

Pre, Post & During Engagement Disclosure Analysis

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Introduction

The Department of Labor ("DOL") issued interim final regulations¹ under ERISA Section 408(b)(2) on July 16, 2010. In general, ERISA prohibits service providers from providing services to a qualified retirement plan under ERISA Section 406(a)(1)(C) unless the provision of services meets the statutory exemptive relief prescribed under ERISA Section 408(b)(2).

With the issuance of these new regulations, exemptive relief is conditioned upon plan sponsors and service providers meeting and adhering to mandatory disclosure obligations before entering into a covered service agreement and during the performance of services. This comparative analysis is a summary of the similarities and differences between the disclosure obligations required for the exemption and similar disclosures required as part of a benefit plan's annual report on Form 5500. This analysis is not comprehensive.

COMPARATIVE ANALYSIS

When must disclosure occur?

Schedule C
 Post-Engagement

408(b)(2)
 Pre-Engagement & Reasonably in Advance
2550.408b-2(c)(1)(v)(A)

What is the effective date?

Schedule C
 PYE 2009 & After

408(b)(2)
 July 16, 2011
2550.408b-2(c)(1)(xii)

What happens if there is a FAILURE to comply?

Schedule C
 Report to DOL
Schedule C Part II - Line 4
2009 Instructions - Pg 25

408(b)(2)
 Report to DOL
2550.408b-2(c)(1)(ix)

What are the requirements to report noncompliance?

Schedule C
 Annually
2009 Instructions - Pg 3

408(b)(2)
 Within 30 days of Refusal or
 After 90 days from date of Request
2550.408b-2(c)(1)(ix)(C) & (E)

¹ The regulation has been issued in final form; however, public comments are invited and may ultimately affect the final regulation.

What Noncompliant Information Must be Reported?

Schedule C

- The name and address or EIN;
- Applicable Service Codes; and
- A description of the information that was not disclosed.

*Schedule C Part II - Line 4
2009 Instructions - Pg 25*

408(b)(2)

- The name, address, phone number and EIN;
- A description of the Services Provided
- A description of the information that was not disclosed
- Date information was requested in writing
- Statement whether the covered service provider continues to provide services to the plan.

2550.408b-2(c)(1)(ix)(D)

What is a Covered Plan?

Schedule C

Pension/Profit Sharing/Welfare/DFE
2009 Instructions - Pg 3-4

408(b)(2)

Pension/Profit Sharing & ERISA 403(b)
Excludes Welfare
ERISA 3(2)(A) & 2550.408b-2(c)(1)(ii)

How is Service Provider Defined?

Schedule C

Any Person
ERISA 3(9)

Key Service Providers:

- *Fiduciary - ERISA 3(21)*
- Contract Administrator
- *Consultant*
- *Custodian*
- *Investment Advisor*
- Investment Manager
- *Broker*
- *Recordkeeper*

FAQ 15 & 26

408(b)(2)

Covered Service Provider (CSP)

1. *ERISA Fiduciaries*
 - *RIA*
 - *Fiduciary to Investment Contracts*
1. *Certain Recordkeeping & Brokerage Services*
 - *Individual Account Plan*
 - *Designated Investments*
 - *Platform of Options*
2. *Services for Indirect Comp*
 - Accounting, Actuarial, Appraisal, Auditing, Banking, Consulting, Custodial, Insurance, Legal, Advisory, TPA, Valuation services

2550.408b-2(c)(1)(iii)

What is the Participant Count Threshold?

Schedule C

Plans > 100 Participants
2009 Instructions - Pg 9

408(b)(2)

No Limit
2550.408b-2(c)(1)(i)

What Compensation Paid by the Plan Must be Reported?

Schedule C

Direct & Indirect
2009 Instructions - Pg 2 & 20

408(b)(2)

Direct & Indirect
2550.408b-2(c)(1)(viii)(B)

What is the Compensation Threshold

Schedule C

= or > \$5000
2009 Instructions - Pg 2

408(b)(2)

Expect \$1000 or more
2550.408b-2(c)(1)(iii) & (viii)(F)

What is the Amount of De minimis Non-Monetary Compensation Excluded from Reporting?

Schedule C
< \$100
FAQ 34

408(b)(2)
= or < \$250
2550.408b-2(c)(1)(viii)(B)

When Must Disclosures Occur?

Schedule C
Due 7 months after end of plan year
Automatic 2 ½ Month extension available
2009 Instructions - Pg 4

408(b)(2)
Prior To – Extends - Renews
2550.408b-2(c)(1)(v) & (vi)

What Happens When Information is Incorrectly Reported?

Schedule C
Amended Return Required
2009 Instructions - Pg 6

408(b)(2)
Correct within 30 days of discovery of error
2550.408b-2(c)(1)(vii)

When Must Changes be Reported?

Schedule C
Annually
2009 Instructions - Pg 3

408(b)(2)
60 Days from Date of Known Change
2550.408b-2(c)(1)(v)(B)

When Must Additional Information be Provided when Requested?

Schedule C
Limited to those expressly described

408(b)(2)
30 Days of Request
2550.408b-2(c)(1)(vi)(A) & (B)

What is the Disclosure Format that Must be Followed?

