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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5665
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attention: 408(b)(2) Amendment

Dear Sir or Madam:

Subject: Comment letter relating to proposed amendment to ERISA Section 408(b)(2) regulations

Hewitt Associates (Hewitt) welcomes the opportunity to submit comments on the Department of Labor's (Department's) proposed fee disclosure regulations relating to the definition of a reasonable contract or arrangement under Section 408(b)(2)of ERISA. This request was published by the Department in the *Federal Register* on December 13, 2007.

Who We Are

With more than 60 years of experience, Hewitt (http://www.hewitt.com/) is a leading global provider of human resources outsourcing and consulting services. Hewitt consults with more than 2,300 companies and administers human resources, health care, payroll, and retirement programs on behalf of more than 340 companies for millions of employees and retirees worldwide. Our outsourcing services process customer interactions from nearly 20 million employees and retirees annually, making Hewitt one of the largest providers of retirement plan recordkeeping and administration services in the country.

Hewitt acknowledges the Department's significant efforts with these proposed regulations and we welcome its request for comments. Hewitt has been a vocal advocate of the fiduciary's need to understand and evaluate total plan costs. Hewitt's practice has always been to fully disclose our fees and the services to which such fees apply. Additionally, Hewitt has consistently disclosed our fee arrangements with investment managers. We therefore welcome the promotion of clarity and uniformity in fee disclosure requirements.

These regulations, however, also raise some concerns. We therefore offer these comments in an effort to both congratulate the Department and offer suggestions for needed revision and clarification.

Comments on Basic Fee Disclosure Requirements

Hewitt commends the Department for promoting thorough disclosure of fees to plan fiduciaries. Understanding plan costs is fundamental to the basic duties of a fiduciary. Such understanding is necessary to ensure that charges under a contract with a service provider constitute reasonable compensation and thus, fall within the prohibited transaction exemption under Section 408(b)(2) of ERISA. Just as importantly, understanding plan costs is necessary for a fiduciary to act prudently, solely in the interest of plan participants and beneficiaries, as required by Section 404(a) of ERISA, when selecting a service provider. Thus, fee disclosures aid fiduciaries in satisfying these two duties, both of which are present when reviewing plan costs to determine whether they are reasonable.

A fiduciary can satisfy neither duty, however, when fee disclosures do not permit the meaningful comparison of costs between competing service providers. Whether fees are reasonable depends not upon a single number or percentage but, rather, on how those fees compare to what is being charged by others for similar services. Uniform disclosure rules that permit the meaningful comparison of fees will help fiduciaries better evaluate the cost of services of competing service providers, even when different packaging and pricing methods are utilized. Plan fiduciaries must understand the major cost components of plan expenses, however they are packaged (i.e., bundled or unbundled), as well as what services are covered, in order to act prudently and assess the reasonableness of a contract.

Fiduciaries also need to be aware of the indirect compensation that service providers may receive for their services to the plan. This is especially important in evaluating administrative costs for individual account plans. These regulations will aid plan fiduciaries in these evaluations. However, the proposed rules may not go far enough in providing plan fiduciaries with uniform disclosures that will enable them to make meaningful comparisons of service provider fees and related contracts.

Disclosure requirements should apply uniformly to all service providers, whether bundled or unbundled. The proposed regulations do not require bundled service providers to disclose the allocation of fees to affiliates and subcontractors within the bundled arrangement. The Department has followed the same approach as the requirements for reporting fees on the Schedule C of the Form 5500 (Annual Return/Report of Employee Benefit Plan). We submit, however, that whether or not expenses must be separately reported on a plan's annual return, the fiduciary still must understand the components of fees paid in order to make a determination as to whether the fees are reasonable, and therefore whether the underlying contract is reasonable.

In addition to evaluating fees at the time the contract is executed, fiduciaries will use the information contained in required disclosures to compare competing offers and select service providers. Therefore, fiduciaries should know that there is a cost associated with services that they may perceive as free because they are wrapped into a bundled offer, in order to uniformly compare bundled costs with other unbundled services. By comparing allocated administrative costs under a bundled arrangement with the administrative costs of an unbundled service provider, a fiduciary can better understand competing offers. The fiduciary may leverage this understanding to select a lower-cost unbundled arrangement, or negotiate lower fees with a bundled provider. Either way, the plan and plan participants benefit, as demonstrated by the following example from Hewitt's consulting experience.

In one situation, a fiduciary requested a thorough breakdown of bundled costs. The fiduciary hired Hewitt to help identify the breakdown of fees associated with administration versus investment management services. Once this uncoupling of fees was completed, it was discovered that the revenue sharing fees allocated for recordkeeping and administration were 40 percent higher than the equivalent costs of other unbundled administrative service providers. With that information, the fiduciary was able to negotiate a reduction of fund expenses and revenue sharing to make the bundled fees competitive and therefore reasonable. This reduction accrued to plan participants in the way of lower fees. Moreover, this cost savings compounded to the benefit of participants each subsequent year of the contract.

