

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2550**

RIN 1210-AB08

**Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure**

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

**SUMMARY:** This document contains a final regulation under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) requiring that certain service providers to pension plans disclose information about the service providers' compensation and potential conflicts of interest. These disclosure requirements are established as part of a statutory exemption from ERISA's prohibited transaction provisions. This regulation will affect pension plan sponsors and fiduciaries and certain service providers to such plans.

**DATES:** *Effective Date:* The final rule is effective on July 1, 2012.

**FOR FURTHER INFORMATION CONTACT:** Fil Williams or Allison Wielobob, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background***1. General*

In recent years, the Department has undertaken a series of regulatory initiatives to ensure that employee benefit plan fiduciaries, as well as plan participants and beneficiaries, obtain comprehensive information about the services that are provided to employee benefit plans, and the cost of those services.<sup>1</sup> Today, the Department is

<sup>1</sup> The "408(b)(2)" regulation finalized by the Department in this Notice addresses disclosures that must be furnished before plan fiduciaries enter into, extend or renew contracts or arrangements for services to certain pension plans. The Department also implemented changes to the information that must be reported concerning service provider compensation as part of the Form 5500 Annual Report. These changes to Schedule C of the Form 5500 complement this final rule by assuring that plan fiduciaries have the information they need to monitor service providers consistent with their duties under ERISA section 404(a)(1). See 72 FR 64731; see also frequently asked questions on Schedule C, available on the Department's Web site at <http://www.dol.gov/ebsa>. Finally, the Department published a final rule in October 2010 requiring the disclosure of specified plan and investment-related information, including fee and expense information, to participants and beneficiaries of

publishing in the **Federal Register** a final rule concerning the disclosures that must be furnished to plan fiduciaries in order for a contract or arrangement for plan services to be "reasonable," as required by ERISA section 408(b)(2). A proposed rule was published in December 2007 (72 FR 70988).<sup>2</sup> Following review of public comments on the proposal and testimony presented at the Department's 2008 public hearing,<sup>3</sup> the Department published an interim final rule in the **Federal Register** on July 16, 2010 (75 FR 41600). Both the proposal and the interim final rule required that reasonable contracts or arrangements between employee pension benefit plans and certain providers of services to such plans include specified information to assist plan fiduciaries in assessing the reasonableness of the compensation paid for services and the conflicts of interest that may affect a service provider's performance of services. The Department believes that plan fiduciaries need this information, when selecting and monitoring service providers, to satisfy their fiduciary obligations under ERISA section 404(a)(1) to act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan.

*2. Public Comments on Interim Final Regulation*

Commenters on the December 2007 proposed regulation raised a number of technical issues, which persuaded the Department to make significant changes to the regulation. Because of these changes, the Department published the regulation in July 2010 as an interim final rule and invited comments from interested persons on all aspects of the rule. In response to this invitation, the Department received 45 written comments from a variety of persons, including plan sponsors, fiduciaries, service providers, financial institutions, and industry representatives of employee benefit plans and

participant-directed individual account plans. See 75 FR 64910.

<sup>2</sup> A notice of proposed rulemaking was published in the **Federal Register** (72 FR 70988) on December 13, 2007. On the same day, the Department also published, separately, a proposed class exemption from the restrictions of ERISA section 406(a)(1)(C) in the **Federal Register** (72 FR 70893). For ease of reference, the exemptive relief for fiduciaries was incorporated into the interim final rule; the final rule continues to incorporate the class exemption.

<sup>3</sup> Public comments on the proposed regulation, as well as supplemental materials submitted in connection with the Department's March 31 and April 1, 2008, public hearing, are available on the Department's Web site at <http://www.dol.gov/ebsa>.

participants. These comments are available for review under "Public Comments" on the "Laws and Regulations" page of the Department's Employee Benefits Security Administration Web site at <http://www.dol.gov/ebsa>.

Set forth below is an overview of the final regulation and the public comments received on the Department's interim final regulation.

**B. Overview of Final Regulation and Public Comments**

The Department's final regulation retains the basic structure of the proposal and interim final rule by requiring that covered service providers satisfy certain disclosure requirements in order to qualify for the statutory exemption for services under ERISA section 408(b)(2).

The furnishing of goods, services, or facilities between a plan and a party in interest to the plan generally is prohibited under section 406(a)(1)(C) of ERISA. As a result, a service relationship between a plan and a service provider would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a "party in interest" to the plan. However, section 408(b)(2) of ERISA exempts certain arrangements between plans and service providers that otherwise would be prohibited transactions under section 406 of ERISA. Specifically, section 408(b)(2) provides relief from ERISA's prohibited transaction rules for service contracts or arrangements between a plan and a party in interest if the contract or arrangement is reasonable, the services are necessary for the establishment or operation of the plan, and no more than reasonable compensation is paid for the services. Regulations issued by the Department clarify each of these conditions to the exemption.<sup>4</sup>

The interim final rule, as modified in this final rule, amends the regulation at 29 CFR 2550.408b-2(c) to add new conditions to the meaning of a "reasonable" contract or arrangement for covered plans. Previously, this paragraph stated only that a contract or arrangement is not reasonable unless it permits the plan to terminate without penalty on reasonably short notice. In publishing the July 2010 interim final rule, the Department added a requirement that, in order for certain contracts or arrangements for services to be reasonable, the covered service provider must disclose specified information to a "responsible plan

<sup>4</sup> See 29 CFR 2550.408b-2.

fiduciary.” The regulation defines this term as a fiduciary with authority to cause the plan to enter into, or extend or renew, a contract or arrangement for the provision of services to the plan.

The final rule published today reflects several modifications to the interim final rule. For example, as discussed in detail below, the final rule conforms the investment-related disclosure requirements to the Department’s recently finalized participant-level disclosure regulation, at 29 CFR 2550.404a–5 (75 FR 64910, Oct. 20, 2010) (the “participant-level disclosure regulation”), and requires more specific information concerning “indirect” compensation that will be received by a covered service provider. The Department has retained most of the disclosures required by the interim final rule, subject to minor technical modifications, explained below. A comprehensive analysis of these

disclosures, and how they differ from those contained in the Department’s December 2007 proposed rule, is included in the Supplementary Information published with the interim final rule.<sup>5</sup> The discussion below focuses on the final rule and how it has been modified in response to comments on the interim final rule.

As required by Executive Order 12866, the Department evaluated the benefits and costs of this final rule. The Department believes that mandatory proactive disclosure will reduce plan sponsor information costs, discourage harmful conflicts, and enhance service value. Additional benefits will flow from the Department’s enhanced ability to redress abuse. Although the benefits are difficult to quantify, the Department is confident they more than justify the cost. The Department estimated costs for the rule over a ten-year time frame for purposes of this analysis and used

information from the quantitative characterization of the service provider market presented below as a basis for these cost estimates. This characterization did not account for all service providers, but it does provide information on the segments of the service provider industry that are likely to be most affected by the rule (*i.e.*, those with contracts listed on the Form 5500). In addition to the costs to service providers, the Department also considered, and discusses below, the potential costs to plans.

In accordance with OMB Circular A–4,<sup>6</sup> Table 2 below depicts an accounting statement showing the Department’s assessment of the benefits and costs associated with the final rule. The estimates vary from those in the interim final rule by updating the analysis to reflect 2008 Form 5500 data (the latest available data) and 2011 labor rates.

TABLE 1—ACCOUNTING TABLE

Category	Primary estimate	Year dollar	Discount rate	Period covered
<b>Benefits:</b>				
Qualitative: The final regulation will increase the amount of information that service providers disclose to plan fiduciaries. Non-quantified benefits include information cost savings, discouraging harmful conflicts of interest, service value improvements through improved decisions and value, better enforcement tools to redress abuse, and harmonization with other EBSA rules and programs.				
The Department believes that the non-quantified benefits are substantial and exceed the quantified costs of the rule. A detailed analysis of the non-quantified benefits exceeding the quantified costs is contained in the impact analysis of the July 16, 2010 interim final regulation. The Department is confident that the benefits of the final rule exceed the costs.				
<b>Costs:</b>				
Annualized Monetized (\$millions/year) .....	\$63.7	2011	7%	2012–2021
	58.9	2011	3%	2012–2021
<b>Note:</b> Quantified costs include costs for service providers to perform compliance review and implementation, for disclosure of general, investment-related, and additional requested information, for responsible plan fiduciaries to request additional information from service providers to comply with the exemption and to prepare notices to the Department if the service provider fails to comply with the request.				
Transfers .....	Not Applicable			

1. General

The final regulation amends paragraph (c) of § 2550.408b–2 by moving, without change, the original provisions of paragraph (c) to a newly designated paragraph (c)(3) and adding new paragraphs (c)(1) and (c)(2) to address the disclosure requirements applicable to a “reasonable contract or arrangement.” Paragraph (c)(1) describes the disclosure requirements for pension plans. Paragraph (c)(2) is reserved for future guidance concerning the disclosure requirements for welfare plans.<sup>7</sup>

Paragraph (c)(1)(i) has not changed from the interim final rule. It provides that no contract or arrangement for services between a covered plan and a covered service provider, nor any extension or renewal, is reasonable within the meaning of ERISA section 408(b)(2) and this regulation unless the requirements of the regulation are satisfied. The terms “covered plan” and “covered service provider” are defined in paragraph (c)(1)(ii) and (iii), respectively.

The Department notes that some contracts or arrangements will fall outside the scope of the final regulation

because they do not involve a “covered plan” and a “covered service provider.” ERISA nonetheless requires such contracts or arrangements to be “reasonable” in order to satisfy the ERISA section 408(b)(2) statutory exemption. ERISA section 404(a) also obligates plan fiduciaries to obtain and carefully consider information necessary to assess the services to be provided to the plan, the reasonableness of the compensation being paid for such services, and potential conflicts of interest that might affect the quality of the provided services.<sup>8</sup>

<sup>5</sup> See 75 FR 41600.

<sup>6</sup> Available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

<sup>7</sup> This separate initiative, including the Department’s December 2010 public hearing, is discussed below.

<sup>8</sup> See, e.g., Field Assistance Bulletin 2002–3 (Nov. 5, 2002), Advisory Opinion 97–15A (May 22, 1997), Advisory Opinion 97–16A (May 22, 1997),

Understanding Retirement Plans Fees and Expenses, (<http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html>), and Selection and Monitoring Pension Consultants—Tips for Plan Fiduciaries, (<http://www.dol.gov/ebsa/newsroom/fs053105.html>).

The general paragraph in section (c)(1)(i) of the final rule goes on to provide, as in the interim final rule, that the rule's disclosure requirements are independent of a fiduciary's obligations under ERISA section 404.<sup>9</sup> A few commenters on the interim final rule requested that the Department more directly address the treatment, for ERISA section 404 purposes, of information that is requested by the responsible plan fiduciary, but that is not specifically required from the covered service provider under the final rule. These commenters are concerned that responsible plan fiduciaries may believe that they need additional information, which a service provider is not willing to furnish, to satisfy their obligations under ERISA section 404 to prudently select and monitor plan service providers. It is the view of the Department that if a plan fiduciary needs particular information to make an informed decision when selecting or monitoring a plan service provider, then ERISA section 404's duty of prudence requires that fiduciary to request such information. If the service provider fails or refuses to furnish the requested information, then ERISA section 404 may preclude the plan fiduciary from entering into (or continuing) the service contract or arrangement. The disclosure requirements of the final rule are independent of a fiduciary's obligations under ERISA section 404.

