provide any advice to any plan sponsor or participant regarding which investment options to choose for the plan menu or for investment.

In the above situation, is there a conflict of interest by reason of the fact that the service provider's compensation varies by reason of which investment option is selected? The answer is clearly no. The service provider's compensation is affected by the choice of investment option, and the service provider does not provide any services in that regard. That leaves no conceivable conflict of interest.

Conflicts of interest only exist when a service provider supplies fiduciary services, such as advice, that can affect its own compensation. Such arrangements are prohibited transactions, unless an applicable exemption applies. So what does subclause (D) require to be disclosed? Prohibited transactions without regard to whether there is an exemption? Only prohibited transactions for which there is no exemption? Or is the proposed regulation suggesting that some actual conflicts of interest may not be prohibited transactions? None of these possibilities makes much sense.

In brief, we recommend deleting subclause (D). We strongly support full disclosure of fees. And we strongly support enforcement of the prohibited transaction laws generally banning conflicts of interest. But subclause (D) serves neither purpose.

<u>Gifts</u>

The proposed regulations require disclosure of various in-kind gifts such as lunches and trips. While the Council agrees with EBSA that plan fiduciaries should be made aware of excessive gift giving, the Council is concerned that an overly broad interpretation of the proposed regulations could result in the disclosure of every pen or cup with a logo on it. In addition some of this disclosure would result in exceptional administrative difficulty without much benefit. For example, an investment manager that provides services to multiple plans is invited to speak at an industry-wide conference and is paid a speaker's fee. Several of the investment manager's plan fiduciary clients attend the meeting. The Council sees little benefit in an arbitrary division of the speaker's fee among the investment manager's clients for disclosure purposes. Again, the Council recommends disclosure only when there is a clear and direct relationship between the "gifts" and the plans. In addition, the Council urges EBSA to include a de minimis concept such as the $50 threshold in the Form 5500 instructions to avoid the logo product or occasional sandwich problem.

Method of Disclosure

The Council supports the regulatory language that allows a plan service provider to disclose compensation in dollar amounts, formulas, percentages, etc. It makes sense administratively to allow for disclosure in the method used to trigger the compensation. However, language in the preamble seems to imply that methods other than dollar amounts can be used only if dollar amounts cannot be ascertained. The Council requests clarification that other methods such as formulas and percentages can be utilized without regard to whether dollar amounts could be determined.

Updates

The proposed regulations require service providers to report material changes in compensation arrangements within 30 days of the change. The Council requests a clarification of the meaning of "material change" that includes a *de minimis* concept. Plan fiduciaries do not want to know about every change (such as a change in the mail house being used by the service provider) and believe *de minimis* profit increases are irrelevant to their fiduciary analysis. The Council also urges EBSA to increase the 30-day time period to 90 days because a third party fee change could affect hundreds of customers. In addition, the Council recommends that EBSA clarify the beginning date for determining when the report must be provided. For example, a service provider's knowledge of a subcontractor's decision to increase fees should not trigger an obligation to disclose unless that increase automatically flows through to the plan. Correspondingly, a service provider's own internal decision-making process regarding modifications should not trigger a disclosure obligation. A disclosure obligation should only be triggered by a public decision by a service provider to make a material change or by the service provider's knowledge of a public decision by a subcontractor that has a direct effect on the plan.

Consulting Services

One aspect of the proposed regulation that the Council is concerned about is that its language broadly sweeps in "consulting" as one of the categories of services that trigger disclosure requirements, without further identifying what kind of consulting is addressed. Virtually all services involve some consulting. The Council recommends narrowing covered "consulting" services to consulting with regard to investments or management of assets, such as the consultant that helps the fiduciaries select and monitor its asset managers, financial advisors, etc. Without some limitation, this category could sweep in many service providers that should not be covered.

Contract Requirement

The proposed regulation requires a written service agreement prior to the start of the services arrangement. The Council suggests that EBSA carefully consider how the written agreement requirement will apply in the context of certain products where the service agreement has independent significance. For example, insurers typically need to have contracts approved by the applicable state insurance agency and it would be very burdensome for insurers to have to run any disclosure requirements under the proposed regulation through the state insurance process. A related issue may be presented by trust agreements associated with preapproved plans, such as prototype plans. The Internal Revenue Service reviews all trust agreements in connection with its review and approval process under which it issues opinion letters to prototype plan providers. The IRS issues these approvals on a six-year cycle. Any revision to trust agreements approved by the IRS for use with a preapproved plan will cause all employers utilizing that trust agreement to lose their reliance on the opinion letters issued by the IRS. Under the IRS' new six-year cycle, moreover, prototype plan sponsors are constrained in their ability to seek off-cycle approval for any changes. In the case of individually-designed plans, trust agreements are approved by the Internal Revenue Service in connection with its determination letter program. Any revisions to the trust agreement could likewise cause the agreement and the plan to lose the blessing of the Service. For these reasons, the Council recommends that the final regulation clarify that the disclosure requirement may be satisfied outside of the four corners of the services contract in appropriate circumstances.