Schedule C
Complete Schedule C
2009 Instructions - Pg 22

408(b)(2)
In Writing
2550.408b-2(c)(1)(iv)

How do you disclose the services being rendered?

Schedule C
Use Codes
2009 Instructions - Pg 22
Schedule C Line 2(b)

408(b)(2)
In Writing - Exclude Non-Fiduciary Services to
Investment Contract
2550.408b-2(c)(1)(iii)(D)(2)
2550.408b-2(c)(1)(iv)(A)

How is direct compensation reported?

Schedule C
If Paid From Plan Assets
2009 Instructions - Pg 22
Schedule C Line 2(d)

408(b)(2)
If Paid From Plan Assets
2550.408b-2(c)(1)(iv)(C)(1) & (D)(1)
2550.408b-2(c)(1)(viii)(B)(1) & (3)

How is indirect compensation reported?

Schedule C
Must Disclose
2009 Instructions - Pg 22
Schedule C Line 2(e), (f) & (g)

408(b)(2)
Must Disclose
2550.408b-2(c)(1)(iv)(C)(2) & (D)(1)
2550.408b-2(c)(1)(viii)(B)(2) & (3)

In a bundled arrangement what is the reporting obligation of related parties?

Schedule C
Limited Disclosure Obligation
FAQ 8, 13 and 14
Supplemental FAQ 16

408(b)(2)
Must Disclose All Related Party Payments
FR 41607 (July 16, 2010)
2550.408b-2(c)(1)(iv)(C)(3)

Is it required to report relationships between service providers and parties in interest?

Schedule C
Limited Disclosure Required
Schedule C Line 2(c)

408(b)(2)
Disclose Payment Sources
2550.408b-2(c)(1)(iv)(C)(2) & (3)

Are you required to identify the recipient of the compensation?

Schedule C
Must Disclose
Schedule C Line 1(b), 2(a) & 3(a)

408(b)(2)
Must Disclose
2550.408b-2(c)(1)(iv)(C)(3)

Are you required to identify the source of indirect payments?

Schedule C
Must Disclose
2009 Instructions - Pg
Schedule C Line 3(d)

408(b)(2)
Must Disclose
2550.408b-2(c)(1)(iv)(C)(2) & (3)

When are you required to disclose Termination fees?

Schedule C
Only Disclose What is Paid
2009 Instructions - Pg 2

408(b)(2)
Must Disclose In Advance of Agreement
2550.408b-2(c)(1)(iv)(C)(4)

What is the method of receipt of compensation?

Schedule C
Billed or Deducted

408(b)(2)
Billed or Deducted
2550.408b-2(c)(1)(iv)(E)

Can compensation be described, reported and disclosed as a formula?

Schedule C
Permitted
2009 Instructions - Pg 24
Schedule C Line 3(e)

408(b)(2)
Permitted/Method/Assumptions
2550.408b-2(c)(1)(viii)(B)(3)

Is it necessary to report compensation that is reported on the Schedule A?

Schedule C
Excluded but applies to Minimum
2009 Instructions - Pg 22

408(b)(2)
Must Disclose
2550.408b-2(c)(1)(iv)(C)(3) & (F)(1)

Is it necessary to describe the services rendered for the fees paid?

Schedule C
Tie to Codes
2009 Instructions - Pg 24

408(b)(2)
General Description
2550.408b-2(c)(1)(iv)(A) & (ix)(D)(6)

Investment Disclosures for Fiduciaries, Recordkeepers and Brokerage Services

Schedule C
N/A

408(b)(2)
Describe Compensation tied to
Acquisition, Sale Or Transfer
2550.408b-2(c)(1)(iv)(F)(1) & (G)(1)

N/A

Describe Operating Expense Ratio (OER)
2550.408b-2(c)(1)(iv)(F)(2) & (G)(1)

N/A

Describe Ongoing Expense above OER
2550.408b-2(c)(1)(iv)(F)(3) & (G)(1)

What are the consequences if you do not comply?

- Schedule C**
- \$1,100/day penalty - ERISA 502(c)(2)
 - \$100,000/10 years - ERISA 501
 - \$10,000/5 years - ERISA 111
- 2009 Instructions - Pg 7

- 408(b)(2)**
- Disgorgement of Fees Received
 - Payment of Lost Opportunity Cost
 - Excise Tax
 - Potential expulsion from serving any plans
- 2550.408b-2(c)(1)(i)

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David J Witz, AIF® is a 29 year industry veteran and recognized expert in fiduciary issues. A noted speaker, author and expert witness, Witz now devotes his full time to developing tools designed to support compliance efforts that establish a prudent documented process. Most recently, Witz has released a customized Advisor Search and Request for Proposal (RFP) system available to plan sponsors, ERISA attorneys, CPAs and service vendors. The ERISA Advisor Evaluator (EAE) system is a custom solution PlanTools built for the Center for Due Diligence. There is no other system available on the market that is more comprehensive, cost effective and efficient in helping sponsors retain the services of an expert advisor using a documented prudent process. Plan Sponsors retaining advisors without engaging in a documented prudent process are vulnerable to fiduciary claims. EAE is designed to protect the sponsor and participants. If your process to select an advisor can't be predictive then be comprehensive. EAE is the industry's comprehensive solution.

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