Moreover, the final rule's disclosure requirements should be construed broadly to ensure that responsible plan fiduciaries base their review of a service contract or arrangement on comprehensive information.

### 2. Scope—Covered Plans

Paragraph (c)(1)(ii) defines a "covered plan" to mean, with certain exceptions, an employee pension benefit plan or a pension plan within the meaning of ERISA section 3(2)(A) (and not described in ERISA section 4(b)). A "covered plan" shall not include a "simplified employee pension" described in section 408(k) of the Internal Revenue Code of 1986 (the Code), a "simple retirement account" described in section 408(p) of the Code, an individual retirement account described in section 408(a) of the Code, or an individual retirement annuity described in section 408(b) of the Code. For purposes of the final rule, paragraph

<sup>9</sup> Two commenters on the interim final rule suggested that the final rule should explicitly state that compliance does not provide relief from fiduciary obligations under ERISA section 404. Such a provision was already included in the interim final rule, and has not been removed or revised for purposes of the final rule.

(c)(1)(ii) includes an additional exclusion from the definition of "covered plan." The Department was persuaded by commenters on the interim final rule to exclude all or that part of a Code section 403(b) plan (hereafter "403(b) plan") that consists exclusively of "frozen" contracts or accounts, as described in the Department's Field Assistance Bulletins addressing the limited application of the annual reporting requirements to such contracts or accounts.<sup>10</sup> Plan sponsors and fiduciaries likely would be unable to comply with this rule because they often have no dealings with the relevant plan service providers and are unable to obtain information about these contracts and accounts. Accordingly, paragraph (c)(1)(ii) of the final rule now provides that, in the case of a Code section 403(b) plan subject to Title I of ERISA, the "covered plan" would not include annuity contracts and custodial accounts described in section 403(b) of the Code with respect to which the plan sponsor ceased to have any obligation to make contributions (including employee salary reduction contributions) and in fact ceased making contributions to such contracts or accounts for periods before January 1, 2009. Further, the contract or account has to have been issued to a current or former employee before January 1, 2009; all the rights and benefits under the contract or account have to be legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and such individual owner has to be fully vested in the contract or account.

One commenter requested that the Department clarify that health savings accounts are not "covered plans." The Department notes that health savings accounts are not pension plans within the meaning of ERISA section 3(2)(A) and generally are not employee benefit plans within the meaning of ERISA section 3(3), when employer involvement with the accounts is limited. Therefore, a health savings account would not be a "covered plan" for purposes of the final rule. See the Department's discussion of health savings accounts and ERISA section 3(2)(A) in Field Assistance Bulletins 2004-1 and 2006-02.<sup>11</sup>

Another commenter asked whether the definition of a covered plan would include a plan that provides benefits only to a business owner and his or her

<sup>10</sup> See Field Assistance Bulletins 2010-01 (Feb. 17, 2010) and 2009-02 (July 20, 2009).

<sup>11</sup> See Field Assistance Bulletins 2004-1 (April 7, 2004) and 2006-02 (Oct. 27, 2006).

spouse, such as a Keogh or "HR-10" plan. The final rule describes a "covered plan" as a pension plan within the meaning of ERISA section 3(2)(A), which is an "employee benefit plan" under section 3(3) subject to Title I. The Department's existing regulations at 29 CFR 2510.3-3 clarify the definition of "employee benefit plan" in section 3(3) for purposes of Title I coverage.<sup>12</sup> Under such regulations, the term "employee benefit plan" does not include any plan, including a pension plan, under which no employees are participants in the plan (referred to therein as "common law employees"). Section 2510.3-3(c) provides that an individual and his or her spouse are not "employees" with respect to a trade or business, incorporated or unincorporated, which is wholly owned by the individual and his or her spouse. Nor does "employee" include a partner in a partnership and his or her spouse with respect to the partnership. For example, a "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are plan participants is not an "employee benefit plan" subject to Title I. Thus, under the final rule, a pension plan without "employees" who are participants in the plan, as defined in § 2510.3-3(c), would not be a "covered plan."

### 3. Scope—Covered Service Provider

The final rule, in paragraph (c)(1)(iii)(A), (B), and (C), covers the same categories of service providers as the interim final rule. A "covered service provider" is a service provider that enters into a contract or arrangement with the covered plan and reasonably expects \$1,000 or more in compensation, direct or indirect, to be received in connection with providing one or more of the services described in paragraphs (c)(1)(iii)(A), (B), or (C) of the final rule.<sup>13</sup> A service provider will

<sup>12</sup> See also *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004).

<sup>13</sup> Some commenters on the interim final rule suggested that \$1,000 is not an appropriate threshold for covered service providers. Some believe that \$1,000 is too low, because it will subject relatively insignificant arrangements to the required disclosures, and suggested that \$2,500 or \$5,000 would be more appropriate. Others, however, argued that \$1,000 is too high and will adversely affect small plans, many of which are likely to have smaller service arrangements (for less than \$1,000) and less sophistication and bargaining power to obtain detailed information about such arrangements. Some commenters argued that the standard should be tied to a percentage of plan assets, subject to a cost-of-living adjustment, or conformed to Form 5500 Schedule C standards. The Department was not persuaded to revise this provision and believes that \$1,000 strikes an appropriate balance between these competing concerns. Some commenters asked the Department to more specifically delineate the time period over

be covered even if some or all of the services provided pursuant to the contract or arrangement are performed (or some or all of the compensation for such services is received) by affiliates of the covered service provider or subcontractors. The limitation contained in paragraph (c)(1)(iii)(D)(1) ensures that services providers do not themselves, separately, become “covered service providers” solely as a result of services that they perform in their capacity as an affiliate of the covered service provider or a subcontractor.

The first category of covered service providers, described in paragraph (c)(1)(iii)(A), includes those providing services as an ERISA fiduciary or as an investment adviser registered under either the Investment Advisers Act of 1940 (Advisers Act) or any State law. This category is split into three subsections, as in the interim final rule: Paragraph (1) includes ERISA fiduciary services provided directly to the covered plan; paragraph (2) includes ERISA fiduciary services provided to an investment contract, product, or entity that holds plan assets and in which the covered plan has a direct equity investment (a direct equity investment does not include investments made by the investment contract, product, or entity in which the covered plan invests); and paragraph (3) includes services provided directly to the covered plan as an investment adviser registered under either the Advisers Act or State law.

The second category of covered service providers, described in paragraph (c)(1)(iii)(B), includes providers of recordkeeping services or brokerage services to a covered plan that is an ERISA section 3(34) individual account plan that permits participants and beneficiaries to direct the investment of their accounts, if one or more designated investment alternatives will be made available (e.g., through a platform or similar mechanism) in

which the \$1,000 must be measured, for example, over a calendar or plan year or during the term of the contract. The Department notes that the focus is on whether \$1,000 is expected to be received in connection with providing the services specified in the contract, regardless of whether compensation is expected to be received in a particular year or during the stated term of the contract. Some compensation, for example, trailing commissions, may be received after the services have been furnished, but still be “in connection with” those services. In response to some expressed concerns, the Department cautions parties against attempting to structure contracts for ongoing services specifically to avoid the \$1,000 threshold. In determining compliance with the threshold, the Department will look to the substance, rather than form, of the contract or arrangement between the plan and service provider(s).

connection with such recordkeeping services or brokerage services.

The third category of covered service providers, described in paragraph (c)(1)(iii)(C), includes those providing specified services to the covered plan when the covered service provider (or an affiliate or subcontractor) reasonably expects to receive “indirect” compensation or certain payments from related parties. As discussed below, the final rule defines the terms “affiliate,” “indirect compensation,” and “subcontractor” in paragraph (c)(1)(viii). The services set forth in this category, which have not changed from the interim final rule, are accounting, auditing, actuarial, appraisal, banking, consulting (i.e., consulting related to the development or implementation of investment policies or objectives, or the selection or monitoring of service providers or plan investments), custodial, insurance,<sup>14</sup> investment advisory (for plan or participants), legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services provided to the covered plan.

Paragraph (c)(1)(iii)(D) of the final regulation clarifies that, notwithstanding the preceding categories of “covered service providers,” no person or entity is a “covered service provider” solely by providing services (1) as an affiliate or a subcontractor that is performing one or more of the services to be provided under the contract or arrangement with the covered plan (see paragraph (c)(1)(iii)(D)(1)), or (2) to an investment contract, product, or entity in which the covered plan invests, regardless of whether or not the investment contract, product, or entity holds assets of the covered plan, other than services as a fiduciary described in paragraph (c)(1)(iii)(A)(2) (see paragraph (c)(1)(iii)(D)(2)).

Paragraph (c)(1)(iii)(D) clarifies the disclosure obligations of multiple parties within an arrangement for plan services. The party entering into the contract or arrangement with the covered plan is the covered service provider responsible for making the rule’s disclosures, even if other parties perform some of the services.<sup>15</sup> For

<sup>14</sup> One commenter on the interim final rule requested clarification that insurance brokerage services were included in this category; the commenter explained, for example, that insurance brokers often are involved in selling pension plan arrangements, especially to small plans. The Department does intend that such insurance services are included in this category of covered service providers.

<sup>15</sup> The final rule should not be interpreted, however, as requiring that any services which otherwise would be provided separately must be

example, in cases when a “bundled” arrangement of multiple services is offered to the covered plan, only one service provider would need to furnish the required disclosures for the bundled services. For example, a recordkeeper (Recordkeeper) who enters into a contract with a covered plan to furnish specified recordkeeping services and to make available a platform of investments may outsource some of the recordkeeping and plan administration services, and pay transaction-based compensation, to an affiliated third party administrator (TPA). The TPA does not have any separate contract or arrangement with the covered plan. Although both the Recordkeeper and the TPA provide services that are described in the categories of covered service providers under the final rule (the Recordkeeper under paragraph (c)(1)(iii)(B) and the TPA under paragraph (c)(1)(iii)(C)), only the Recordkeeper is the covered service provider. The Recordkeeper is the “covered” service provider because he or she is the party entering into the service contract or arrangement with the covered plan.

Multiple service providers that furnish services pursuant to a single contract or arrangement with a covered plan may agree among themselves who will enter into the contract or arrangement with the covered plan and be the covered service provider. The other service providers may be affiliates of or subcontractors to the covered service provider; and covered service providers’ disclosures would reflect their status in accordance with the final rule.

#### 4. Initial Disclosure Requirements

The final rule continues to require that covered service providers furnish specified disclosures to responsible plan fiduciaries in writing.<sup>16</sup> As discussed in detail below, these disclosures generally must be furnished reasonably in advance of entering into, or extending or renewing, the contract or arrangement for services. The disclosed information will assist plan fiduciaries in understanding the services and in

packaged together pursuant to one contract or arrangement. In many cases, more than one service provider will enter into a contract or arrangement with a covered plan, and, in that case, there may be more than one “covered” service provider, whose separate contract or arrangement with the covered plan must comply with the final rule.

<sup>16</sup> Consistent with the Department’s position in the interim final rule, although required information must be disclosed “in writing,” the final rule does not require that a formal contract or arrangement itself be in writing or that any representations concerning the obligations of the covered service provider be included in such written contract or arrangement.

assessing the reasonableness of the compensation, direct and indirect, that the service provider will receive.

#### a. Description of Services

Paragraph (c)(1)(iv)(A) of the final rule requires that the covered service provider describe the services to be provided to the covered plan pursuant to the contract or arrangement (but not including certain non-fiduciary services to an investment product, contract, or entity in which the covered plan invests, as described in paragraph (c)(1)(iii)(A)(2) of the final rule). This paragraph has not changed from the interim final rule.

