The Profit Sharing and 401(k) Advocate • Sharing the Commitment since 1947
20 N. Wacker Drive, Suite 3700 • Chicago, IL 60606 • 312.419.1863 • Fax: 312.419.1864 • www.psca.org

August 30, 2010

Office of Regulations and Interpretations
Employee Benefits Security Administration
United States Department of Labor
Washington, DC
delivered electronically

RE: Section 408(b)(2) Interim Final Rule

The Profit Sharing/401k Council of America (PSCA) is pleased to comment on the Interim Final Rule on Reasonable Contract or Arrangement Under Section 408(b)(2)-Fee Disclosure (the rule). Founded in 1947, PSCA is a non-profit association representing companies that sponsor profit sharing and 401(k)-type plans. PSCA speaks for 1,200 companies who employ approximately five million plan participants throughout the United States. PSCA's members range in size from very small firms to conglomerates with hundreds of thousands of employees. All regard their profit sharing or 401(k)-type plans as vital factors in their business success.

The rule is a significant step forward in providing plan sponsors with the information necessary for them to meet their fiduciary requirement to ensure that plan fees paid with plan assets are reasonable. Several of the changes from the proposed rule are laudable; particularly the decision to not include the requirement for a service provider to disclose what it subjectively deems to be a conflict of interest. The rule's approach to require disclosure of compensation of fees received from an affiliate is a better approach to this important issue. The provisions requiring a service provider to disclose additional information upon request will be very helpful to those plans that are equipped to realize that such information is required.

However, PSCA remains concerned that the rule will leave plan fiduciaries only partially armed to meet their fiduciary duties. We believe that the importance of the rule is inversely proportional to plan size – the smaller the plan, the less likely that the plan fiduciary is equipped to learn about fees without the disclosures provided under the rule. Our largest plans, on the other hand, are usually able to obtain fee disclosures without the requirements of the rule. In several circumstances the rule supposes a level of sophistication and ability to obtain information outside the scope of the rule that does not exist for small plans. For example, the preamble, in discussing the $1,000 threshold for a covered service provider, states "the Department is persuaded that the parties to these relatively small service contracts or arrangements may not need to provide the detailed disclosures required under the rule in order to ensure that plan fiduciaries have the information they need to make informed decisions about the services and cost of the services to be provided." We believe that for thousands of small plans the express exclusion of these services from the rule will preclude the plan fiduciary from learning about them at all. Simply put, many small plans "don't know what they don't know."

PSCA makes the following recommendations that will improve the utility of the rule to plan fiduciaries.

The rule should require full disclosures in a single written document. The rule provides that a covered service provider may disclose investment-related fees under paragraph (c)(1)(iv)(G) by providing current materials from a non-affiliated regulated issuer of a designated investment alternative. In the preamble, the Department requests comments on the adequacy of the general disclosure provisions and whether or not the rule should be amended to require the provision of a "summary disclosure statement" that will include "a roadmap for the plan fiduciary describing where to find the more detailed elements of the disclosures required by the regulation."

PSCA believes that neither this provision nor the proposed summary disclosure statement is adequate to assist plan fiduciaries in determining the reasonableness of plan fees. All the disclosures required by a covered service provider should be provided in a single written document (including in electronic format). Furthermore, the Department should promulgate uniform parameters in the way disclosures are presented. These parameters should be broad enough to permit individual service providers to utilize their current formats as much as possible while also facilitating the comparison of proposals from different service providers.

Under our recommendation, the process of compiling disclosures into a single source and developing a common general format for comparison will be transferred from the responsible plan fiduciary to the service provider. Service providers can manage this process far more efficiently than most individual responsible plan fiduciaries. Overall costs to the system, which are ultimately paid by most plan participants, may be lower if the Department mandates consolidated and generally uniform service provider disclosures.

In-house service providers should not be covered service providers. Many plan sponsors provide services to their own plans. These services include many of the activities enumerated in the rule. A responsible plan fiduciary, by definition, provides fiduciary services to its own plan. Plan assets may be used to compensate these services and the responsible plan fiduciary must ensure that these fees are reasonable. In this situation, there is complete transparency regarding all features of the services provided to the plan and any compensation received. The required disclosures provided under the rule are not necessary. The rule should be amended to provide that a covered service provider does not include a service provider to a plan who is an employee of the plan sponsor or its affiliate.

The Department should clarify that "direct compensation" includes amounts reimbursed to the plan sponsor by the plan. The rule defines direct compensation as compensation received directly from the covered plan. The Department should clarify, consistent with section 408(c)(2) and its guidance under the Form 5500, that compensation received directly from the plan includes compensation from the plan sponsor that is reimbursed by the plan.

