

DOL Regulatory Update

Disclosure and Other Obligations for Service Providers
and Plan Administrators

Kenneth M. Johnson
Tuggle Duggins & Meschan, P.A.

Introduction

- Service Provider Fee Disclosure
 - Effective January 1, 2012 (change from original July 16, 2011 date).
 - Possible further extension?
 - Regulated under the statutory exception to ERISA's prohibited transaction rules for "reasonable arrangements" with party in interest service providers. ERISA §408(b)(2).
- Proposed regulation of the definition of "fiduciary" for providing investment advice.
 - Regulated under ERISA §3(21) defining a fiduciary.
 - Hearings held on March 1st and 2nd 2011 and comment period closed on April 12, 2011.
 - Dramatically expands the definition of fiduciary.

Introduction

- Participant Fee Disclosure
 - Effective for plan years beginning after November 1, 2011.
 - Possible extension?
 - Regulated under ERISA's general prudence standard. ERISA §404(a)(1).
 - Replaces disclosure under ERISA §404(c) and requires disclosure for all participant directed plans.
- Form 5500 Schedule C Reporting of Compensation to Service Providers
 - Effective with the 2009 Form 5500.
 - Regulated pursuant to Section 103 of ERISA and the requirement to file an Annual Report (Form 5500).
 - Requires plan administrators to “turn in” service providers who do not fully report compensation received.

Service Provider Disclosure

- Reason for Increased Disclosure:
 - “In recent years, there have been a number of changes in the way services are provided to employee benefit plans and in the way service providers are compensated. Many of these changes may have improved efficiency and reduced the costs of administrative services and benefits for plans and their participants. However, the complexity resulting from these changes also has made it more difficult for plan sponsors and fiduciaries to understand what service providers actually are paid for the specific services rendered.”

Service Provider Disclosure

- Plans Covered:
 - Applies to “employee pension benefit plans” which would include all defined contribution and defined benefit plans. Also would apply to ERISA covered 403(b) plans.
 - Does not apply to IRAs (including SEPs and SIMPLEs), welfare plans and plans not subject to ERISA (certain governmental plans, church plans and “owner only” plans).
 - Welfare plan regulations will be issued in the future.

Service Provider Disclosure

- Covered Service Providers
 - Fiduciaries and Registered Investment Advisors
 - Plan Fiduciary
 - Traditional ERISA analysis
 - Investment contract fiduciary
 - Investments holding “plan assets” under ERISA (collective trusts, insurance company separate accounts, certain non-publicly traded entities).
 - Does not include mutual funds, REOCs, VCOCs etc.
 - Only applies to the first level of investment. (If an insurance company separate account invested in a collective trust it would only apply to the manager of the separate account).

Service Provider Disclosure

- Covered Service Providers (cont.)
 - Fiduciaries and Registered Investment Advisors
 - Registered Investment Advisors
 - Registered under federal or state law.
 - Can separate broker/dealer activity from RIA activity (dual status).
 - “Platform” recordkeeping or brokerage service providers.
 - Recordkeeping and brokerage services provided to participant directed individual account plans, if one or more of the plan’s designated investment alternatives will be made available in connection with the service arrangement (through a platform or other mechanism).

Service Provider Disclosure

- Covered Service Providers (cont.)
 - Recipients of Indirect Compensation
 - Accounting, auditing, actuarial, appraisal, banking, consulting (relating to investments or monitoring investment service providers), custodial, insurance, investment advice, legal, recordkeeping, brokerage, third party administration, or valuation services.
 - Includes recordkeeping and brokerage service providers who are not platform providers.