The description of services should be clear and understandable to the responsible plan fiduciary. In the preamble to the interim final rule, the Department explained that a detailed description of the services may not be necessary when the parties to the contract or arrangement already understand the nature of the services. Some commenters on the interim final rule pointed out that they do not believe all plan fiduciaries have a basic understanding of plan services. They recommended that the final rule explicitly define the level of detail necessary for a description of services and perhaps require “plain English” disclosures, model language, or a “check the box” format. The Department has not included additional standards for the description of services. As noted earlier, and consistent with the Department’s position in the interim final rule, responsible plan fiduciaries have a duty to carefully review the information they receive when entering into a contract or arrangement for plan services. This regulation requires that responsible plan fiduciaries receive the basic information needed to make informed decisions about service costs and potential conflicts of interest. If responsible plan fiduciaries need assistance in understanding any information furnished by the service provider, as a matter of prudence, they should request assistance, either from the service provider or elsewhere.

A few commenters on the interim final rule asked whether a covered service provider must disclose only the services that make the service provider a “covered” service provider. The final rule provides that a covered service provider must describe all services that will be provided to the covered plan “pursuant to the contract or arrangement[.]” This includes services that will be performed by its affiliates and subcontractors pursuant to the contract or arrangement. Thus, a covered service provider may need to

disclose services beyond those that make it a “covered” service provider.

#### b. Status of Covered Service Providers, Affiliates, and Subcontractors

Paragraph (c)(1)(iv)(B) of the final rule requires, if applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan (or to an investment vehicle that holds plan assets and in which the covered plan has a direct equity investment) as a fiduciary (within the meaning of section 3(21) of ERISA); and, if applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan as an investment adviser registered under either the Advisers Act or any State law. If a service provider will, or reasonably expects to, provide services both as a fiduciary and a registered investment adviser, the statement must reflect both of these roles. This paragraph has not changed from the interim final rule except that, for clarification purposes, the parenthetical “within the meaning of section 3(21) of the Act” was added to modify use of the term “fiduciary” for this purpose.

Two commenters on the interim final rule suggested that covered service providers should be required to state affirmatively whether or not they will be providing services as an ERISA fiduciary or a registered investment adviser. The Department declined to accept this suggestion, because statements explaining that a service provider will not be providing services as an ERISA fiduciary or as a registered investment adviser may be more confusing than helpful to responsible plan fiduciaries. Another commenter requested that the Department affirm that formal agreements stating whether a person is an ERISA fiduciary are not dispositive of whether the person actually is a fiduciary by virtue of a factual analysis of the functions performed. The Department agrees that a formal agreement that a person is not a fiduciary is not dispositive. The definition of “fiduciary” in ERISA, as set forth in section 3(21), is based on a person’s actual functions, authority and responsibility.<sup>17</sup>

<sup>17</sup> The Department issued a proposed amendment to the regulation on fiduciary investment advice at 29 CFR 2510.3–21. Among the parties treated by the proposal as ERISA fiduciaries are persons who provide investment advice (as defined in the proposal) for a fee, and who represent or

#### c. Disclosure of Compensation

Paragraph (c)(1)(iv)(C) of the final rule requires the covered service provider to disclose comprehensive information about the compensation that will be received in connection with the services provided pursuant to the contract or arrangement. This paragraph, including paragraphs (1) through (4), is structured the same as in the interim final rule. One substantive change, discussed below, has been made to the disclosures required for the receipt of “indirect” compensation. Also, cross references have been modified as necessary to reflect the reordering of paragraphs (c)(1)(iv)(E) through (G). Otherwise, the final rule retains the same concepts as the interim final rule with respect to what types of compensation have to be disclosed for purposes of a reasonable contract or arrangement.

Paragraph (c)(1)(iv)(C)(1) requires a description of all direct compensation, either in the aggregate or by service, that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in paragraph (c)(1)(iv)(A). For purposes of the final rule, “direct” compensation is compensation received directly from the covered plan. See paragraph (c)(1)(viii)(B)(1) of the final rule. This paragraph has not changed from the interim final rule. In response to comments raised on the interim final rule, the Department notes that “direct” compensation includes compensation that initially is paid by the plan sponsor, but who then is reimbursed from the plan.<sup>18</sup> Parties cannot avoid this disclosure requirement by creating intermediary payments and arguing that, as a technical matter, such payments do not constitute “compensation” for purposes of the final rule. The Department also confirms, as requested by a commenter,

acknowledge that they are acting as an ERISA fiduciary with respect to providing such advice. See 75 FR 65263 (Oct. 22, 2010). See also 29 CFR 2509.75–8. The Department recently announced its decision to re-propose this amendment as a response, in part, to requests from the public, including members of Congress, that the agency allow an opportunity for additional input (Sept. 19, 2011).

<sup>18</sup> The Department notes that such reimbursement could be appropriate if there was a clear understanding or agreement, as a result of plan language or otherwise, on or before the time the services were performed, that the plan would reimburse the reasonable expenses paid for by the plan sponsor. However, once the obligation to reimburse arises but is not fulfilled, the monies then outstanding may become an extension of credit to the plan by the sponsor. Prohibited Transaction Exemption 80–26 (45 FR 28545; April 29, 1980; amended at 71 FR 17917; April 7, 2006) may provide relief for such an extension of credit, depending upon the facts and circumstances.

that “direct” compensation, described in the final rule as coming from the covered plan, includes compensation that is paid directly from participants’ and beneficiaries’ accounts.

Paragraph (c)(1)(iv)(C)(2) requires a description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in paragraph (c)(1)(iv)(A). For purposes of the final rule, “indirect” compensation is compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate. Compensation received from a subcontractor is indirect compensation, unless it is received in connection with services performed under the subcontractor’s contract or arrangement described in paragraph (c)(1)(viii)(F). A non-substantive revision to this definition, in paragraph (c)(1)(viii)(B)(2) of the final rule, is discussed below.

The covered service provider also must identify the services for which the indirect compensation will be received, and the payer of the indirect compensation. In addition, this paragraph has been modified from the interim final rule to include one more requirement: the covered service provider must identify not only the payer of the indirect compensation, but also describe the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid.

This new requirement will illustrate for the responsible plan fiduciary potential conflicts of interest on the part of the covered service provider (or an affiliate or subcontractor) resulting from the receipt of indirect compensation. The covered service provider must describe its arrangement with the payer of indirect compensation so that the responsible plan fiduciary can analyze why the payer, generally an unrelated third party, is compensating the covered service provider in connection with the covered service provider’s contract or arrangement with the covered plan. The proposed rule, published in December 2007, contained a series of specific conflict of interest disclosure provisions. These provisions were eliminated in the interim final rule, which relied instead on fuller disclosure of the circumstances under which the covered service provider will be receiving compensation from parties other than the plan (or plan sponsor). For instance, the interim final rule required identification of such parties, in addition to the compensation

expected to be received. Although one commenter on the interim final rule suggested that the Department should reinstate the conflict of interest disclosures from the proposal, the Department continues to believe, for the reasons stated in the preamble to the interim final rule, that the scope of the proposed conflict of interest requirements, especially as to “potential” conflicts of interest, was inappropriately broad in the context of this regulation. The Department determined that the most effective way to achieve disclosure of conflicts of interest for purposes of the final rule is to inform plan fiduciaries of what compensation will be received and from whom. However, the Department also is persuaded that a responsible plan fiduciary would benefit from an explanation of the arrangement between the parties that gives rise to the indirect compensation paid in connection with the covered plan’s service contract or arrangement, and, accordingly, has provided for such a disclosure in the final rule.

The Department intends that the concept of compensation to be received by a covered service provider, or its affiliates or subcontractors, “in connection with” a particular contract or arrangement for services be construed broadly. To the extent a covered service provider reasonably expects that compensation will be received, which is based in whole or in part on its service contract or arrangement with the covered plan, the compensation will be considered “in connection with” such contract or arrangement. For example, a recent report pertaining to conflicts of interest prepared by the Department’s Office of Inspector General<sup>19</sup> identified a fact pattern in which a service provider had not disclosed that certain financial institutions subsidized the cost of attendance at a conference that the service provider offered for its clients. Specifically, to help defray the costs of the conference, plan sponsor attendees paid a registration fee of \$850, while the financial institution paid a subsidy fee of \$20,000. In this regard, it is the Department’s view that, when a covered service provider is engaged to provide consulting services to a covered plan (or plans) and receives subsidies or other remuneration from financial institutions or other parties with respect to whom the service provider may be making recommendations to attending plan sponsors or representatives, such

<sup>19</sup> See “EBSA Needs To Do More To Protect Retirement Plan Assets From Conflicts Of Interest” (U.S. Department of Labor, Office of Inspector General, Office of Audit, Sept. 30, 2010).

subsidies or remuneration would be compensation received “in connection with” the service provider’s contract or arrangement with the covered plan.

With respect to the requirement to describe arrangements between a covered service provider and a payer of indirect compensation, the Department notes that certain commenters expressed concerns about the ability of a broker-dealer to properly identify the payer of such compensation in advance of service arrangements involving securities purchased through brokerage windows, self-directed brokerage accounts, or similar arrangements. The Department understands these concerns and believes that descriptions of indirect compensation for this purpose may be expressed in general terms, provided that the description contains information that is sufficient to permit a responsible plan fiduciary to evaluate the reasonableness of such compensation in advance of the service arrangement. Therefore, to the extent that such information is unknown at the time the disclosures are made, the description need not identify the specific payer in advance of the service arrangement. Instead, the description may provide information that would allow the responsible plan fiduciary to compare the expected compensation with compensation that would be received by competing broker-dealers for similar investment services.

Paragraph (c)(1)(iv)(C)(3) requires a description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services described pursuant to paragraph (c)(1)(iv)(A) of the final rule if it is set on a transaction basis (e.g., commissions, soft dollars, finder’s fees or other similar incentive compensation based on business placed or retained) or is charged directly against the covered plan’s investment and reflected in the net value of the investment (e.g., Rule 12b-1 fees). The covered service provider also must identify the services for which such compensation will be paid and identify the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor). Compensation must be disclosed pursuant to this paragraph regardless of whether such compensation also is disclosed pursuant to paragraph (c)(1)(iv)(C)(1) or (2) (direct or indirect compensation) or (c)(1)(iv)(E) or (c)(1)(iv)(F) (investment disclosure) of the final rule. The final rule further clarifies that this paragraph (c)(1)(iv)(C)(3) shall not apply to compensation received by an employee

from his or her employer on account of work performed by the employee. This paragraph has not changed from the interim final rule.

Finally, paragraph (c)(1)(iv)(C)(4) requires a description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination. This paragraph has not changed from the interim final rule, except to the extent cross references to other sections of the final rule have been updated.

