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Employee Benefits Security Administration
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Re: Comment Letter in Regards to the Proposed §408(b)(2) Regulations

Dear Jan and Joe:

Thanks for sponsoring an informative teleconference briefing on the proposed ERISA §408(b)(2) regulations on February 7, 2008. It was an excellent learning experience and we appreciate the time and effort it took to organize and conduct and make it successful.

We have concerns about these proposed regulations and do not see them being complied with. We say that as we both come from inside the retirement plan industry (national retirement plan provider, large national broker/dealer, national trust company environments) and are grappling with some fundamental practices that run counter to some of the intent of the proposed §408(b)(2) regulations.

The more regulations point out what needs to be disclosed, the more providers will seek out and promote revenue streams that are not disclosed. A recent example is the aggressive selling of Self Directed Brokerage Accounts (SDBAs):

> A distribution channel that gives participants perceived additional diversification,
>
> A clear "caveat emptor" and "wash my hands" mindset by the plan sponsor who offers this in their plan, and
>
> And from a compensation perspective, a nice opportunity to providers to make some very high non-disclosed revenue

Throughout our reading of the proposed regulations leading to the comments in this letter, we were struck by three fundamental issues:

1. How is the plan sponsor fiduciary really going to know and keep track of these fee disclosures, determine if they are reasonable and otherwise given themselves some level of comfort that they are asking the right questions?
2. What motivation will cause the service provider to increase disclosure, particularly in an environment where fewer providers (and less competition) are offering their services?
3. Who will monitor, regulate or oversee disclosures to determine if they are accurate, reasonable and can be relied upon by the plan sponsor fiduciary?

Disclosure rules exist now – in the 5500 (Schedules A and C), in Prospectus and Statement of Additional Information materials.

> What has prevented providers from disclosing before? What do you expect the behaviors to be in the new §408(b)(2) regs?
>
> Specifically on page 70989 – 1st column – how will the proposed regs change the behavior of a large insurance provider who has imbedded penalties in their GIC investments….and the plan sponsor fiduciary wants to change to another provider…and faces a penalty, "market value adjustment" expense or must delay liquidation for 12-60 months for coming out of the GIC? In fact, how are you going to monitor the accuracy on GIC compensation disclosures? This is a great mystery to most operating in the industry and certainly to fiduciaries. Some of the largest sources of compensation currently are received from GIC spreads (which can only be proven by an audit).

Page 70990 – 1st column – how will the plan sponsor fiduciary know that their provider has give them all appropriate disclosures?

Page 70990 – 1st column – Prospectus, Form ADV, ADV II or the Summary of Additional Information (SAI) present very minimal disclosure insufficient to the plan sponsor fiduciary for analysis. A service provider with an affiliated mutual fund company with funds in the plan will continue to say: "Those expenses are in the prospectus – go there.." A prospectus shows fees in summary, ADV and ADV II present an advisor's fees in summary or how fees are structured and an SAI describes the potential compensation that could be coming to the provider. These do not give adequate information to the individual plan sponsor fiduciary to understand how a provider is compensated from a particular plan. For example, hypothecation or securities lending – a significant source of compensation to the provider – described as a one-line/one-paragraph in the prospectus/SAI. For this to be meaningful, the amount compensated to the provider from a specific plan's holdings would have to be disclosed. We do not anticipate any provider going to that level. Other sources of significant compensation at this summary (and not meaningful level) include:

Premium income on option income

Premiums on swaps/warrants

Rebates for placing trades through preferred brokers

STIF fund interest in payment account

Spreads on STIF, GIC, cash or other short term money vehicles

Fund family payments to service provider for the privilege of being on that provider's trading platform (beyond 12b-1 fees).

And numerous others….

Saying that these items are not DOL items and are under the purview of the Securities and Exchange Commission does not relieve the plan sponsor fiduciary of trying to fathom what expenses they are truly paying.

Page 70990 – 2nd column - Will providers really disclose the amount they spent to take their clients to golf outings? Dinners? Trips to resort destinations? Trips to corporate offices? Will plan sponsors really want it known that they were treated by their provider to a nice trip?

Page 70990 – 2nd column – how will a plan sponsor fiduciary know when a provider has adequately disclosed (for example): finder's, placement, transfer agent, shareholder servicing fees?

Page 70990- 3rd column – how will a plan sponsor fiduciary know when a provider has disclosed a formula based, direct expense base or "swag" based fee amount? Will service providers really explain the assumptions…and will plan sponsor fiduciaries really understand?

Page 70991 – 1st column – we are troubled by the bundled arrangement exemption. Any large provider will go here first and use this to avoid any further disclosure. The citation:*" For instance, the service provider would not have to break down the aggregate fee into the amount that will be charged for preparing the Form 5500 annual report and the amount that will be charged for preparing the participant statements. Also, the bundled provider generally is not required to disclose the allocation of revenue sharing or other payments among affiliates or subcontractors within the bundle*." We see this as totally negating the intent of these regulations even after accounting for the exceptions pointed out in the second column.

Page 70991 - 2nd column. We concur with the Department's statement that fee disclosure would not open up proprietary or confidential practices. However, we expect that providers will say that these are confidential or that these cannot be determined, which means the disclosures will remain grossly understated just as they are now. On that second item, we wonder how providers would calculate profitability on a particular plan if they could not determine what the revenue and expense elements are.

Page 70991 – 3rd column – We are concerned that that the service provider may act in a fiduciary role (discretionary control over the assets, plan operations or decision making) and state they are not, putting the plan sponsor fiduciary in the awkward and dangerous position of understanding the nuances of service provider fiduciary roles. We have seen repeatedly through out the industry that that if plan sponsors challenge some provider duties as being fiduciary, many day to day operations and ministerial functions will not take place.

Page 70992 – 1st column – Disclosures should include what is generating compensation, the nature and *the amount of compensation* received. Lip service is paid to the first two items and nowhere is the amount disclosed.

Page 70992 – 3rd column – We are troubled by the differences between the annual reporting requirements on the Form 5500 and the tracking required by the proposed regulations. The service providers will minimally support the Form 5500 disclosures just as they have always done. What efforts will the plan sponsor fiduciaries need to take to understand the nuances between the two and what leverage do they have to get what they need? To essentially give the plan sponsor fiduciary two different requirements with two different information requests to service providers places a tremendous burden on the fiduciary. The confusion will work in the service provider's favor, as long as clients are confused they will never reach the roots of the issues at hand.

What we are trying to understand is that Schedule C disclosures have always been required with service providers not really disclosing their expenses; what will be different now? We see these new regulations placing more responsibility on plan fiduciaries in an environment they cannot control. It's hard to expect fiduciaries to exercise power they do not have, and then hold them liable. Given past experiences, we see no incentive for service providers to disclose more. Since they are not fiduciaries and have little to lose by conducting business as usual, what new element will make them more compliant?

Our concern is that plaintiff litigators will have more opportunities with the new proposed regulations than the current version. So far, this is what all the fee cases are doing right now, and to date, the service providers are mostly escaping the damages. If no one is regulating the service providers, except the fiduciaries as stated on February 7th call, then it looks to us like the proposed regulations are not helping the plan fiduciaries as intended.

We see this is a great effort on behalf of the DOL, but it will create more issues than it will resolve.

We'd be happy to share with you additional thoughts on this topic. Please do not hesitate to contact us.

Very Truly Yours,

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