Service Provider Disclosure

- Disclosure requirement does not apply to:
 - A subcontractor or affiliate of a covered service provider.
 - But the covered service provider must disclose all of the compensation received including that received by affiliates or subcontractors if:
 - It is set on a transactional basis (e.g. commissions, soft dollars, finders fees or other incentive compensation based on business place or retained) or
 - It is directly charged against the covered plan's investment or reflected in the net value of the investment.
 - A provider receiving less than \$1,000 in direct or indirect compensation over the term of the contract or arrangement

Service Provider Disclosure

- Each covered service provider must provide the following information in writing (but **no contract required**):
 - Description of services—no required format.
 - Statement of fiduciary status.
 - Negative disclosure requirement in the proposed regulations was eliminated.
 - Direct compensation (paid by the plan).
 - Indirect compensation (must provide the payer and description of services).
 - Compensation paid among related parties:
 - *if it set on a “on a transaction basis (e.g. commissions, soft dollars, finder's fees or other similar incentive compensation based on business placed or retained).*
 - *If it is charged directly against the covered plan's investment and reflected in the net value of the investment (e.g., Rule 12b-1 fees).*
 - *Replaces the conflict disclosures in the original regulation but may be confusing because of “duplicate reporting”.*
 - Termination compensation.
 - Penalties prohibited.
 - Manner of receipt.

Service Provider Disclosure

- Compensation Description
 - May be expressed as a monetary amount, formula, percentage of the covered plan's assets, or a per capita charge for each participant or beneficiary or, if the compensation cannot reasonably be expressed in such terms, by any other reasonable method.
 - Compensation paid by the plan sponsor is not subject to the Regulation's requirements.

Service Provider Disclosure

- Timing.
 - Must be provided by January 1, 2012 for existing covered service providers (a change from the original July 16, 2011 date). Another extension possible?
 - Otherwise must be provided to the responsible plan fiduciary reasonably in advance of the date the contract or arrangement is entered into, extended or renewed.
 - If there are changes the updated information generally must be disclosed to the plan fiduciary within 60 days from the date the covered service provider is informed of the change.
 - For example a covered service provider that is a platform provider must provide information concerning the change in an expense ratio of a mutual fund within 60 days of learning of that change.
 - Additional disclosures must be provided by within 30 days of a written request by a plan fiduciary or plan administrator.

Service Provider Disclosure

- Additional Disclosure for Recordkeepers.
 - Reason for Additional Disclosure.
 - “Especially in complicated service arrangements when a variety of services, including recordkeeping services, are provided to the covered plan and may be paid for through charges at the plan investment level or through revenue sharing, it is sometimes difficult for a plan fiduciary to determine the portion of aggregate charges that will be applied to recordkeeping services...”
 - In other words providers who say recordkeeping is “free”.

Service Provider Disclosure

- Additional Disclosure for Recordkeepers (cont.)
 - Recordkeepers must provide:
 - A description of all direct and indirect compensation the recordkeeper (and its affiliates and contractors) reasonably expects to receive in connection with the recordkeeping services.
 - If there is no explicit compensation stated (or if compensation is offset or rebated based on other compensation received) then a “reasonable and good faith estimate” must be provided. Must include “an explanation of the methodology and assumptions used to prepare the estimate and a detailed explanation of the recordkeeping services must be provided...”
 - Should take into account the rates that would be charged to (or paid by third parties for) the services, or prevailing market rates for a plan with similar characteristics.

Service Provider Disclosure

- Additional Disclosure for Investment Contract Fiduciaries.
 - Information regarding transactional charges (sales charges/loads, deferred sales charges, surrender fees, exchange fees etc.).
 - Information regarding operating expenses (the expense ratio) if the return on the investment alternative is not fixed.
 - Information regarding ongoing expenses (wrap fees, mortality and expense fees etc.).
 - This information does not have to be provided if it is already being provided by a platform service provider.

Service Provider Disclosure

- Additional Information Requirements for Platform Providers (brokers and recordkeepers) for each investment alternative.
 - Information regarding transactional charges (sales charges/loads, deferred sales charges, surrender fees, exchange fees etc.).
 - Information regarding operating expenses (the expense ratio) if the return on the investment alternative is not fixed.
 - Information regarding ongoing expenses (wrap fees, mortality and expense fees etc.).
 - Information can be provided using a prospectus, summary prospectus or similar material only if:
 - the investment alternative provider is not an affiliate of the covered service provider;
 - the disclosure materials are regulated by a state or federal agency; and
 - the covered service provider does not know the materials are incomplete or inaccurate.
 - An investment alternative does not include brokerage windows/self-directed brokerage accounts but does include mutual funds, insurance company separate account etc.