#### d. Disclosures Regarding Recordkeeping Services

Paragraph (c)(1)(iv)(D) of the final rule requires disclosure concerning the cost to the covered plan of recordkeeping services, to the extent such services will be provided to the covered plan. This disclosure must be provided without regard to the disclosure of compensation pursuant to paragraph (c)(1)(iv)(C), (c)(1)(iv)(E), or (c)(1)(iv)(F) of the final rule. Specifically, if recordkeeping services, as defined in paragraph (c)(1)(viii)(D), will be provided to the covered plan, paragraph (1) requires a description of all direct and indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with such recordkeeping services. Paragraph (2) also requires that, if the covered service provider reasonably expects recordkeeping services to be provided, in whole or in part, without explicit compensation for such recordkeeping services, or when compensation for recordkeeping services is offset or rebated based on other compensation received by the covered service provider, an affiliate, or a subcontractor, the covered service provider must furnish a reasonable and good faith estimate of the cost to the covered plan of such recordkeeping services, including an explanation of the methodology and assumptions used to prepare the estimate and a detailed explanation of the recordkeeping services that will be provided to the covered plan. The estimate shall take into account, as applicable, the rates that the covered service provider, an affiliate, or a subcontractor would charge to, or be paid by, third parties, or the prevailing market rates charged, for similar recordkeeping services for a similar plan with a similar number of covered participants and beneficiaries.

This provision was added to the interim final rule to reflect the Department's belief that information

relating to recordkeeping services and the costs to covered plans of those services should be disclosed to responsible plan fiduciaries in a meaningful way. The Department believes that, especially in the context of complicated service arrangements when a variety of services (including recordkeeping services) are provided to a covered plan, separate disclosure is necessary for fiduciaries to make informed evaluations of a covered plan's recordkeeping costs. Commenters on the interim final rule generally supported this requirement. Some commenters argued that this disclosure element would provide little value to responsible plan fiduciaries, especially to the extent it might appear to create a "cost" for something that does not really have a cost. One commenter argued that it is insufficient to require only the separate disclosure of the cost of recordkeeping services, and that investment management and administrative services also should be separately disclosed. In consideration of the Department's rationale for including this provision, discussed in more detail in the preamble to the interim final rule, the Department was not persuaded by these commenters that the requirement should be eliminated or revised. Accordingly, this paragraph has not changed from the interim final rule, except to the extent that cross references have been updated as necessary.

Commenters also requested a few clarifications concerning this requirement. For example, a couple of commenters are concerned that the definition of "recordkeeping services" (paragraph (c)(1)(viii)(D) of the final rule) is so broad that it will be difficult for responsible plan fiduciaries to make meaningful comparisons, especially to the extent the data provided will be in some cases mere estimates of the cost of recordkeeping services. The Department believes that this provision has been constructed to manage these concerns. First, the definition of "recordkeeping services" in the final rule is designed to be broad and provide a basic parameter for ensuring that providers of recordkeeping services understand when they will be covered service providers under paragraph (c)(1)(iii)(B) of the final rule. The Department does not want service providers to avoid this responsibility by narrowly defining the services that they provide. However, the Department understands that the breadth of this definition could create difficulty for responsible plan fiduciaries when comparing the recordkeeping services of different providers. Thus, the final rule (as in the

interim final rule) requires as part of this paragraph (c)(1)(iv)(D) that the covered service provider include "a detailed explanation of the recordkeeping services that will be provided to the covered plan." This detailed explanation will better enable the responsible plan fiduciary to understand precisely what is included in a particular service provider's "recordkeeping services" such that comparisons among service providers' offers can be made. Second, by requiring "an explanation of the methodology and assumptions used to prepare the estimate[.]" this provision enhances the ability of responsible plan fiduciaries to analyze and compare estimates. A responsible plan fiduciary who understands why, and how, a particular service provider prepared an estimate will be better able to compare that estimate to other service providers' disclosures concerning the cost of recordkeeping services.

Finally, a few commenters asked the Department to take definitive positions on whether certain specified services constitute "recordkeeping services" for purposes of this provision. Although the Department declines to make general pronouncements concerning these highly contextual and fact-specific questions, the Department again notes that the final rule broadly defines "recordkeeping services." Regardless of how a service arrangement is structured or funded, plan fiduciaries need to know when such administrative services are being provided and how much they contribute to the total cost of plan services.

#### e. Investment Disclosure—Fiduciary Services

Paragraph (c)(1)(iv)(E) of the final rule (previously paragraph (c)(1)(iv)(F) in the interim final rule) requires additional investment disclosures from covered service providers described in paragraph (c)(1)(iii)(A)(2) (providers of fiduciary services to an investment contract, product, or entity that holds plan assets and in which the covered plan has a direct equity investment). The information set forth in paragraphs (c)(1)(iv)(E)(1) through (3) must be furnished for each investment contract, product, or entity for which fiduciary services will be provided pursuant to the contract or arrangement with the covered plan, unless such information is disclosed to the responsible plan fiduciary by a covered service provider providing recordkeeping services or



brokerage services (as described in paragraph (c)(1)(iii)(B)).<sup>20</sup>

The interim final rule required the disclosure of three categories of compensation information concerning such plan investments, as applicable: (1) A description of any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, transfer of, or withdrawal from the investment contract, product, or entity (e.g., sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees); (2) a description of the annual operating expenses (e.g., expense ratio) if the return is not fixed; and (3) a description of any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees). These categories of investment-related information have been modified from the interim final rule, as discussed below, to better conform this provision of the final rule to the investment-related information required pursuant to the Department's participant-level disclosure regulation and to enhance the ability of the responsible plan fiduciary or covered plan administrator to comply with the participant-level disclosure regulation.

Paragraph (c)(1)(iv)(E)(1) requires a description of any compensation that will be charged directly against an investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, accounts fees, and purchase fees; and that is not included in the annual operating expenses of the investment contract, product, or entity. Although this language has been modified from that used in paragraph (c)(1)(iv)(F)(1) of the interim final rule, the provision is intended to capture the same information; the Department merely

revised the language to conform to the language used in a comparable provision of the participant-level disclosure regulation. Accordingly, the substance of the information required to be disclosed pursuant to this paragraph has not changed from the interim final rule.

Paragraph (c)(1)(iv)(E)(2) requires a description of the annual operating expenses (e.g., expense ratio) if the return is not fixed<sup>21</sup> and any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees), or, for an investment contract, product, or entity that is a designated investment alternative, the total annual operating expenses expressed as a percentage and calculated in accordance with 29 CFR 2550.404a-5(h)(5). This first part of the requirement combines paragraphs (c)(1)(iv)(F)(2) and (3) from the interim final rule, requiring a description of both the annual operating expenses and, if applicable, any additional ongoing expenses. However, the latter part of this requirement is intended to provide consistency for parties that also are required to comply with the Department's participant-level disclosure regulation for designated investment alternatives in a participant-directed individual account plan. If an investment contract, product, or entity subject to this paragraph is a "designated investment alternative" (as defined in paragraph (c)(1)(viii)(C) of the final rule), then the covered service provider must disclose the total annual operating expenses for the designated investment alternative, calculated in accordance with 29 CFR 2550.404a-5(h)(5), rather than rely on the interim final rule's more general standards. This will ensure consistent disclosure and prevent confusion to the extent a covered service provider under this final rule otherwise may have had to disclose expense information for the same investment differently under the participant-level disclosure regulation. For investment contracts, products, or entities that are not designated investment alternatives, a covered service provider may continue to disclose annual operating expenses and any additional ongoing expenses, in

accordance with the standards first introduced in the interim final rule. To avoid creating unnecessary cost and burden for disclosure with respect to investments that are not designated investment alternatives in a participant-directed individual account plan, a covered service provider will not be required to calculate total annual operating expenses for such investments according to the participant-level disclosure regulation's definition.

Paragraph (c)(1)(iv)(E)(3) also requires, for an investment contract, product, or entity that is a designated investment alternative, any other information or data about the designated investment alternative that is within the control of, or reasonably available to, the covered service provider and that is required for the covered plan administrator to comply with the disclosure obligations described in 29 CFR 2550.404a-5(d)(1) (the participant-level disclosure regulation). Although this information was not explicitly required in the interim final rule, the Department does not anticipate that it will create an undue burden on covered service providers, because the requirement applies only to designated investment alternatives, for which the same disclosures otherwise will have to be made by plan administrators pursuant to the participant-level disclosure regulation. The Department believes that this requirement will enhance compliance with the participant-level disclosure regulation by ensuring that a responsible plan fiduciary and, therefore, the covered plan's administrator, will obtain the investment-related information concerning designated investment alternatives that must be furnished to participants and beneficiaries. The Department does not intend to create a new or increased burden on a covered service provider, or require the covered service provider to obtain or prepare information that otherwise is not within the covered service provider's control or reasonably available to the covered service provider. For example, in the case of a recordkeeper that offers a platform of designated investment alternatives consisting of mutual funds, the recordkeeper could satisfy its obligations under this provision by passing through to the covered plan the prospectuses for such funds, in view of the fact that such disclosures would contain much of the required information and be reasonably available to the recordkeeper (the covered service provider).

This provision does not require a covered service provider to furnish information from the plan sponsor, from

<sup>20</sup> Several commenters on the interim final rule requested clarification concerning the meaning of "unless such information is disclosed to the responsible plan fiduciary by a covered service provider providing recordkeeping services or brokerage services[.]" Specifically, commenters were confused as to whether this language implies an affirmative obligation on the part of recordkeepers and brokers to provide this information, or whether duplicative disclosure is intended. The Department confirms that the ERISA fiduciary service provider to a plan asset vehicle has the obligation to furnish this investment information. This language is intended to avoid duplicative disclosure if, for some reason, the information already is disclosed to the responsible plan fiduciary by a recordkeeper or a broker. For instance, a recordkeeper or broker, separately, may agree with the ERISA fiduciary to furnish such information. In that case, the ERISA plan asset fiduciary would not also have to furnish the same information.

<sup>21</sup> A few commenters requested further guidance on how to determine if an investment's return is fixed. This determination should be made in the same manner as under the participant-level disclosure regulation. The preamble to the participant-level disclosure regulation provides that designated investment alternatives with fixed returns are those that provide a fixed or stated rate of return to the participant, for a stated duration, and with respect to which investment risks are borne by an entity other than the participant (e.g., insurance company). 75 FR 64910 (Oct. 20, 2010).



another unrelated service provider to the plan, or from the issuer of a designated investment alternative, unless it is reasonably available to the covered service provider. Accordingly, this requirement is limited to information or data that is within the control of, or reasonably available to, the covered service provider.

Paragraph (c)(1)(iv)(E)(3), to the extent applicable, requires disclosure of information that the plan administrator will need in order to comply with its own disclosure obligations to participants under 29 CFR 2550.404a-5. This includes the following additional investment information about a designated investment alternative (an "alternative"): identifying information such as the name and type or category of the alternative (29 CFR 2550.404a-5(d)(1)(i)); performance data (29 CFR 2550.404a-5(d)(1)(ii)); benchmarks (29 CFR 2550.404a-5(d)(1)(iii)); and fee and expense information for alternatives with respect to which the return is fixed (29 CFR 2550.404a-5(d)(1)(iv)(B)). The covered service provider already is required to disclose the fee and expense information described in 29 CFR 2550.404a-5(d)(1)(iv)(A)(1) and (2) pursuant to paragraphs (c)(1)(iv)(E)(1) and (2) of the final rule.

Although the requirement in 29 CFR 2550.404a-5(d)(1)(v) to furnish an Internet Web site address falls on the covered plan's administrator, the covered service provider may have within its control, or reasonably available to it, some of the data that must be provided at the Web site address, such as the name of the investment alternative's issuer (29 CFR 2550.404a-5(d)(1)(v)(A)); the alternative's objectives or goals (29 CFR 2550.404a-5(d)(1)(v)(B)); the alternative's principal strategies and principal risks (29 CFR 2550.404a-5(d)(1)(v)(C)); and the alternative's portfolio turnover rate (29 CFR 2550.404a-5(d)(1)(v)(D)). The covered service provider would not be responsible for preparing the glossary required by 29 CFR 2550.404a-5(d)(1)(vi), as that is not specific information about a particular designated investment alternative.