The proposed disclosure rules, however, do not require fiduciaries to be provided with the information necessary to make a uniform comparison of packages and services offered by different providers. If such a breakdown is not required, some bundled service providers may refuse to furnish this information, even upon request. Ultimately there will be a significant negative financial impact on plans and plan participants.

We therefore request that the final rules require the disclosure of the allocation of fees to affiliates and subcontractors in a bundled fee arrangement, in order to achieve uniform disclosure and a better understanding of plan fees. With this understanding, fiduciaries will have the necessary information to determine whether a contract is reasonable.

Clarity is required for the bundled service provider rules. As noted above, we believe the bundled service provider disclosure rules need to be significantly revised. However, as currently written, the exception to full disclosure for bundled providers, set forth in Section 2550.408b-2(c)(1)(iii)(A)(3) of the proposed regulations, requires clarification. This provision states that the service provider does not have to disclose how the compensation or fees received for bundled services are allocated to each specific affiliate in the bundled services contract:

> "…except to the extent such party receives or may receive compensation or fees that are a separate charge directly against the plan's investment reflected in the net value of the investment or that are set on a transaction basis, such as finder's fees, brokerage commissions, and soft dollars…"

The language in this exception is confusing. It is not clear under what circumstances this exception would apply. Specifically, we request clarification as to what the Department intends to capture with the phrase "separate charge directly against the plan's investment." For example:

What does "separate" mean?

- Does it mean in addition to the fees disclosed in (c)(1)? For example, if as part of the package of services provided by the bundled service providers there are "separate" fees in addition to the bundled fees and such separate fees are charged directly against a plan investment, are these the type of fees for which the allocation must be specifically disclosed?

- Does it mean "specific"? For example, if certain fees are included in bundled cost, must their allocation still be separately disclosed if such fees are specifically charged against the net value of a plan investment?

What does it mean to be charged against the plan investment?

- Does it mean that only the allocation of charges against an individual plan investment must be broken out, such as charges that only impact a specific investment option?

- Does it mean that any charge impacting the value of the investment at the trust level must be broken out? For example, if service provider's fees are being deducted from the net value of all the combined plan investments, would that need to be disclosed?

We appreciate the Department's use of general terminology in order to allow these provisions to capture both current and future fee structures. However, in this case the terminology is too general. Although it would be preferable if the final regulations require the disclosure of bundled fee arrangements, if they do not, both fiduciaries and service providers need a more definite understanding of this exception in order to comply. We request that the Department clarify this exception with an explanation of the type of situation the exception is intended to address. Detailed examples would help to clarify the intent.

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Flexibility in the manner of disclosure will be important to efficient compliance. Hewitt appreciates the Department's recognition that as long as the service provider makes the required disclosures and submits a statement to the fiduciary that disclosures have been made, it is not necessary to utilize any specific format or a single document. The fiduciary must be able to easily ascertain the charges, or the method by which fees will be charged. However, each service provider should retain the flexibility to provide the information in the most efficient and cost-effective manner.

Comments on Conflict of Interest Requirements

A specific conflict of interest disclosure is not necessary. Section 2550.408b-2(c)(1)(iii)(D) of the proposed regulations requires a service provider to disclose any relationship that creates or may create a material conflict of interest that might impact its performance of services under the contract. The concept of conflict of interest as reflected in the proposed rules is ambiguous. Moreover, a "potential" conflict does not appear to be contemplated in the scope of the prohibited transaction rules under Section 406 of ERISA. The brief reference to conflict of interest in Section 2550.408b-2(e) of the current ERISA regulations seems to refer to an actual conflict resulting in a prohibited transaction.

We believe that with existing law and the remaining provisions of the proposed regulations, fiduciaries will have sufficient information to judge whether any other business relationships of a service provider will compromise its performance under a contract. Both fiduciaries and service providers have always had to be alert to possible conflicts caused by other business relationships that might result in a prohibited transaction under ERISA Section 406. Service providers may be subject to costly penalties if found to be engaged in a prohibited transaction. Thus, existing law already provides a significant deterrent.

Moreover, the other provisions of these proposed regulations obligate the service provider to disclose sufficient information to allow a fiduciary to evaluate the provider's objectivity. Under the proposed rules, service providers must disclose all direct and indirect compensation, any situation in which providers may be able to influence their compensation, as well as procedures to prevent existing or potential conflicts from adversely impacting service delivery. If a service provider is not forthcoming with its disclosures, the fiduciary will notify the Department pursuant to the procedures set forth in proposed Prohibited Transaction Class Exemption 2008-XX. This gives the service provider sufficient incentive to furnish thorough responses.

