



September 12, 2008

Robert J. Doyle, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Additional guidance requested for Form 5500

Dear Mr. Doyle,

I am writing on behalf of the American Benefits Council to suggest that the Employee Benefits Security Administration (EBSA) issue additional guidance on the new Schedule C for the 2009 Form 5500. 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.

As you may know, a number of Council members have been reviewing the final guidance on the Form 5500 changes in anticipation of making necessary systems and process changes and the Council formed a task force to identify and report issues, as well as to compare notes. A representative group of the Council's 5500 task force was able to talk with EBSA representatives prior to issuance of the follow-up question and answers (FAQs) and we would like to commend you for addressing many of the issues we raised. More generally, we would like to recognize and commend the very significant efforts made by EBSA in the final guidance and FAQs.

The Council shares EBSA's goal of ensuring that plan fiduciaries have the complete information about indirect and direct compensation received by plan service providers and recognizes the need for additional reporting on the Form 5500 Schedule C. 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 weighs the need for appropriate reporting and disclosure against potentially excessive costs and complexities of administration.

After reviewing the FAQs, the Council's 5500 Task Force has identified a number of additional issues for which additional guidance would be helpful and appropriate. Accordingly, we respectfully request that EBSA issue additional guidance addressing these and other issues. As discussed in our earlier conversations with members of your staff, the Council has drafted the request for additional guidance in the form of questions and proposed answers. The remainder of this letter outlines the questions and proposed answers.

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Q1: Mutual funds have imposed short-term trading fees as a result of SEC Rule 22c-2. These are commonly known in the industry as "redemption fees". Other investment products (collective trust funds, separate accounts, etc.) may impose similar fees to curb short-term trading. Such fees are generally assessed when a participant transfers out of a fund within a certain timeframe (often 30-60 days) after investment in the fund. The fees flow back into the fund, trust or account through a reporting and remittance process developed between the recordkeeper or intermediary and the fund or investment company. Should these fees be reported as redemption fees using code 57 on Schedule C as direct compensation to the fund company?

Proposed Answer:

Redemption fees are not payment for services rendered to a plan, nor are they received in connection with a person's position with a plan. Moreover, these fees are for the benefit of all shareholders of the fund or unitholders of the trust or separate account (including in many cases shareholders not associated with any given plan). In addition, a redemption fee that is paid into a mutual fund, or the unit holders of a trust or separate account, is not compensation because it is not being received by a plan service provider. Thus, such redemption fees are neither direct nor indirect compensation to a service provider that would be reported on Schedule C.

Q2: ERISA fee recapture accounts or ERISA budget accounts ("ERISA Accounts") are becoming commonplace in the retirement industry. Recordkeepers may receive revenue sharing payments from fund companies in the form of shareholder servicing fees. Where the revenue sharing exceeds the fees negotiated between the recordkeeper and the plan sponsor to service the plan, these ERISA Accounts may be created. While there are variations on the handling of this revenue, the following are two common approaches:

Either all revenue sharing received by the recordkeeper, or the amount in excess of the fees needed by the recordkeeper to administer the plan, is deposited into the retirement plan trust ERISA Account, and used to pay legitimate administrative expenses. Amounts remaining in the account at the end of the plan year are generally allocated to participants per the plan document.

All revenue sharing is retained by the recordkeeper, and applied as a credit to the plan or plan sponsor to pay for (offset) the expenses of administering the plan. Amounts in excess of the fees negotiated by the recordkeeper to administer the plan are available to pay legitimate plan administrative expenses as directed by the Plan Administrator.

How are such arrangements to be reported for Schedule C purposes?

Proposed Answer:

In scenario 1 above, if all revenue sharing is paid into the plan's ERISA Account, the recordkeeper is merely a conduit between the fund company and the plan trust, and therefore the recordkeeper has received no indirect compensation for Schedule C purposes. Any fees paid out of the ERISA Account, as stated in the instructions for Schedule C, are considered direct compensation to the receiving service provider. If the amount deposited into the ERISA Account by the recordkeeper is net of its fees, the recordkeeper would report indirect compensation of the revenue sharing amounts it retains.

In situation 2, the recordkeeper is considered to have received indirect compensation, which is generally reportable indirect compensation, but could be eligible indirect compensation, and must be reported accordingly on Schedule C under either Line 1 or Line 2 of Part I. Payments made by the recordkeeper to other service providers as directed by the plan administrator would be reported on Line 2 as indirect compensation received by those other service providers.

Q3: Plan service providers attempting to classify their services and the fees they receive are concerned about potentially overlapping codes and that inadvertent misclassifications will result in rejected Form 5500s. What standard applies to the selection of service codes?

Proposed answer:

A reasonable good faith effort to properly classify services and fees is required. EBSA will not reject Form 5500s or impose penalties for failure to file solely because EBSA may have utilized a different code, provided that a reasonable good faith effort was made to select the proper codes.

Q4: Are contingent deferred sales charges, market value adjustments for annuity contracts, or surrender/ termination charges reportable expenses and if so, are they direct or indirect?

Proposed Answer:

Contingent deferred sales charges are fees paid from an investment, but are not reportable indirect compensation. They are instead expenses that are 'internal' to the investment and are similar to the "ordinary operating expenses" described in FAQ #4 that are not reportable indirect compensation. Surrender or termination charges are similarly a form of ordinary operating expenses that are not subject to reporting.