If the covered service provider has information about designated investment alternatives that fall within the participant-level disclosure regulation's special rules, contained in 29 CFR 2550.404a-5(i), the covered service provider may have to furnish information necessary for the covered plan administrator to comply with such regulation's requirements for annuity options (29 CFR 2550.404a-5(d)(1)(vii) and 29 CFR § 2550.404a-5(i)(2));

employer securities (29 CFR 2550.404a-5(i)(1)); fixed-return investments (29 CFR 2550.404a-5(i)(3)); and target date or similar funds (29 CFR 2550.404a-5(i)(4)). As set forth above, in each case, the covered service provider is responsible only for specific data about designated investment alternatives that is within the provider's control or reasonably available. Some of the information required pursuant to 29 CFR 2550.404a-5 pertains to information that, although relevant to an investing participant or beneficiary, is not specific data about a particular designated investment alternative. Thus, for example, the covered service provider is not responsible for furnishing an Internet Web site address or for preparing cautionary statements designed to inform a plan's participant and beneficiaries. The covered service provider does not, by virtue of paragraph (c)(1)(iv)(E)(3), assume responsibility for obligations of the covered plan administrator, who continues to bear legal responsibility for the requirements of the participant-level disclosure regulation.<sup>22</sup>

#### f. Investment Disclosure—Recordkeeping and Brokerage Services

Paragraph (c)(1)(iv)(F) of the final rule requires the same investment disclosure, discussed above, from covered service providers described in paragraph (c)(1)(iii)(B) (providers of recordkeeping services or brokerage services to an individual account plan that permits participants and beneficiaries to direct the investment of their accounts, if one or more designated investment alternatives will be made available in connection with such recordkeeping services or brokerage services). Paragraph (1) requires that such covered service providers furnish the additional information described in paragraph (c)(1)(iv)(E)(1) through (3) with respect to each designated investment alternative for which recordkeeping services or brokerage services will be provided pursuant to the contract or arrangement with the covered plan. Apart from updating cross references as necessary, paragraph (1) has not changed from the interim final rule.

Several commenters on the interim final rule questioned statements in the preamble to the interim final rule and asked whether recordkeepers who make available a platform of investments must

furnish the investment information for designated investment alternatives that are not on their platform. The commenters explained that sometimes a recordkeeper will administer and provide some level of recordkeeping services for off-platform investments as a concession to pension plan clients. These commenters argued that the direct relationship that exists between the responsible plan fiduciary and the issuer of these off-platform investments (which are separately selected by the plan fiduciary) is a more appropriate basis for requiring the provision of investment information from such issuer. The Department explained, in the preamble to the interim final rule, its view that this category of covered service providers encompasses service providers who provide recordkeeping or brokerage services that include designated investment alternatives independently selected by the responsible plan fiduciary. These "off-platform" investment alternatives may be included in the covered plan's investment options when the responsible plan fiduciary enters into a contract or arrangement with the recordkeeper or broker, or they may later be added. The Department continues to believe that these covered service providers are in the best position to furnish the required investment information. To the extent the covered service provider is not affiliated with the issuer of the designated investment alternative, the covered service provider may benefit from compliance with paragraph (2) of this paragraph (c)(1)(iv)(F).

Paragraph (2) provides that a covered service provider may comply with this paragraph (c)(1)(iv)(F) by providing current disclosure materials of the issuer of the designated investment alternative, or information replicated from such materials, that include the information described in such paragraph, provided that three conditions are satisfied. First (paragraph (j)), the issuer cannot be an affiliate<sup>23</sup> of the covered service provider. Second

<sup>22</sup> Of course, as is recognized in the participant-level disclosure regulation, the covered plan administrator is permitted to retain a service provider to fulfill the plan administrator's obligations under the participant-level disclosure regulation.

<sup>23</sup> A few commenters on the interim final rule requested clarification that, even though the relief provided by this paragraph is available only for non-affiliated issuers, covered service providers still can pass through disclosure materials from affiliated issuers. These commenters believed that the provision could be read to imply that covered service providers must create separate, potentially different, disclosure materials for investments of affiliated issuers. The Department confirms that covered service providers may pass through disclosure materials from affiliated issuers; this provision was not intended to limit the ability of covered service providers to do so. However, covered service providers will be responsible for the content of the affiliated materials pursuant to this paragraph of the final rule.

(paragraph (ii)), the issuer must be a registered investment company, an insurance company qualified to do business in any State, an issuer of a publicly traded security, or a financial institution supervised by a State or federal agency. Finally, third (paragraph (iii)), the covered service provider must act in good faith and not know that the materials are incomplete or inaccurate, and furnish the responsible plan fiduciary with a statement that the covered service provider is making no representations as to the completeness or accuracy of such materials. The Department included this provision in recognition that recordkeepers and brokers, unlike fiduciaries to investment vehicles holding plan assets, are not directly involved in the day-to-day management of the investment vehicles that they represent; rather, they generally serve merely as intermediaries between plans and the issuers of the investment vehicles for purposes of furnishing such information. The final rule, like the interim final rule, enables them to comply with the regulation without having to vouch for the completeness and accuracy of such information.

This paragraph has been modified from the interim final rule, which previously required that the disclosure materials must be regulated by a State or federal agency. The Department was persuaded by commenters that the “pass through” relief was too narrow when applied to only regulated disclosure materials. Commenters explained that disclosure materials for many common investments offered in pension plans, such as collective trusts, insurance general accounts, and guaranteed investment contracts, are not “regulated” as required by the interim final rule. Retaining this standard, commenters argued, might dissuade recordkeepers and brokers from offering these products on their platforms. Commenters also are concerned that responsible plan fiduciaries would expend considerable resources to find other recordkeepers or brokers willing to offer the products. Accordingly, the Department revised this provision of the final rule. Rather than focusing on the disclosure materials, paragraph (ii) now requires that the issuer of the designated investment alternative be regulated. Specifically, the issuer must be a registered investment company (*i.e.*, by filing a registration statement with the Securities and Exchange Commission as required by the Investment Advisers Act of 1940), an insurance company qualified to do business in any State, an issuer of a publicly traded security, or

a financial institution supervised by a State or federal agency. This provision focuses the requirement more narrowly on entities that are “regulated” in connection with their issuance of investment products, and allows the covered service provider to satisfy paragraph (c)(1)(iv)(F) by passing through these issuers’ disclosure materials. Paragraph (iii) provides “pass through” relief solely for purposes of determining whether or not a contract or arrangement with a covered service provider falls within ERISA section 408(b)(2). The “pass through” provision does not provide relief from any other legal obligations or liabilities under ERISA or other applicable law.

Paragraph (iii) also requires that the covered service provider furnish the responsible plan fiduciary with a statement that the covered service provider is making no representations as to the completeness or accuracy of such materials. This will ensure that the responsible plan fiduciary understands that these materials are merely being passed through and that the covered service provider is not, therefore, vouching for their completeness or accuracy. The Department does not intend that the covered service provider must furnish a separate statement for each item of investment disclosure material. Rather, the covered service provider could, for example, include the statement once in the service contract or arrangement, along with a description of the investment disclosure material(s) to which the statement applies.

Other commenters requested that this provision be expanded to cover information from such regulated issuers that is consolidated or summarized into a user-friendly format. Otherwise, these commenters maintain, covered service providers will be more likely to pass through lengthy, technical disclosure documents, for example multiple Securities and Exchange Commission prospectus documents. The Department agrees that covered service providers should not be discouraged from presenting the required information in a more user-friendly format for responsible plan fiduciaries. Accordingly, covered service providers may rely on this provision if they merely are replicating information received from a regulated, unaffiliated issuer that the covered service provider does not know to be inaccurate or incomplete.

#### g. Manner of Receipt of Compensation

Paragraph (c)(1)(iv)(G) of the final rule requires a description of the manner in which the compensation described in paragraph (c)(1)(iv)(C) through (F) of the

final rule, as applicable, will be received, such as whether the covered plan will be billed or the compensation will be deducted directly from the covered plan’s account(s) or investments. This provision has not substantively changed from the interim final rule. However, this provision has been moved from paragraph (c)(1)(iv)(E) of the interim final rule to paragraph (c)(1)(iv)(G) of the final rule, and cross references have been updated throughout the final rule as necessary, to ensure that the manner of receipt of all compensation (including compensation received in connection with plan investments in paragraphs (c)(1)(iv)(E) and (F) of the final rule) is described.

#### h. Summary or Guide to Initial Disclosures; Format and Delivery

In the preamble to the interim final rule, the Department requested comment on the format of disclosures required under the rule. Neither the proposal nor the interim final rule required covered service providers to disclose information in any particular format. Further, the preamble to the proposal specifically noted that covered service providers could use different documents from separate sources, as long as all of the documents, collectively, contained the required information. Commenters on the proposal disagreed as to whether this would lead to a cost-effective and meaningful presentation of the required information to responsible plan fiduciaries. In the preamble to the interim final rule, the Department explained that it had not determined whether it was feasible to provide specific and meaningful formatting standards. Accordingly, the Department requested comment on whether to revise the final rule to require a summary of, or guide to, the mandated disclosures, or to include other formatting requirements.

Commenters on the interim final rule, as on the proposed rule, continued to disagree about the utility of, and feasibility of, requiring a summary or guide, or otherwise mandating any particular format for the required disclosures. Many commenters argued that the Department should retain the position taken in the proposal and the interim final rule, giving covered service providers flexibility to determine the format of their disclosures. These commenters expressed concern that a “one-size-fits-all” approach could not accommodate the tremendous variety of current pension plan service arrangements and likely changes in the future. They also believed that the costs

to pension plans, and the participants and beneficiaries of such plans, of such an approach will be significant. The commenters expressed concern that responsible plan fiduciaries would rely solely, and thus improperly, on the summary, rather than reviewing the fuller and more detailed disclosures required by the rule. These commenters also were concerned that requiring the comprehensive disclosures and a summary would simply result in unnecessarily duplicative disclosures. In addition, in the case of discrepancies between the two, questions may arise over which disclosures would govern. These commenters preferred that the Department retain the flexible position taken in the proposal and interim final rule or, at most, require covered service providers to furnish an index or "roadmap" to the disclosures. Commenters also suggested that any summary or other formatting requirement the Department may adopt be flexible and not mandate any particular language, formatting, or page limits.<sup>24</sup>

Other commenters, however, supported the addition of a summary disclosure, guide, or similar requirement. They argued that plan fiduciaries, especially those for small and medium-sized plans, often are overwhelmed by highly technical disclosures from separate sources, especially concerning plan investments. These commenters suggested placing the burden of organizing this information on covered service providers, who can do so more effectively and at less cost. Further, these commenters believe that the costs should not be overstated and are likely to be minimal following an initial transition to compliance with any new summary or other formatting requirement. These costs, they argued, would be greatly outweighed by the benefit of increased clarity to responsible plan fiduciaries. One commenter, for example, pointed out that fuller disclosure will not result in increased transparency if the information continues to be obscured in lengthy, technical documents. A few of these commenters suggested information that should be contained in

a separate, summary disclosure requirement.<sup>25</sup>

Following a careful review and analysis of the comments on this issue, the Department has decided to reserve paragraph (c)(1)(iv)(H) of the final rule and intends ultimately to publish in a separate proposal a guide or similar requirement with respect to the initial disclosures (in paragraph (c)(1)(iv) of the final rule) that covered service providers may be required to furnish to responsible plan fiduciaries. Given the lack of specific suggestions or data on how best to structure such a requirement and what the real costs of such a requirement would be, the Department is not prepared at this time to implement a guide or similar requirement as part of the final rule. Rather, given the policy and economic considerations presented by commenters, the Department has decided not to include such a requirement in this final rule without providing separately for public review and comment.

