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**From:** Richard Perlin [mailto:richard@erisainc.com]  
**Sent:** Sunday, May 04, 2008 2:53 AM  
**To:** EBSA, E-ORI - EBSA  
**Subject:** Compensation Disclosures Under 408(b)(2)

Dear EBSA:

I would like to comment on the Proposed Regulation issued December 13, 2007 on "Reasonable Contract or Arrangement under Section 408(b)(2)." This proposal addresses a very important issue for plan fiduciaries that affects both the costs charged against participant's accounts and the quality of services provided to retirement plans. One of the biggest issues fiduciaries face in evaluating retirement plan providers, and in particular 401(k) plan providers, is determining the actual asset based costs of a program. While it is important to disclose information that might identify conflicts of interest and issues of reasonable compensation, I feel plan fiduciaries would be better served if the proposed regulation placed more emphasis on the total asset related costs.

The current state of affairs results in plan sponsors receiving information about plan expenses from a variety of documents and a variety of sources. It is common for CFO's of smaller companies, who often are given primary responsibility for evaluating 401(k) programs, to have little knowledge about the expenses that are actually charged against plan assets under their companies' 401(k) plans. The method of disclosures is often inconsistent and not always accurate.

In one recent example, a booklet prepared by a large provider contained detailed information about the funds from which participants may select. However, the expenses of the funds listed in the booklet were for the bare fund expenses and omitted the layers of additional expense for recordkeeping and broker service fees. While information on total expenses was available, it was not easily available, and the listing of fund expenses in the employee booklet did not disclose that these expenses were essentially incomplete. Unfortunately, in some cases representatives of financial institutions that sell 401(k) programs are often uninformed about true costs, and consequently do not offer accurate (or any) information to plan fiduciaries. Since these financial representatives actively promote retirement plan programs, these individuals often have the largest level of contact with plan fiduciaries. This true cost information is generally available, but is often buried in lengthy contract documents

Consider, for example, a proposal from one provider that provides a set of services at a cost equal to 1.0% of assets per year. Then consider another provider that offers the same set of services for 1.50% per year. Regardless of how the dollars are split among service providers, the effect on participants is the same.

It is also increasingly common for 401(k) program providers to pay indirect compensation to parties, such as third party administrators, that comes from the provider and is not directly taken from plan assets. It is also common for amounts to be paid to third parties that are assessed indirectly from plan assets, i.e. the payments are not identified as a specific category of expense to the plan assets. In either of these cases, the same purpose of relevant disclosures would be served by use of a disclosure that focuses on plan expenses rather than amounts received by each service provider. Where compensation paid does not directly impact plan costs, competition in the marketplace among providers of plan services should have the effect of limiting compensation to reasonable levels, if plan fiduciaries are given clear and concise disclosures of total expenses.

For example, if a service provider pays a subsidy to third party administrators and one administrator offsets its normal fee by all or a portion of the subsidy, while another administrator

does not, then that second administrator will, in an environment where plan fiduciaries are well informed, have to justify why it deserves a higher fee.

Section 408(b)(2) refers to "reasonable compensation" in the context of forming "reasonable" contracts or arrangements. I contend that compensation is likely to be reasonable when plan fiduciaries can make informed choices based on total expenses.

The regulation recognizes that it is not feasible for bundled providers to break out compensation paid to each affiliated and unaffiliated sub-contractors. But unbundled providers are allowed to make separate disclosures, in separate documents, provided at different times. I believe this leads to confusion and difficulty in comparing the real costs of different programs. The true costs of a program can be easy to bury.

For these reasons, I feel that the regulation should require a consolidated, simplified, and concise disclosure focusing on overall plan expenses. The level of detail would be commensurate with the relative size of the plan. To approach the issue of reasonable arrangements from the perspective of compensation paid leaves open the possibility that fiduciaries will continue to have difficulty ferreting out the real costs of programs they are called upon to analyze.

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