The $1,000 threshold should apply to responsible plan fiduciaries, not just service providers. The Department requested comments on the $1,000 threshold for covered service providers. As noted previously, it will often result in fiduciaries being unaware of the fee whatsoever. While the rule specifies that it is independent of section 404, it will, unfortunately, be widely perceived as being coordinated with the section 404(a) requirement to ensure that fees paid with plan assets are reasonable. The rule should be amended to specify that if a service is covered under the rule except for the $1,000 threshold, a responsible plan fiduciary has no duty under section 404 to determine the reasonableness of the undisclosed fees attached to such service. Additionally, the Department should clarify that the $1,000 thresholds for the definition of a covered service provider and a subcontractor is calculated by considering total compensation over the life of the contract or arrangement**.**

The rule should require the disclosure of all covered services at the level the Department believes is necessary to meet the requirements of section 404(a). In the preamble, the Department discusses its decision to delete "all" from the required description of services. The Department concludes that "the level of detail required to adequately describe the services to be provided pursuant to a contract or arrangement will vary depending on the needs of the responsible plan fiduciary." The preamble states "In certain instances, it may well be understood that a particular service necessarily encompasses, among other things, a variety of sub-services such that a description of sub-services is unnecessary. For example, plan fiduciaries may understand that the execution of securities transactions includes, but is not limited to, valuation, safekeeping, posting of income, clearing and settling transactions, and reporting transactions, thereby eliminating the need to describe such sub-services." PSCA believes that a large majority of plan fiduciaries do not possess this understanding. The Department then cautions that "the responsible plan fiduciary must, under sections 404 and 408(b)(2) of ERISA, decide whether it has enough information about the services to be provided pursuant to the contract or arrangement to determine whether the cost of such services to the plan is reasonable." If the fiduciary concludes the information is insufficient, they must request additional information.

The example used by the Department raises an important issue. It infers that at least some responsible plan fiduciaries must understand the myriad sub-services related to securities transactions to meet their requirements under sections 408(b)(2) and 404(a), and that the rule does not require disclosure of this information. This argues for a broader required level of disclosure under the rule. Additionally, while the Department notes that a responsible plan fiduciary must request additional information beyond the scope of the required disclosures in order to meet the requirements of section 408(b)(2) and 404 , the rule does not compel a covered service provider to provide the information. Paragraph (c)(1)(vi), that requires the furnishing of information needed to comply with the reporting and disclosure requirements of Title I of the Act, should be amended to include information needed to comply with sections 408(b)(2) and 404(a) of the Act.

Recordkeepers may need additional relief in reporting investment fees. The rule's requirement for recordkeepers to convey investment related fees is critical to the operation of the rule. It is important that a recordkeeper's liability when it merely transmits investment-related disclosures from the investment issuer should be minimal, regardless of the regulated status of the investment issuer or its affiliation with the recordkeeper. Additionally, PSCA believes the rule requires a recordkeeper to convey the investment disclosures of a fiduciary to an investment holding plan assets regardless of any direct disclosure by said fiduciary to the responsible plan fiduciary. This requirement appears to be redundant and could increase the likelihood of an inaccurate disclosure. Notwithstanding our comment on the need for a single written disclosure, we expect that recordkeepers and their representative organizations will file comments on these and other issues related to the disclosure of investment fees, and we urge the Department to give them serious consideration.

The Department should reiterate that fiduciary status is criteria-driven. The requirement for a service provider to disclose if it will, or expects to, provide services as a fiduciary is a positive element of the rule that will assist plan fiduciaries. However, fiduciary status is based on the performance of certain activities, not on this disclosure. The preamble should include a discussion that the provision of this disclosure, including a statement that a service provider will not be providing services as a fiduciary, is not dispositive of the fiduciary status of the provider.

Flexibility may be required in reporting services related to a broker window. PSCA believes that, under the rule, an entity providing brokerage services for a broker window or similar arrangement pursuant to a contract or arrangement with the plan is a covered service provider. The brokerage service may receive indirect compensation that varies with the investment selected by the plan participant. This creates difficulty in reporting expected compensation pursuant to the rule. The Department should consider amending the rule to permit the reporting of a range of expected compensation in this situation.

The exemption for a responsible plan fiduciary should also waive any ability of the provider to recoup costs. Paragraph (c)(1)(ix) provides critical relief for plan fiduciaries who do not receive the disclosures required under the rule. We commend the Department for this important provision. Paragraph (c)(1)(ix)(G) requires a responsible plan fiduciary to determine whether or not to terminate or continue a contract following the discovery of a failure to disclose required information. Presumably, an unresolved failure to receive such disclosures will result in the lack of a reasonable contract or arrangement whose continuance will be a prohibited transaction. The plan fiduciary will have no choice about continuing the contract or arrangement. PSCA recommends that the rule be amended to provide that in this situation any contractual requirement to compensate the service provider for losses or recovery of expenses as the result of the termination shall be null and void. Anti-abuse protections for service providers may be appropriate.

The effective date is appropriate, but it should be adjusted for substantive changes. PSCA believes that the July 16, 2011, effective date in the rule is appropriate. However, if substantive changes are made, including our recommendations, the one-year lead time in the rule should be extended and preserved.

Sincerely,

David L. Wray
President