Additionally, the term "conflict of interest" is pejorative. It implies that positive and productive business relationships are, instead, inappropriate. Therefore, because smaller service providers will have fewer disclosures than large providers, fiduciaries may be inclined to select the smaller providers, even though it might not be the best selection. However, it might appear to be the most prudent selection based upon the weight of the larger provider's "conflicts."

It is possible that some providers might not even recognize what relationships create conflicts, and therefore, might not sufficiently disclose. However, given that the consequences of noncompliance with these requirements may include the cancellation of service contracts and loss of business relationships, most service providers may be inclined to over-disclose. Therefore, if included in the final rules, this provision could result in an inefficient process of mountainous disclosure, resulting in overwhelming review obligations for the fiduciary. The time, effort, and cost to all parties would be unjustifiably burdensome. We therefore request that this provision be omitted from the final regulations.

Comments on the Concept of "Materiality"

Non-fiduciary service providers should not be subject to a fiduciary standard of review. Section 2550.408b-2(c)(1)(iii)(D) of the proposed regulations, discussed above, requires the service provider to disclose any "material" relationship that may constitute a conflict of interest. Section 2550.408b-2(c)(1)(iv) of the proposed regulations requires a service provider to disclose any "material" changes to the information required to be disclosed. The preamble indicates that something is a material change if the reasonable plan fiduciary would think the change significantly alters the mix of information made available or if the change would impact the fiduciary's decision to hire or retain the service provider. Whether something constitutes a "material change" falls within the venue of the fiduciary. However, many service providers are not fiduciaries. Accordingly, in determining whether relationship or change is "material," non-fiduciary service providers should not be subject to a fiduciary standard of conduct or review.

Section 404(a)(1)(B) of ERISA requires a fiduciary to carry out its duties:

> "…with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in conduct of an enterprise of a like character with like aims."

This is a high standard that should apply only to fiduciaries whose professional conduct requires them to understand and operate under such parameters. Non-fiduciary service providers do not operate in "like capacity" to fiduciaries and are not as "familiar with such matters." We request, therefore, that the Department acknowledge this distinction and clarify that in determining materiality, non-fiduciary service providers will be required to act in good faith based upon their knowledge and reasonable understanding of what is material.

Comments on the Effective Date and Compliance Effort

The preamble to the proposed regulations indicates that the regulations will be effective 90 days after publication. Given the amount of clarification that will be necessary in order to comply with these regulations, we request that service providers should be required to make a good faith effort to comply with these regulations, but that the regulations are not effective for at least one year after publication.

The preamble estimates that each service provider will have to spend one hour to become familiar with the rules and 80 hours to implement. We realize that the Department is attempting to estimate time for all service providers of all sizes. However, we believe that even the smallest provider of any type of service will spend significantly more than one hour understanding what these rules mean to its business. For the large multiservice providers, that number will be appreciably larger.

We also believe that 80 hours for implementation is incredibly low. We hope that there will be considerable commonality to implementation efforts. Standard templates, checklists, and training will be developed or updated for the various types of services. However, disclosure is ultimately a client-by-client proposition. The scope of services may vary from one client to the next, and this variation may impact the relevant disclosure. While much disclosure may be standardized, each relationship must be reviewed for any special situation that might indicate additional information is needed. We therefore would suggest that a much more substantial time estimate would be appropriate for all but the very smallest service providers.

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The Department also needs to understand that fiduciaries must have time to review the disclosures and perform any necessary due diligence. Because we believe that the time required for analysis, implementation, and review is much greater than anticipated in the preamble to the proposed regulations, we request that the effective date of the final regulations be extended.

Ongoing compliance also will have to be addressed client-by-client and service-by-service. Accordingly, 56 hours may be sufficient for small providers of very standardized services. However, to account for the more varying relationships of the larger providers, we believe providers with a larger volume of business will require a great deal more time to review and update their disclosures. As such, we recommend an effective date that is no earlier than one year from the date the final rules are published.

The proposed rules are not specific regarding the treatment of existing contracts or arrangements. They could be interpreted to mean that existing contracts do not comply with ERISA Section 408(b)(2) even though such contracts were valid when executed. If this is the intended interpretation, then by the Department's own estimates, more than one million existing contracts must be brought into compliance by the effective date. Such an effort would be impossible. Service providers require clarification of several issues from the final regulations and so will not be able to begin some of their compliance efforts until after publication. In order to address the sheer volume, we recommend that a transitional good faith compliance period be extended to existing contracts. We request that for at least one year after the effective date of the final rules, service providers will be deemed compliant as long as they make the required disclosures by the end of the transition period. We also request that the Department not require existing contracts to be amended. Rather, service providers should be able to meet these requirements by providing the required disclosures.

We submit the foregoing comments and suggestions to help clarify these rules and better enable service providers to disclose information that will allow plan fiduciaries to uniformly assess service provider fees and determine if contracts are reasonable.

Sincerely,
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