

Disclosure of Service Provider Compensation: Final 408(b)(2) Regulation Will be Issued Soon

By Fred Reish and Bruce Ashton

In December 2007, the Department of Labor issued a proposed regulation under ERISA Section 408(b)(2). When finalized, the regulation would mandate disclosure of service provider compensation and potential conflicts of interest in advance of entering into an arrangement to provide services to an ERISA-covered plan. (It is not clear whether the regulation would also cover non-ERISA – e.g., one person – plans and/or IRAs, but the final regulation should answer that question.) Failure to comply would make the service provider’s agreement a prohibited transaction, resulting in disgorgement of the service provider’s compensation and potential excise taxes. The DOL received an unprecedented number of comments on the proposal and held hearings earlier this year to determine the impact of the proposal.

The DOL has considered the comments and testimony from the hearings and has completed its work on the final regulation. On September 23, the regulation was submitted to the Office of Management and Budget (OMB), the final step in the approval process for all federal agency regulations. The official announcement of the submission appears on page 2. While OMB has up to 90 days to approve the regulation or send it back to the agency for additional work (which rarely happens), the White House has indicated in a letter to all federal agencies that “final

regulations should be issued by November 1, 2008” (and the OMB announcement indicates a final action date of “11/00/08”).

We haven’t seen the final regulation, but here’s what we know now: the regulation should be issued in final form within a matter of weeks, almost certainly before Thanksgiving; and the regulation will require advance disclosure of compensation and potential conflicts. Beyond that, however, we need to wait on publication of the final regulation to get answers to the following questions: the effective date of the regulation with respect to new arrangements; what the transition period will be for existing arrangements; and whether the DOL has modified any of the specific disclosure requirements from the proposed regulation.

Whatever form the final regulation takes, we also know that every service agreement for every broker-dealer, RIA, recordkeeper, third party administrator and other covered service providers will need to be amended to comply with the regulation before the effective date.

As soon as the final regulation is released, we will issue another Bulletin laying out the details. ❖

Official Announcement

AGENCY: DOL-EBSA **RIN:** 1210-AB08
TITLE: Amendment of Standards Applicable to General Statutory Exemption for Services
STAGE: Final Rule **ECONOMICALLY SIGNIFICANT:** Yes
RECEIVED DATE: 09/23/2008 **LEGAL DEADLINE:** None

View Rule

DOL/EBSA **RIN:** 1210-AB08 **Publication ID:** Spring 2008

Title: Amendment of Standards Applicable to General Statutory Exemption for Services

Abstract: This rulemaking will amend the regulation setting forth the standards applicable to the exemption under ERISA section 408(b)(2) for contracting or making reasonable arrangements with a party in interest for office space or services (29 CFR 2550.408b-2). This amendment will ensure that plan fiduciaries are provided or have access to that information necessary to a determination of whether an arrangement for services is “reasonable” within the meaning of the statutory exemption.

Agency: Department of Labor(DOL)

Priority: Economically Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Final Rule Stage

Major: Yes

Unfunded Mandates: No

CFR Citation: 29 CFR 2550 (To search for a specific CFR, visit the Code of Federal Regulations.)

Legal Authority: 29 USC 1108(b)(2); 29 USC 1135

Legal Deadline: None

Statement of Need: This regulation is needed to eliminate the current uncertainty as to what information relating to services and fees plan fiduciaries must obtain and service providers must furnish for purposes of determining whether a contract for services to be rendered to a plan is reasonable.

Summary of the Legal Basis: Section 505 of ERISA provides that the Secretary may prescribe such regulations as she finds necessary and appropriate to carry out the provisions of title I of the Act. Regulation 29 CFR 2550.408b-2 sets for the conditions necessary for relief, including the requirement that such contract or arrangement is reasonable.

Alternatives: Alternatives will be considered following a determination of the scope and nature of the regulatory guidance needed by the public.

Anticipated Costs and Benefits: Preliminary estimates of the anticipated costs and benefits will be developed, as appropriate, following a determination regarding the alternatives to be considered.

Timetable:

Action	Date	FR Cite
NPRM	12/13/2007	72 FR 70988
NPRM Comment Period End	02/11/2008	
Final Action	11/00/2008	

Regulatory Flexibility Analysis Required: Undetermined

Government Levels Affected: None

Federalism: No

Included in the Regulatory Plan: Yes

RIN Data Printed in the FR: No

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Around the Firm

Speeches: On October 11th and 12th, **Fred Reish** presented “Plan Design and Emerging Trends” and “The Direction of 401(k) Plans: Shifting the Fiduciary Burden from Plan Sponsors to Providers and Advisors” at the Center for Due Diligence Conference.

Articles: In the June issue of *PLANSPONSOR* magazine, **Fred** wrote a column entitled “For Better or Worst.” In the June issue of the *Pension Plan Fix-It Handbook*, **Nick White** wrote the article “ERISA Section 404(c) Protection: A Reminder of What it Is...and Isn’t.”

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