Accordingly, in the near future, the Department intends to publish in the **Federal Register** a Notice of Proposed Rulemaking, under which covered service providers may be required to furnish a guide or similar tool along with the rule's initial disclosures. For example, a proposed provision could require that, in addition to the information that must be disclosed pursuant to paragraph (c)(1)(iv)(A) through (G) of the final rule (the initial disclosures), the covered service provider must separately furnish to the responsible plan fiduciary a guide that specifically identifies the document, section and page number where specified information, as applicable to the contract or arrangement, is located. Furnishing the guide as a separate document would ensure that the responsible plan fiduciary is aware of such document and can use it effectively in his or her review of the required disclosures. Alternatively, a regulatory provision could require some or all of the required disclosures to be included in a chart or similar summary format. In any event, by separately proposing such a requirement as a new provision in paragraph (c)(1)(iv)(H) of the final rule, the Department will ensure that all interested parties can

fully review the regulatory provision and provide feedback to the Department.

In the meantime, the Department understands that many service providers already are moving in this direction. For example, service providers have represented to the Department that, as a best practice, they currently furnish their plan clients with a guide or index to the service providers' disclosures, a summary of certain key disclosures, or, in some cases, both. The Department strongly supports such innovation, because these tools will assist responsible plan fiduciaries, especially fiduciaries to small and medium-sized plans, in managing and analyzing the potentially complex disclosure documents that are provided to them or if disclosures are located in multiple documents. Further, the Department believes that covered service providers are in the best position to construct these tools, given their increased familiarity with and access to the various and potentially lengthy and technical documents that they may use to disclose information.

To further encourage service providers to assist plan fiduciaries in this manner, the Department is including a "sample guide" to initial disclosures as an appendix to the final rule. Several commenters on the interim final rule suggested that if the Department were to adopt a summary or other formatting requirement in the final rule, it should provide an illustration of how a covered service provider may comply with such requirement to encourage consistency and to enable lower-cost compliance. Although the Department is not adopting such a requirement at this time, the sample guide published today may be useful, on a voluntary basis, to covered service providers as a format to assist responsible plan fiduciaries with the required disclosures. Similarly, to the extent a responsible plan fiduciary experiences difficulty finding and reviewing the required disclosures in lengthy, technical, or multiple disclosure documents received from a covered service provider pursuant to the requirements of the final rule, the fiduciary should consider requesting assistance from the covered service provider, for example, discussing with the covered service provider the feasibility and cost of using the attached sample guide.

The sample guide has been included because the Department believes, at this time, that such a guide may strike an appropriate balance between the need to facilitate a responsible plan fiduciary's review of information important to a

<sup>24</sup> A few commenters on the interim final rule discussed, and disagreed on, whether a "single document" rule should be adopted, requiring that all disclosures be furnished in one document. The Department was convinced neither that such a requirement would be feasible and cost-effective for all service arrangements, nor that it would necessarily result in the most meaningful delivery of required information to responsible plan fiduciaries. The Department therefore declined to adopt such a requirement.

<sup>25</sup> Commenters generally suggested, for example, that the Department focus on a summary of the rule's compensation information and information concerning designated investment alternatives, while cross referencing to assist fiduciaries in locating the primary information contained in other disclosures. One commenter cautioned that a summary should focus on total cost, not just one component of the cost, such as recordkeeping.

prudent decision-making process, and the costs and burdens attendant to the preparation of a new disclosure document. A guide would provide a basic framework for responsible plan fiduciaries concerning the disclosures they receive, and where to find such disclosures, while avoiding the uncertainty and burdens inherent in attempting to construct a “summary” of existing documents and provisions. Of course, the Department will continue to review these issues, and interested persons are encouraged to submit their views on the relative benefits and costs of a guide requirement, versus a summary or other formatting requirement, in response to the Department’s forthcoming Notice of Proposed Rulemaking.

Finally, in addition to providing their views on a formatting requirement in the final rule, commenters on the interim final rule requested further guidance on how required information may be delivered to responsible plan fiduciaries. Specifically, several commenters asked the Department to affirm that covered service providers could furnish the required disclosures electronically, including by making information available on a secure Web site if responsible plan fiduciaries are notified as to how to access such information. These commenters argued that electronic delivery enables more cost-effective compliance, permits easy confirmation of delivery, and enables service providers to create and use tools that can enhance the review of information by responsible plan fiduciaries. Consistent with the views expressed in the 2007 proposed rule,<sup>26</sup> there is nothing in the regulation that limits the ability of covered service providers to furnish information required by the regulation to responsible plan fiduciaries via electronic media.<sup>27</sup> However, unless the covered service provider’s disclosure information on a Web site is readily accessible to responsible plan fiduciaries, and fiduciaries have clear notification on how to gain such access, the information on the Web site may not be regarded as furnished within the meaning of the regulation.

##### 5. Timing of Initial Disclosures; Changes

Paragraph (c)(1)(v) of the final rule addresses the timing requirements for the initial disclosures described in paragraph (c)(1)(iv), as well as the

requirements for when a covered service provider must disclose changes to the initial disclosures in compliance with the final rule. Paragraph (c)(1)(v)(A) of the final rule, concerning the timing of initial disclosures, has not changed from the interim final rule. A covered service provider must disclose the information required by paragraph (c)(1)(iv) of the final rule to the responsible plan fiduciary reasonably in advance of the date the contract or arrangement is entered into, and extended or renewed. A few commenters requested clarification on the meaning of “the date the contract or arrangement is entered into.” The Department was not persuaded to adopt the alternative dates that were proposed, such as the date the written contract is signed, the date that compensation is first received, or the date the contract is legally binding. The Department does not believe that these standards are clearer or more appropriate than the standard used in the final rule. Commenters on the proposal argued that service arrangements often go into effect without a signature by a plan fiduciary. In addition, delaying disclosure of compensation until it is received would result in piecemeal disclosures during the term of a service arrangement and would undercut an important purpose of the disclosure, which is to assist fiduciaries in selecting service providers. Tying disclosures to a determination of when a contract or arrangement becomes legally binding is not practicable because such determinations may depend on many facts and circumstances, as well as different State laws. The final rule gives plan fiduciaries and service providers some flexibility to determine when an arrangement is entered into. However, to ensure that the responsible plan fiduciary can review, analyze, and consider the disclosures in compliance with his or her ERISA fiduciary obligations, the covered service provider must furnish the disclosures “reasonably in advance” of the date that the parties enter into the contract or arrangement. The Department is confident that the parties to a service contract or arrangement will be able to determine what is “reasonable” in this context.

The final rule contains two exceptions to this “reasonably in advance” timing requirement. The first exception, contained in paragraph (c)(1)(v)(A)(1), has not changed from the interim final rule. When an investment contract, product, or entity is determined not to hold plan assets upon the covered plan’s direct equity investment, but

subsequently is determined to hold plan assets while the covered plan’s investment continues, the information required by paragraph (c)(1)(iv) of the final rule must be disclosed as soon as practicable, but not later than 30 days from the date on which the covered service provider knows that such investment contract, product, or entity holds plan assets. The second exception, contained in paragraph (c)(1)(v)(A)(2), has not changed substantively. The investment information described in paragraph (c)(1)(iv)(F) of the final rule relating to any investment alternative that is not designated at the time the contract or arrangement is entered into must be disclosed as soon as practicable, but not later than the date the investment alternative is designated by the covered plan.<sup>28</sup> The cross reference to paragraph (c)(1)(iv)(F) was updated to reflect minor restructuring in the final rule, discussed above, and the reference to investment alternatives designated by the “covered plan” conforms to the final rule’s slightly modified definition of “designated investment alternative,” discussed below.

Paragraph (c)(1)(v)(B) of the final rule, concerning when a covered service provider must disclose changes to the initial information previously disclosed, has been modified in response to comments received on the interim final rule. Specifically, this paragraph has been divided into two paragraphs (1) and (2). Paragraph (1) continues to provide that a covered service provider must disclose a change to required information as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider’s control, in which case the information must be disclosed as soon as practicable. However, this 60-day standard has been limited to the information required by paragraphs (c)(1)(iv)(A) through (D), and (G) of the final rule (e.g., information concerning the services to be provided; the status of the covered service provider, an affiliate, or a subcontractor as an ERISA fiduciary or registered investment adviser; the compensation to

<sup>28</sup> One commenter on the interim final rule suggested that the exceptions to the “reasonably in advance” requirement should be expanded for circumstances when a responsible plan fiduciary changes a designated investment alternative during the term of the service contract or arrangement; the Department believes that this situation would be addressed as a “change” to the initial disclosures and a covered service provider should comply with the provisions regarding such changes contained in paragraph (c)(1)(v)(B).

<sup>26</sup> See 72 FR 70988.

<sup>27</sup> The Department’s regulations at 29 CFR 2520.104b-1 apply solely for purposes of disclosures from plans to participants and beneficiaries and do not extend to disclosures from third parties to plan fiduciaries.

be received in connection with the contract or arrangement; the cost of recordkeeping services (if applicable); and the manner of receipt of compensation).

Some commenters suggested that the 60-day period should be expanded to, for example, 90 days or 60 days following the later of the date the service provider is informed of the change or the effective date of the change. The Department was not persuaded to revise the 60-day period and believes that it gives covered service providers enough time to make the disclosure while ensuring that responsible plan fiduciaries receive prompt notice of changes. A few commenters suggested that the Department reintroduce the "materiality" standard used in the proposed rule to avoid requiring disclosure of de minimis and meaningless changes. The Department did not adopt this suggestion. For the reasons stated in the preamble to the interim final rule, the Department continues to believe that a materiality standard, in this context, would be ineffective. 72 FR 70988.

Paragraph (c)(1)(v)(B)(2) contains a new requirement applicable to the revised investment disclosures required by paragraph (c)(1)(iv)(E) and (F). Several commenters on the interim final rule argued that the ongoing, or "rolling," requirement to disclose changes to previously furnished information within 60 days would result in a highly burdensome process with respect to investment information. For example, commenters explained that for a covered plan offering a large number of designated investment alternatives, minor modifications to the investment information concerning those alternatives might occur continuously and a covered service provider would have to inundate responsible plan fiduciaries with frequent notifications about what are often nominal changes. The commenters argued that responsible plan fiduciaries may eventually ignore the notices. Further, covered service providers constantly would have to monitor all of the investment alternatives on their platform for changes. These commenters suggested, as an alternative standard, that covered service providers should have to periodically update the investment disclosures; this approach would be more consistent with current industry practice and more likely to focus the responsible plan fiduciary's attention on the information at specified intervals.

The Department agrees that the need to constantly furnish notices of even minor changes to investment

information could be burdensome, especially for plans offering a large number of investment alternatives. The Department also agrees that a non-stop stream of such notifications is inconsistent with the goal of ensuring that responsible plan fiduciaries receive useful and meaningful disclosures. Accordingly, the final rule has been modified to provide an alternate timing standard for changes to investment information. Rather than furnishing notification of each such change within 60 days, paragraph (2) requires that a covered service provider must, at least annually, disclose any changes to the investment information required by paragraph (c)(1)(iv)(E) and (F).