Another issue with respect to the written agreement requirement is the extent to which it requires affirmative agreement. We believe that no such rule should apply. For example, some service arrangements include evergreen clauses, which provide that the agreement is automatically renewed at its existing terms at the end of the a stated term unless either party to the agreement affirmatively opt out. These evergreen clauses should clearly be permitted and should not be viewed as requiring affirmative agreement.

There are also many situations in which services will commence before the written agreement is executed. One example is where a new service is agreed to and implemented before the written agreement is finalized. The final regulation should permit a retroactive contract of this type so long it is entered into within a reasonable period after services commence. It is sometimes necessary for a plan to have a service provided immediately, e.g., where a prior service provider suddenly goes out of business, before the formal service agreement can be executed. Similarly, the final regulation should make clear that retroactive compensation increases are permitted. In many situations, a contract renewal is not finalized until after the term of a new contract has started and this reasonable and customary practice should not raised prohibited transaction concerns.

A related issue has to do with service agreements where the compensation that a service provider will receive depends on subsequent events. A common example is a recordkeeper to a 401(k) plan that will receive indirect compensation from plan investment options. It is not uncommon for the recordkeeper and the plan sponsor to execute an administrative services agreement before the plan fiduciary has settled upon the plan's investment menu. The subsequent investment menu decisions can affect the recordkeeper's compensation, which would seem to make it difficult to satisfy the advance disclosure requirement. The Council recommends clarifying that more general disclosure regarding the possibility of indirect compensation is permitted temporarily in this context. We are not raising a concern here regarding the nature of the disclosure that is ultimately required but simply are asking for a needed delay in providing that full disclosure.

A final issue related to the written agreement requirement is the need to facilitate electronic agreements. The Council commends EBSA for the efforts that we are aware of in updating and modifying its electronic delivery requirements and we urge continued modifications that will allow further expansion of the use of new technologies. For example, posting of relevant information on an appropriate website for plan fiduciaries could make it easier to access and update information.

Participant Disclosure

Although the proposed regulation relates only to disclosure between the plan's service providers and plan fiduciaries, it should be noted that the type of disclosures anticipated by the regulation would be overwhelming to most plan participants. Plan fiduciaries are understandably concerned that they could be required to provide this information to participants and the Council urges EBSA not to include such a requirement in proposed participant disclosure regulations.

Effective Date

One of the most important issues for Council members is the proposed effective date of 90 days after publication of final regulations. Implementation of the final regulations will require a huge effort by both plan fiduciaries and plan service providers. Compliance procedures will need to be largely rewritten and little of this work can be done in advance of the final regulations since substantial comments and changes to the proposed regulations are expected to occur. Large plan sponsors may have many agreements for services to their plans and many of these may be in letter agreement form that will now need to be fleshed out. Others will need to be modified but modifications of contracts involve negotiations.

The 90-day time period clearly is not sufficient for service providers because the rule, as proposed, would require significant modifications to computer systems, the training of operational and administrative staff, the preparation of new communication and administrative materials for plan fiduciaries, as well as the development of actual disclosure documents. This work is in addition to the modification and renegotiation of agreements with plan fiduciaries and other service providers.

The Council recommends that the final regulation be generally effective for new service contracts and material modifications of existing service contracts entered into on or after the first day of the year beginning at least 12 months following publication of final regulations. If, notwithstanding our recommendation, EBSA determines that an earlier effective date is necessary, we strongly recommend delaying the effective date for outstanding contracts that have not been materially modified. Any revisions to outstanding contracts will be enormous undertaking in both volume and in complexity, and it would be in the interests in everyone's best interest if there is substantial lead time to facilitate an orderly transition.

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Again, we appreciate the opportunity to comment on the proposed regulations under ERISA Section 408(b)(2), and will provide additional comments as our members continue to analyze the proposal. We believe that the American Benefits Council offers an important and unique perspective of both the employer sponsors of employee benefit plans and the service providers that assist them, and we look forward to working with you on these important changes.

Sincerely,

Jan M. Jacobson
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American Benefits Council