Service Provider Disclosure

- ERISA Prohibited Transaction Rules
 - Provision of services between the plan and a party in interest usually is a prohibited transaction.
 - Unless, the arrangement complies with the following under the §408(b)(2) statutory exemption:
 - Services are necessary for the establishment or operation of the plan;
 - No more than reasonable compensation is paid for the services, and
 - The services are provided pursuant to a “reasonable contract arrangement”.

Service Provider Disclosure

- Consequences for Failure to Disclose
 - Compliance with disclosure is necessary for the arrangement to be “reasonable”.
 - If arrangement does not comply with new regulation, the plan fiduciary approving the arrangement will have deemed to cause the plan to engage in a prohibited transaction, a violation of his or her duties.
 - Service provider could be liable to “unwind” the transaction (repay plan part or all of its compensation), excise taxes (15% of “amount involved”) under IRC §4975 which imposes a liability on “disqualified persons” who engage in prohibited transactions with pension plans.

Service Provider Disclosure

- No Prohibited Transaction If:
 - The responsible fiduciary upon discovery of the disclosure violation requests in writing that full disclosure be provided.
 - If the covered service provider fails to respond within 90 days that DOL be notified within 30 days of that failure (120 days from the original request for full disclosure).
 - Regulations specify the information that must be in this notice.
 - Responsible fiduciary makes a determination on whether to retain the service provider including the service provider's qualifications and cost of a replacement provider, the reason for the disclosure failure and the provider's response to that failure.

Service Provider Disclosure

- Inadvertent Errors.
 - Arrangement will not fail to be “reasonable” solely because a service provider, acting in good faith and with reasonable diligence, makes an error or omission in its disclosure, so long as the service provider discloses the correct information as soon as practicable, but no later than 30 days from the date on which the service provider knows of the error or omission.

Proposed Definition of the Term “Fiduciary”

- On October 22, 2010, DOL released a proposed rule on the definition of the term “fiduciary” in the context of providing investment advice.
- Extensive comments and hearings.
- Substantial adverse impact on broker-dealers and others who give occasional advice to employee benefit plans and did not consider themselves fiduciaries .

Proposed Definition of the Term “Fiduciary”

- Reason for Proposed Change
 - DOL’s view that plans needed more protection from self-dealing and a belief that conflicts of interest were not being disclosed. What may be perceived by plan fiduciaries as “impartial” advice is not actually impartial.
 - The change from a defined benefit to a defined contribution marketplace.
 - SEC report that “many consultants believe they do not have any fiduciary relationships with their advisory clients.”
 - Current definition has hampered DOL enforcement actions against certain “consultants, advisers and appraisers”.

Proposed Definition of the Term “Fiduciary”

- Current Definition is a 5 part test originally adopted in 1975.
 - Render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property...
 - On a *regular* basis...
 - Pursuant to a *mutual* agreement, arrangement or understanding, with the plan or a plan fiduciary, that...
 - The advice will serve as a *primary basis* for investment decisions with respect to plan assets, and that...
 - The advice will be individualized based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan assets.
- 1976 DOL advisory opinion that appraisal or valuation services would not be a fiduciary function.

Proposed Definition of the Term “Fiduciary”

- Proposed Definition
 - Advice:
 - *Provides advice, or an appraisal or fairness opinion, concerning the value of securities or other property, or*
 - *Makes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property, or*
 - *Provides advice or makes recommendations as to the management of securities or other property.*
 - To a plan, a plan fiduciary or a plan participant or beneficiary;

Proposed Definition of the Term “Fiduciary”

- Proposed Definition (cont.)
 - The person providing such advice either directly or indirectly (e.g., through or together with any affiliate):
 - *Represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA with respect to providing advice or making recommendations described in 1 above; or*
 - *Is a fiduciary with respect to the plan for reasons other than providing investment advice in the proposed regulation (e.g. exercising any discretionary authority or control over the management of the plan, or exercising any authority or control over the disposition of assets, or has discretionary authority or responsibility in the administration of the plan); or*
 - *Is an investment adviser within the meaning of the Investment Advisers Act of 1940; **OR***

Proposed Definition of the Term “Fiduciary”

- Proposed Definition (cont.)
 - *New 4 Part Test. Provides advice:*
 - pursuant to an agreement, arrangement or understanding, written or otherwise,
 - between such person and the plan, a plan fiduciary, or a plan participant or beneficiary,
 - that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and
 - the advice will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.