#### 6. Reporting and Disclosure Information

Paragraph (c)(1)(vi)(A) of the final rule requires a covered service provider to furnish, upon request of the responsible plan fiduciary or covered plan administrator, any other information relating to the compensation received in connection with the contract or arrangement that the covered plan needs in order to comply with the reporting and disclosure requirements of Title I of ERISA and the regulations, forms and schedules issued thereunder. The substantive requirement, in paragraph (c)(1)(vi)(A), has not changed from the interim final rule, except that the language has been modified to refer to "the written" request of the responsible plan fiduciary or covered plan administrator.<sup>29</sup> The timing requirement, in paragraph (c)(1)(vi)(B), however, has been modified.

The interim final rule required, in paragraph (c)(1)(vi)(B), that the covered service provider disclose the information required by paragraph (c)(1)(vi)(A) not later than 30 days following receipt of a written request from the responsible plan fiduciary or covered plan administrator, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable. A number of commenters on the interim final rule requested that the Department better align this timing requirement with existing reporting and disclosure standards. For example, service providers currently must furnish information necessary to complete the

<sup>29</sup> The timing requirement contained in paragraph (c)(1)(vi)(B) of the interim final rule previously referred to the responsible plan fiduciary's or covered plan administrator's "written" request. Because paragraph (c)(1)(vi)(B) was modified for purposes of the final rule, the concept of the "written" request was incorporated into paragraph (c)(1)(vi)(A) of the final rule.

Form 5500 Annual Report no later than 120 days after the end of the plan year. The Department is persuaded that the timing requirement for this reporting and disclosure information should be based on the reporting or disclosure requirements in question, rather than on the time that a responsible plan fiduciary chooses to request the information. Accordingly, paragraph (c)(1)(vi)(B) now requires that such information be furnished reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator states that it must comply with the applicable reporting or disclosure requirement, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable. The Department believes that this modification will address commenters' concerns.<sup>30</sup>

#### 7. Disclosure Errors

Paragraph (c)(1)(vii) of the final rule addresses inadvertent disclosure errors and omissions. Specifically, the rule provides that no contract or arrangement will fail to be reasonable solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required by the rule. The covered service provider must disclose the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.<sup>31</sup> This provision includes one change from the interim final rule. The Department revised the paragraph to clarify that it covers errors and omissions made when covered service providers disclose changes to the initially required information, which must be disclosed pursuant to paragraph (c)(1)(v)(B) of the

<sup>30</sup> The final rule is not intended to alter any otherwise applicable obligation to provide information to plan fiduciaries. See, e.g., ERISA section 103(a)(2) (information certification requirements for insurance carriers or other organizations which provide benefits under the plan or hold plan assets, banks or similar institutions which hold plan assets, and plan sponsors).

<sup>31</sup> The class exemption, included in paragraph (c)(1)(ix) of the final rule, addresses situations in which a responsible plan fiduciary discovers an error or other deficiency in the disclosure. Paragraph (c)(1)(vii) is meant to provide the parties an opportunity to avoid a prohibited transaction by addressing errors up front. Once a prohibited transaction has occurred, the responsible plan fiduciary will need to rely on the relief provided by the class exemption.

rule. Otherwise, this provision has not changed from the interim final rule.

One commenter on the interim final rule requested that the Department extend the turn-around time to 90 days. The Department did not accept this request. Although it is important to provide a correction mechanism for inadvertent errors or omissions, which inevitably will occur as suggested by commenters on the proposal, it is the Department's view that errors and omissions must be communicated promptly to responsible plan fiduciaries. Another commenter argued that this provision is insufficient to protect covered service providers and that the class exemption should be extended to protect covered service providers. The Department also declined to accept this suggestion, as discussed in the context of the class exemption (paragraph (c)(1)(ix) of the final rule), below.

A number of commenters asked whether this provision would be available to covered service providers (e.g., recordkeepers) who provide the investment disclosures described in paragraphs (c)(1)(iv)(E)(1)–(3) or (c)(1)(iv)(F)(1) of the final rule by using data obtained from a central digital database maintained by a third party. These commenters state, for instance, that instead of providing the plan fiduciary with paper or electronic versions of the issuer's current disclosure materials for each of the plan's designated investment alternatives, as permitted by paragraph (c)(1)(iv)(F)(2), it may be more efficient for the recordkeeper to prepare a summary disclosure document, tailored to the requirements of the final rule, using third party information technology (IT) systems that collect and provide access to the necessary investment disclosure information. The commenters maintain that third party IT systems can receive investment related information directly from mutual funds and other investment funds or from their investment advisers, or pull such information from regulated filings made by the issuers with the Securities and Exchange Commission or other State or federal agencies. These systems may, or may be modified to, allow recordkeepers and others to access the data and incorporate it into summary disclosure documents designed to meet the final rule.

In the Department's view, a covered service provider's use of a reputable and reliable third party commercial database as a source of the investment information described in paragraphs (c)(1)(iv)(E)(1)–(3) or (c)(1)(iv)(F)(1) of the final rule would ordinarily

constitute disclosure made "in good faith and with reasonable diligence" under paragraph (c)(1)(vii) of the final rule. An important element in demonstrating reliability would be a contractual provision that makes the third-party provider responsible for ensuring that the information obtained from the central database is passed on accurately to the covered service provider. Of course, if the covered service provider subsequently becomes aware of an error or omission in the data, it would need to disclose the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days after the covered service provider knows of the error or omission.

#### 8. Definitions

Paragraph (c)(1)(viii) of the final rule defines the terms "affiliate," "compensation," "designated investment alternative," "recordkeeping services," "responsible plan fiduciary," and "subcontractor." Several minor modifications from the interim final rule have been made to this definitional paragraph. Paragraph (c)(1)(viii)(B)(3), concerning how a description of compensation may be expressed, has been modified to apply to a description of "compensation or cost," rather than only to "compensation." A commenter on the interim final rule pointed out that paragraph (c)(1)(iv)(D)(2) may require a covered service provider to disclose the "cost" of recordkeeping services, rather than the compensation received from recordkeeping services. The Department agrees that the flexibility provided in paragraph (c)(1)(viii)(B)(3) should extend to how such costs may be expressed and revised this paragraph. Paragraph (c)(1)(viii)(B)(3) also was modified to clarify that the use of estimates is not limited to recordkeeping costs. The paragraph now provides that a description of compensation or cost 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 or cost cannot reasonably be expressed in such terms, by any other reasonable method. The description may include a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and the covered service provider explains the methodology and assumptions used to prepare such estimate. This modification is intended to make it clear that all covered service providers, not just those providing recordkeeping services, may provide estimates of

monetary amounts, provided that the other requirements of the regulation are satisfied. Paragraph (c)(1)(viii)(B)(3) also provides that any description, including any estimate of recordkeeping cost under paragraph (c)(1)(iv)(D), must contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

A few commenters also asked whether compensation or costs may be disclosed in ranges, for example by a range of possible basis points. The Department believes that disclosure of expected compensation in the form of known ranges can be a "reasonable" method for purposes of the final rule. However, such ranges must be reasonable under the circumstances surrounding the service and compensation arrangement at issue. To ensure that covered service providers communicate meaningful and understandable compensation information to responsible plan fiduciaries whenever possible, the Department cautions that more specific, rather than less specific, compensation information is preferred whenever it can be furnished without undue burden.

A minor, non-substantive modification was made to the definition of "designated investment alternative" in paragraph (c)(1)(viii)(C). The modified definition, which now refers to designation of investment alternatives by the "covered plan," merely conforms this definition to other Departmental regulatory guidance, such as the participant-level disclosure regulation (75 FR 64910). For purposes of the final rule, a "designated investment alternative" is any investment alternative designated by the covered plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term does not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the covered plan.

In light of this exclusion, some commenters requested clarification on what information would have to be disclosed concerning brokerage windows and similar arrangements. Because brokerage windows and similar arrangements are not designated investment alternatives subject to paragraph (c)(1)(iv)(E) and (F), a covered service provider need not furnish the investment-specific information required in these paragraphs concerning each possible investment available through the brokerage window. However, the covered service provider must disclose all applicable information

concerning the brokerage window that is required by the other provisions of the final rule. For example, a covered service provider must describe the services that will be available to participants who elect to take advantage of the brokerage window; any fees or charges that may be paid “directly” from the plan (or from a participant’s or beneficiary’s account); and any compensation that may be received “indirectly” or from related parties in connection with the brokerage window. In the case of indirect compensation, the covered service provider would have to identify the party from whom such compensation will be received and otherwise comply with the requirements of the applicable provisions of the final rule. The Department understands that some of the required information (for example with respect to compensation to be received) may depend on investments ultimately selected by participants through the brokerage window. The Department is confident nonetheless that the final rule provides sufficient flexibility for how compensation may be disclosed, in paragraph (c)(1)(viii)(B)(3), to enable the covered service provider to communicate meaningful information to the responsible plan fiduciary about the compensation the covered service provider, affiliates, and subcontractors expect to receive in connection with offering a brokerage window to the covered plan.

A minor, non-substantive modification also was made to the definition of “indirect” compensation in paragraph (c)(1)(viii)(B)(2). The interim final rule defined “indirect” compensation as compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, an affiliate, or a subcontractor (if the subcontractor receives such compensation in connection with services performed under the subcontractor’s contract or arrangement described in paragraph (c)(1)(viii)(F) of this section). To more clearly describe when compensation received by a subcontractor is “indirect” compensation for purposes of the final rule, the concept contained in the parenthetical to paragraph (c)(1)(viii)(B)(2) of the interim final rule has been moved to a separate sentence. This modification is not intended to substantively alter the definition. Accordingly, this paragraph now describes “indirect” compensation as compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate. Compensation received

from a subcontractor is indirect compensation, unless it is received in connection with services performed under the subcontractor’s contract or arrangement described in paragraph (c)(1)(viii)(F) of the final rule.

The other definitions contained in paragraph (c)(1)(viii) have not changed from the interim final rule. A person or entity’s “affiliate” (paragraph (c)(1)(viii)(A)) directly or indirectly (through one or more intermediaries) controls, is controlled by, or is under common control with such person or entity; or is an officer, director, or employee of, or partner in, such person or entity. As in the interim final rule, unless otherwise specified, an “affiliate” refers to an affiliate of the covered service provider. “Compensation” (paragraph (c)(1)(viii)(B)) is anything of monetary value (for example, money, gifts, awards, and trips), but does not include non-monetary compensation valued at \$250 or less, in the aggregate, during the term of the contract or arrangement.<sup>32</sup> “Direct” compensation (paragraph (c)(1)(viii)(B)(1)) is compensation received directly from the covered plan. The definition of “indirect” compensation (paragraph (c)(1)(viii)(B)(2)) is modified as described above. Paragraph (c)(1)(viii)(B)(3), concerning how compensation may be expressed, also is modified as discussed above.