Market value adjustments related to annuity contracts and other insurance products are merely adjustments to the value of the investment in accordance with the contract. Market value adjustments are not paid in connection with services rendered to the plan or due to a person's position with the plan. They are instead adjustments to reflect the fair market value of an investment that was not held for the contract.

Notwithstanding the foregoing, if a contingent deferred sales charge, surrender or termination charge or market value adjustment includes a payment, fee, or commission payable to a party connected to the plan or performing services to the plan, such as an investment advisor, recordkeeper, trustee, or the plan sponsor, the resulting payment should be characterized as reportable indirect compensation.

Q5: Assume that a plan sponsor pays all direct expenses relating to the administration and funding of benefits of a given plan, such as the third-party claims administration expenses under an employer-pay-all disability plan. No plan assets are used to pay any direct expenses, nor are plan assets used to reimburse the plan sponsor for the payment of direct expenses. Assume further that, in connection with the operation of the plan, payments are made by the claims administrator to a third-party record keeper who tracks participant eligibility. Although the claims administrator may be willing to provide these record-keeping services at no additional charge, the employer sponsors multiple welfare benefit plans for which centralized record-keeping is desirable. Also assume that from time to time the third-party record keeper provides items of non-monetary compensation to the claims administrator in amounts that would not be considered insubstantial under the Form 5500 instructions. Would such indirect compensation be reportable on the plan's Schedule C?

Proposed Answer:

No. Because the financial burden of the plan is borne solely by the plan sponsor, plan fiduciaries do not have an interest in monitoring the financial arrangements or payments made in support of the administration of the plan. This fact is evidenced by the explicit exclusion from Schedule C reporting of plan-sponsor-paid direct expenses. Thus, the public policy (as expressed in the preamble to the regulations) of providing fiduciaries with the financial information they need in order to properly monitor service-provider arrangements, is not furthered by requiring the reporting of indirect compensation in circumstances where there is no direct compensation reportable for the plan.

Q6: Assume in Q&A-5 that the disability plan is contributory so that participants are required to contribute half the value of the disability coverage. All other facts remain the same. Would the indirect compensation paid to the record keeper be reportable on the plan's Schedule C?

Proposed Answer:

No, for the reasons stated above in Q&A-5, plus the setting of amounts charged (contributions) is a settlor function under ERISA for plans that are not Taft Hartley Plans and not a fiduciary function.

Q7: As a related matter, assume that, for a given plan with multiple service providers, a plan sponsor pays all direct expenses relating to one, but not all, plan service providers. The expenses to the remaining service providers are paid directly by the plan using plan assets. If indirect compensation is paid to or by the service provider whose direct compensation is paid entirely by the plan sponsor, would such indirect compensation be reportable on the plan's Schedule C?

Proposed Answer:

No, for the same reasons given in Q&A-5.

Q8: In the health plan context, and specifically with regard to health care claims, what fees will be considered as charged on a per transaction basis?

Proposed Answer:

With regard to health plan claims, each health plan transaction is the health care claim. A health care claim is defined as a request from a health care provider or insured to a health plan to obtain payment for health care services. A fee charged on a per claim basis would be considered charged on a per transaction basis. However, fees associated with electronic transactions that are not health care claims would not be considered transactions for disclosure purposes. Examples of such electronic transactions include the benefits eligibility inquiry and response, the claim status request and response, and others described by the HIPAA transaction rules and elsewhere. Any fee that would be passed onto the employer related to the health care claim would still need to be disclosed, such as a fee to access a provider network.

In no event would a fee charged on a transaction basis need to be reported if it would not increase the amount the plan or plan sponsor was required to pay. For example, if the compensation a plan or plan sponsor paid to the service provider was a flat per-member-per-month or per-contract-per-month fee, any network access or other fees that were recorded within the bundle of services on a per transaction basis would not need to be reported for

purposes of Schedule C if they would not affect the flat fee the plan or plan sponsor would pay pursuant to the contract or agreement.

Q9: Q40 of the FAQs provides limited transition relief from Schedule C reporting where a service provider makes reasonable good faith efforts to develop systems to track the requisite information in a timely fashion but, despite such efforts, is unable to complete the changes for the 2009 plan year. If the service provider provides a statement to this effect to the plan administrator, the plan administrator does not need to identify the service provider as failing to provide the information on the filed Form 5500. What are the plan administrator's obligations? What information should the service provider provide?

Proposed Answer:

EBSA will not reject the Form 5500 or impose penalties for failure to file if the Schedule C does not include required information that was not provided by a service provider that provides the statement described in Q40 to the plan administrator. The service provider should, however, provide all information that it is able to provide regardless of whether it provides the statement described in Q40.

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Again, we appreciate the work you have done in this area and the opportunities you have provided to the Council and other organizations to provide input on needed guidance. We believe additional guidance on the questions indicated above will provide added certainty to plan sponsors and their service providers attempting to meet the new 5500 requirements. We believe that the American Benefits Council offers an important and unique perspective of both the employer sponsors of retirement plans and the service providers that assist them, and we look forward to continuing to work with you on these important changes.

Sincerely,



Jan M. Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

cc: Joe Canary
Elizabeth Goodman