Proposed Definition of the Term “Fiduciary”

- Changes or Clarifications in the Proposed Definition
 - Individuals who value real estate or closely held stock for plans would become fiduciaries under the proposal.
 - The proposal does not require the advice to be provided on a regular basis.
 - The proposal also does not require that the parties have a “mutual understanding” that the advice will serve as a “primary basis” for plan investment decisions.
 - “Eliminates the “primary” requirement does it also eliminate mutual understanding?”
 - “For example, in a complex investment decision, a plan fiduciary may need to consult advisers with different areas of investment expertise in order to make a prudent decision. The relative importance of the different kinds of advice that the plan fiduciary obtains may be impossible to discern, and should not affect the question of whether the adviser is a fiduciary.” (example appears to address only the “primary basis” aspect)

Proposed Definition of the Term “Fiduciary”

- Changes or Clarifications in the Proposed Definition (cont.)
 - Clarifies that fiduciary duties arise in providing advice to plan participants as well as plan fiduciaries.
 - Clarifies that “compensation” includes amounts “from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered” and includes but is not limited to, brokerage, mutual fund sales, and insurance sales commissions.
 - Applies to IRAs.

Proposed Definition of the Term “Fiduciary”

- Investment Advice Does Not Include:
 - The provision of investment education information and materials within the definition of DOL Interpretive Bulletin 96-1;
 - Making a “platform” available (or providing information about the platform):
 - Marketing or making available (e.g., through a platform or similar mechanism), without regard to the individualized needs of the plan... securities or other property from which a plan fiduciary may designate investment alternatives into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts...
 - Required disclaimer in writing that no impartial investment advice is being provided.

Proposed Definition of the Term “Fiduciary”

- Investment Advice Does Not Include (cont.):
 - Valuations for plan reporting (i.e., Form 5500)
 - **But will** be considered providing advice, if it involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants.
 - Sales Exception
 - Must demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that:
 - The person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property (or as an agent of, or appraiser for, such a purchaser or seller);
 - Some confusion as to what this means but probably covers broker-dealers. But what about securities lending, finance transactions etc.?
 - The person's interests are adverse to the interests of the plan or its participants or beneficiaries; and
 - That person is not undertaking to provide impartial investment advice .
 - Exception does not apply to a person that acknowledges fiduciary status.

Proposed Definition of the Term “Fiduciary”

- Effect on Various Providers:
 - Broker-dealers. Broker-dealers who do not provide a disclaimer will probably be viewed as investment advice fiduciaries and any variable compensation (12b-1s, loads, CDSCs) would trigger a prohibited transaction. Could lead broker-dealers to become RIAs and just charge a flat fee or fee based on a percentage of plan assets.
 - IRAs particular area of concern. But, existing PTEs.
 - Investment Consultants. Consultants will now be considered fiduciaries even for “one off” transactions. Has implications for RFPs, manager searches, internally constructed lifestyle options, etc.
 - Appraisers. Almost all appraisers will be fiduciaries.
 - Insurance Agents. Selection of GICs and GACs.

Disclosure to Participants

- Effective for plan years beginning on or after November 1, 2011. Extension?
- Replaces almost all §404(c) requirements and makes disclosure applicable to all participant directed plans.
- Applies to all participant directed individual account plans. Does not apply to IRAs, SEPs and SIMPLEs. Also exempted are plans not covered by ERISA such as church and governmental plans as well as “owner only” plans.
- Applies to any participant or beneficiary who can direct his or her account.

Disclosure to Participants

- Plan administrator (or administrator's designee) must provide disclosure.
 - May rely on information from investment provider.
- Plan level and investment level disclosures.
- A plan administrator who does not comply will be deemed to have breached his/her fiduciary duty. No automatic penalty or fine for not complying. Also, non-compliance would mean that there is no §404(c) protection.

Disclosure to Participants

- Plan Level General Disclosures:
 - An explanation of the circumstances under which participants may give investment instructions;
 - An explanation of any specified limitations on such instructions;
 - Identification of any designated investment alternatives offered under the plan;
 - A description of (or reference to) plan provisions regarding exercise of voting rights related to any designated investment alternative (as well as any restrictions on such rights);
 - Identification of any designated investment managers; and
 - A description of any “self-directed brokerage accounts” (or similar arrangement).

Disclosure to Participants

- Plan Level Administrative Expense Disclosure.
 - Content. An explanation of any fees and expenses for general plan administrative services (e.g., legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative
 - The basis on which such charges will be allocated (e.g., pro rata, per capita).
 - Applies if expenses **may be** charged to participant accounts even if they are not in practice.
 - Can be aggregated (**don't** need to breakdown recordkeeping from legal etc.)

Disclosure to Participants

- Plan Level Individual Expense Disclosure.
 - Content. An explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on an individual, rather than on a plan-wide, basis (e.g., fees for processing plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, commissions, loads etc.) and which are not reflected in the total annual operating expenses of any designated investment alternative.
 - Do have to be broken down by expense. For example listing the separate charges for loans, distributions, QDROs, etc.

Disclosure to Participants

- Plan Level Disclosure Timing
 - Initial and Annual Disclosure. On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter. There is a special 60 day window for the first year that the requirements are effective.
 - *If there is a change to general information then description of the change must be provided at least 30 days, but not more than 90 days, in advance of the effective date of such change;*
 - Exception for “unforeseeable or circumstances beyond the control of the plan administrator” in which case notice of the change must be furnished as soon as reasonably practicable.
 - Can be provided in the SPD or a benefits statement.

Disclosure to Participants

- Plan Level Disclosure Timing (cont.)
 - Quarterly Statement Requirement.
 - Applies to plan level administrative expense and individual expense charges.
 - The dollar amount of the administrative expenses;
 - A description of the services to which the charges relate;
 - For administrative expenses an explanation (if applicable) that, in addition to the administrative expenses disclosed some of the plan's administrative expenses were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (e.g., through revenue sharing arrangements).
 - Can be provided in a quarterly benefits statement.

Disclosure to Participants

- Investment-related Disclosure.
 - Automatic disclosure for each designated investment alternative.
 - Identifying Information. The name of each alternative and the type or category of the investment (e.g., money market fund, balanced fund, large-cap stock fund, etc.)

Disclosure to Participants

- Investment-related Disclosure (cont).
 - Performance Data.
 - If the return is not fixed then the average annual total return of the investment for 1-, 5-, and 10-calendar year periods as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future.
 - If the return is fixed then the fixed rate as well as a statement (if applicable) that the issuer reserves the right to choose the fixed rate of return.
 - If the rate of return can be changed then the current rate of return and any minimum guaranteed rate must be provided as well as how to obtain (e.g., telephone or website) the most recent rate of return.
 - Benchmarks (if the return is not fixed) the name and returns of an appropriate broad-based market index over the 1-, 5-, and 10-calendar year periods.

Disclosure to Participants

- Investment-related Disclosure (cont.)
 - Fee and Expense Information (if the return is not fixed).
 - The amount and a description of each shareholder-type fee that is not part of the expense ratio of the investment. (sales loads, deferred sales charges, redemption fees, etc). as well as a description of any apparent restrictions (such as round trip, equity wash, etc.);
 - The total annual operating expenses of the investment expressed as a percentage (i.e., expense ratio);
 - The total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a \$1,000 investment;
 - A statement indicating that fees and expenses are only one of several factors that should be considered in making plan investments;
 - A statement that the cumulative effect of fees and expenses can substantially reduce the growth of a retirement account and that participants and beneficiaries can visit the Department of Labor EBSA website for an example demonstrating the long-term effect of fees and expenses.

Disclosure to Participants

- Investment-related Disclosure (cont.)
 - Fee and Expense Information (if the return is fixed).
 - The amount and a description of any shareholder-type fees and a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment.
 - Website. An internet website address that provides for each designated investment alternative:
 - The name of the issuer;
 - Objectives or goals;
 - Principal strategies;
 - Portfolio turnover rate;
 - Performance data; and
 - Fee and expense information.

Disclosure to Participants

- Investment-related Disclosure (cont.)
 - An investment glossary (or the address of a website where the glossary can be found).
 - Annuity options:
 - Name of the contract or product;
 - Objectives or goals;
 - The benefits and factors that determine the price (e.g., age, interest rates);
 - Any limitations on the ability to withdraw or transfer amounts;
 - Any fees that will reduce the value of amounts under the annuity (e.g. surrender charges, MVAs other fees,);
 - A statement that guarantees of an insurance company are subject to its long-term financial strength;
 - A link to a website that provides more information.

Disclosure to Participants

- Investment-related Disclosure (cont.)
 - Employer Securities. Special reporting rules are contained in the regulations.
 - Brokerage Account. Brokerage accounts are not considered designated investment accounts and so investment related disclosure is not required.
 - Voting Rights. If voting rights are passed through then information regarding any voting rights must be provided.

Disclosure to Participants

- Investment-related Disclosure (cont.)
 - Timing (Initial and Annual Notices)
 - On or before the date on which a participant can first direct his or her investments and at least annually thereafter.
 - The 30 / 90 day update requirement for plan related information does not apply to investment related information. Also there is a special 60 day window for the first year the requirements are effective.
 - Format. Disclosure must be made in a chart or similar comparative format.
 - DOL has provided a model which is contained in your materials.

Disclosure to Participants

- Investment-related Disclosure (cont.)
 - Information to be Provided Upon Request.
 - Any prospectuses (or, alternatively, any short-form or summary prospectus);
 - Eliminates the requirement of automatically providing the prospectus that existed under §404(c).
 - Financial statements or reports;
 - The value of a share or unit of each designated investment alternative as well as the date of the valuation;
 - A list of the assets comprising the portfolio of each designated investment alternative which contains plan assets (under the ERISA plan asset rules).

Disclosure to Participants

- Effect on ERISA §404(c) Plans.
 - Makes almost all §404(c) disclosure obligations applicable to participant directed individual account plans whether they choose to comply with §404(c) or not.
 - Section 404(c) plans must still provide an additional notice that the plan intends to comply with §404(c) and notice of certain procedures for maintaining the confidentiality of investments in employer securities.
 - Employers who avoided §404(c) status due to the disclosure requirements may now want to reconsider.

Schedule C Reporting of Compensation to Service Providers

- Effective for the 2009 Plan Year
- Extensive FAQs posted by DOL
 - http://www.dol.gov/ebsa/faqs/faq_scheduleC.html
 - <http://www.dol.gov/ebsa/faqs/faq-sch-C-supplement.html>
- Disclosure applies to service providers receiving more than \$5,000 in compensation.
- Applies only to large plans (generally those with over 100 participants).
- Applies to direct and indirect compensation.

Schedule C Reporting of Compensation to Service Providers

- Compensation does not include amounts paid directly by the plan sponsor (employer).
- Direct compensation. Includes any amount that comes from the plan whether through forfeitures charged against participants accounts, charges to recapture an account or “ERISA budget” etc.
- Indirect compensation. Includes any compensation from a third party where payment is based, in whole or in part, on services that were rendered to the plan or on a transaction or series of transactions with the plan.

Schedule C Reporting of Compensation to Service Providers

- Indirect compensation examples:
 - Finders fees, 12b-1 fees, sub-ta fees,
 - Float revenue,
 - Brokerage commissions ,
 - Soft dollar services,
 - Gifts ,
 - Entertainment.

Schedule C Reporting of Compensation to Service Providers

- Alternative reporting if service provider receives **only** “eligible indirect compensation” (EIC).
 - EIC includes fees or expense reimbursement payments charged to “investment funds” and reflected in the value of the plan’s investment or return on investment. Investment funds would include mutual funds, bank common and collective trusts, and insurance company pooled separate accounts.
 - On Schedule C only need to provide the name of the person or entity which provided information on the eligible indirect compensation.

Schedule C Reporting of Compensation to Service Providers

- Alternative reporting of EIC (cont.)
 - In order to use alternative reporting plan administrator must have received written materials that disclosed and described:
 - The existence of the indirect compensation,
 - The services provided for the indirect compensation,
 - The amount or estimate of the compensation or a description of the formula used to calculate the indirect compensation,
 - The identity of the parties paying and receiving the indirect compensation.
- If service provider receive both EIC and other compensation then amounts of other compensation must be reported but the amount of EIC need not be reported.

Schedule C Reporting of Compensation to Service Providers

- Gifts and Meals

- Gifts or meals are not included if less than \$50 and the aggregate gifts are less than \$100 during the year. Gifts with a value of less than \$10 do not count toward the \$100 limit (and are not reported even if you go over \$100).
- Employees of an organization who provide the gift/meal are treated as one source, but employees of an organization who receive the gift/meal are treated as separate persons.
 - Two different brokers from the same firm take the same employee from a TPA firm out to lunch three times each at \$20. The TPA firm has \$120 compensation in needs to report and allocate among its clients.
 - A broker hosts a lunch and for 6 employees of the TPA firm to explain the broker's services. The lunch is valued at \$20 per employee. The TPA has no reportable compensation.
- No stated de minimis rule for ERISA self-dealing prohibitions.

Schedule C Reporting of Compensation to Service Providers

- **Bundled Service Provider.**
 - Defined. Any service arrangements where the plan hires one company to provide a range of services either directly from the company, through affiliates or subcontractors, or through a combination, which are priced to the plan as a single package rather than a service-by-service basis.
 - Payments made by the plan to bundled service provider are reported as direct compensation to the service provider.
 - Payments generally do not need to be allocated among affiliates, subcontractors .

Schedule C Reporting of Compensation to Service Providers

- **Bundled Service Provider (cont).**
 - **First Exception.** Transaction based compensation (brokerage) would be treated as reportable indirect compensation for the provider.
 - **Second Exception.** Fees charged separately against the plan's investment and reflected in the net value of the investment (float revenue, commissions, finder's fees, 12b-1 fees) must be reported separately as indirect compensation.


Schedule C Reporting of Compensation to Service Providers

- Bundled Service Provider (cont).
 - Third Exception. Compensation is received by any person in the bundle who is a fiduciary, provides contract administration, consulting, investment advisory, investment management, securities brokerage and/or recordkeeping services to the plan, and the compensation received is "commissions and other transaction based fees, finders' fees, float revenue, soft dollars and other non-monetary compensation" and equals or exceeds \$5,000.

Schedule C Reporting of Compensation to Service Providers

If a service provider refuses to provide information the plan administrator is required to report the service provider on Schedule C .

Part II Service Providers Who Fail or Refuse to Provide Information		
4 Provide, to the extent possible, the following information for each service provider who failed or refused to provide the information necessary to complete this Schedule.		
(a) Enter name and EIN or address of service provider (see instructions)	(b) Nature of Service Code(s)	(c) Describe the information that the service provider failed or refused to provide



© 2011 Tuggle Duggins & Meschan, P.A. All Rights Reserved. The purpose of this presentation is to provide a general summary of significant legal developments. It is not intended to constitute legal advice or a recommended course of action in any given situation. It is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature. Moreover, information contained in this presentation may have changed subsequent to its publication. This presentation does not create an attorney-client relationship between Tuggle Duggins & Meschan, P.A. and the recipient. Therefore, please consult us or other qualified legal counsel before making any decisions or taking any action concerning the issues discussed herein.

INTERNAL REVENUE SERVICE - CIRCULAR 230 DISCLOSURE:

As provided for in Treasury regulations, advice (if any) relating to federal taxes that is contained in this bulletin (including attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing, or recommending to another party any plan or arrangement addressed herein.