“Recordkeeping services” (paragraph (c)(1)(viii)(D)) include services related to plan administration and monitoring of plan and participant and beneficiary transactions (e.g., enrollment, payroll deductions and contributions, offering designated investment alternatives and other covered plan investments, loans, withdrawals and distributions); and the maintenance of covered plan and participant and beneficiary accounts, records, and statements. A “responsible plan fiduciary” (paragraph (c)(1)(viii)(E)) is a fiduciary with authority to cause the covered plan to

<sup>32</sup> Some commenters on the interim final rule argued that the \$250 threshold for non-monetary compensation should be revised so that the amount would be measured on a calendar- or plan-year basis, rather than over the term of the contract or arrangement. The Department declined to accept this suggestion. Commenters also requested further guidance regarding accounting for and allocating non-monetary compensation. The Department notes that, for purposes of the final rule, covered service providers may look to the guidance and methodologies concerning non-monetary compensation that have been approved for purposes of the Form 5500 Annual Report. See Form 5500 Instructions, available on the Department’s Web site at <http://www.dol.gov/ebsa/forms.html>; see also Frequently Asked Questions concerning the Form 5500 Schedule C, at [http://www.dol.gov/ebsa/faqs/faq\\_scheduleC.html](http://www.dol.gov/ebsa/faqs/faq_scheduleC.html) and <http://www.dol.gov/ebsa/faqs/faq-sch-C-supplement.html>.

enter into, or extend or renew, the contract or arrangement. Finally, a “subcontractor” (paragraph (c)(1)(viii)(F)) is any person or entity (or an affiliate of such person or entity) that is not an affiliate of the covered service provider and that, pursuant to a contract or arrangement with the covered service provider or an affiliate, reasonably expects to receive \$1,000 or more in compensation for performing one or more services described pursuant to paragraph (c)(1)(iii)(A) through (C) of the final rule provided for by the contract or arrangement with the covered plan. Additional background information concerning these definitions can be found in the preamble to the interim final rule (75 FR 41600).

### 9. Exemption for Responsible Plan Fiduciary

Paragraph (c)(1)(ix) of the final rule permits a responsible plan fiduciary to avoid engaging in a prohibited transaction when a covered service provider fails to disclose required information.<sup>33</sup> Specifically, the final class exemption exempts a responsible plan fiduciary from the restrictions of ERISA section 406(a)(1)(C) and (D) if, among other things, the fiduciary did not know that the covered service provider failed to make required disclosures and “reasonably believed” that such disclosures were made.<sup>34</sup> Upon discovery of a disclosure failure, the responsible plan fiduciary must take certain specified steps within designated timeframes, as described in paragraph (c)(1)(ix), including notifying the Department of any disclosure failures that are not corrected.

This paragraph continues to set forth the specific conditions applicable to covered transactions. These conditions require, among other things, a responsible plan fiduciary to notify the Department under certain circumstances of a covered service provider’s failure to comply with its disclosure obligations. The conditions also set forth the timing, content and other requirements

<sup>33</sup> When the Department proposed this rule in 2007, the prohibited transaction class exemption was proposed separately; for ease of reference, the class exemption was included as paragraph (c)(1)(ix) of the interim final rule and continues to be part of the final regulation.

<sup>34</sup> The Department notes that the fact that the service transaction, for the responsible plan fiduciary, is the subject of an exemption will not relieve the covered service provider, as the other party in interest to the transaction, from ERISA’s prohibited transaction provisions. Thus, regardless of the relief available to the responsible plan fiduciary pursuant to this paragraph (c)(1)(ix), a disclosure failure will nonetheless result in a prohibited transaction, and resulting excise taxes, on the part of the covered service provider.



applicable to the notice required to be filed with the Department by the responsible plan fiduciary. The Department notes that parties seeking to avail themselves of the relief provided by the exemption have the burden of demonstrating compliance with the conditions of the exemption.

The exemption provides relief from the restrictions of ERISA section 406(a)(1)(C) and (D) to a responsible plan fiduciary, notwithstanding any failure by a covered service provider to comply with its disclosure obligations, provided that the conditions set forth in paragraph (c)(1)(ix)(A) through (G) are met.

Paragraph (c)(1)(ix)(A) of the regulation requires that the responsible plan fiduciary did not know that the covered service provider failed or would fail to make required disclosures and reasonably believed that the covered service provider disclosed the information required by the final rule. This condition is intended to reinforce the principle that the plan fiduciary must have entered into, and thereafter continued, an arrangement for services with a reasonable belief that the covered service provider met, and would continue to meet, the requirements of the final rule and without knowing of the covered service provider's disclosure failure.

Paragraph (c)(1)(ix)(B) of the regulation requires that, upon discovering that the covered service provider failed to disclose the required information, the responsible plan fiduciary must request in writing that the covered service provider furnish such information. If the covered service provider fails to comply with the responsible plan fiduciary's written request within 90 days, paragraph (c)(1)(ix)(C) requires that the responsible plan fiduciary notify the Department. The Department believes that this condition, along with a covered service provider's exposure to excise tax liability under the Code, will provide covered service providers with a sufficient incentive to address disclosure failures within a reasonable time. The notice requirement does not relieve a plan administrator of the obligation to report a prohibited transaction in accordance with the instructions to the Annual Report Form 5500 Series, without regard to whether the covered service provider furnishes information in response to the fiduciary's request.

Paragraph (c)(1)(ix)(D) through (F) of the regulation sets forth the content, timing, and other requirements applicable to notifying the Department of a covered service provider's failure to

meet its disclosure obligations. Paragraph (c)(1)(ix)(D) states that the notice to the Department must contain the following information: (1) The name of the covered plan; (2) the plan number used for the covered plan's Annual Report; (3) the plan sponsor's name, address, and EIN; (4) the name, address and telephone number of the responsible plan fiduciary; (5) the name, address, phone number, and, if known, EIN of the covered service provider; (6) a description of the services provided to the covered plan; (7) a description of the information that the covered service provider failed to disclose; (8) the date on which such information was requested in writing from the covered service provider; and (9) a statement as to whether the covered service provider continues to provide services to the covered plan.

Paragraph (c)(1)(ix)(E) provides that the responsible plan fiduciary shall file a notice with the Department not later than 30 days following the earlier of: (1) The covered service provider's refusal to furnish the requested information; or (2) the date which is 90 days after the date the written request referred to in paragraph (c)(1)(ix)(B)(1) is made. In this context, a covered service provider's refusal to provide information to the responsible plan fiduciary, following such fiduciary's written request, would constitute a covered service provider's failure to meet its disclosure obligations prior to the end of the 90-day period.

Paragraph (c)(1)(ix)(F) provides that the notice should be sent to the U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement, 200 Constitution Ave., NW., Suite 600, Washington, DC 20210. Such a notice also may be sent electronically to: *OE-DelinquentSPnotice@dol.gov*. The Department has developed a sample notice that will facilitate compliance with the notification requirement; this sample notice will be available on the Department's Web site at: *http://www.dol.gov/ebsa/DelinquentServiceProviderDisclosureNotice.doc*.

Finally, paragraph (c)(1)(ix)(G) of the final rule requires the responsible plan fiduciary, following the discovery of a failure to disclose, to determine the extent to which the contract or arrangement at issue can be continued consistent with the fiduciary's duty of prudence under ERISA section 404. The final rule, like the interim final rule, assumes that plan fiduciaries will take into account certain factors in making such determinations, such as the nature of the failure and the availability and costs of a replacement service provider.

Although this paragraph is intended to afford to the responsible plan fiduciary some flexibility in securing replacement services, this paragraph is not intended to permit fiduciaries to continue contracts or arrangements indefinitely when there has been an unresolved disclosure failure. In this regard, the final rule has been modified to emphasize that determinations in this area are governed by the prudence provisions of ERISA section 404. Thus, the final rule requires that if the requested information relates to future services (*i.e.*, services that will be performed after the end of the 90-day period referred to in paragraph (c)(1)(ix)(C)) and is not disclosed promptly after the end of such 90-day period, then the responsible plan fiduciary shall terminate the contract or arrangement as expeditiously as possible, consistent with the duty of prudence.

The Department received four comments on the class exemption as part of the public comments received on the interim final rule. Three commenters generally supported the class exemption, noting its importance to an otherwise "innocent" plan fiduciary. These commenters stated that since a plan's service provider is often the only party with all information about a service arrangement, particularly indirect compensation, the class exemption rightly imposes the compliance burden for disclosure on the covered service provider. However, two commenters were concerned about requiring the responsible plan fiduciary to have "reasonably believed" that service providers disclosed the requisite information. These commenters noted that availability of the exemption should not be determined based upon whether a responsible plan fiduciary can recognize disclosure omissions or errors. Thus, the exemption should be available, they say, if the fiduciary merely did not "know or have reason to know" that the covered service provider failed to make required disclosures.

The Department has considered these comments, but has chosen not to modify the requirements of the class exemption based upon these concerns. The Department does not believe that responsible plan fiduciaries should be entitled to relief provided by the class exemption absent a reasonable belief that disclosures required to be provided to the covered plan are complete. To this end, responsible plan fiduciaries should appropriately review the disclosures made by covered service providers. Fiduciaries should be able to, at a minimum, compare the disclosures they receive from a covered service

provider to the requirements of the regulation and form a reasonable belief that the required disclosures have been made.

Another commenter expressed concern about the requirement in paragraph (c)(1)(ix)(G) that a responsible plan fiduciary determine whether to terminate or continue a service contract after discovering that information remains undisclosed. This requirement, the commenters stated, means that any unresolved disclosure failures that continue will result in a non-exempt prohibited transaction in which case the covered plan has no choice but to discontinue the existing service arrangement. In such instances, the commenter believes that contractual requirements for a covered plan to compensate the covered service provider for losses or expenses relating to termination should be null and void. The Department does not believe that the class exemption should require that parties to an otherwise appropriately negotiated and approved service contract or arrangement simply disregard all agreed-upon contractual provisions designed to reasonably compensate a covered service provider for losses or expenses relating to a contract's termination. The requirements and obligations of parties to service contracts or arrangements pursuant to paragraph (c)(3) of the final rule remain unchanged, including arrangements between covered plans and covered service providers under this final rule.

Finally, a commenter was concerned about the Department's failure to expand relief to covered service providers who may become liable for excise taxes despite their inability to obtain, through no fault of their own, information from other parties. Thus, the commenter would have the class exemption also cover an otherwise "innocent" covered service provider. The Department believes that the final rule's mechanisms for correcting inadvertent errors and omissions, and for updating changes in disclosures, partially address this concern. However, the Department maintains that the covered service provider dealing directly with the covered plan bears ultimate responsibility for disclosing the information required by the final rule, including information from its affiliates or subcontractors. Therefore, the Department has not modified the class exemption as requested by the commenter.

#### 10. Preemption of State Law

Paragraph (c)(1)(x) of the final rule states that the regulation does not

supersede any State law that governs disclosures by parties that provide services to covered plans, except to the extent that such law prevents application of the regulation. The Department understands that the service provider relationship with the plan may be subject to various State laws, including those relating to contract, tax, and consumer protection. The Department's regulation does not supersede these State laws, which may require disclosures by parties that provide services described in the final rule, except to the extent that compliance with such State law would make compliance with this regulation impossible or would otherwise conflict with one of the regulation's protections. This provision has not changed from the interim final rule.<sup>35</sup>

Paragraph (c)(1)(x) of the final rule addresses only the preemptive effect of the regulation itself, and does not speak to any preemptive effect that ERISA Title I generally, or ERISA section 514 specifically, may have on State laws that regulate parties that provide services to employee benefit plans. A State law that requires disclosure in connection with services or service provider contracts or arrangements, regardless of whether the services are provided directly to an ERISA plan or other entity, generally would not be viewed by the Department as "relating to" employee benefit plans within the meaning of ERISA section 514 or as otherwise preempted by Title I of ERISA.

#### 11. Application of Section 4975 of the Internal Revenue Code

Code section 4975(d)(2) contains a provision that is parallel to ERISA section 408(b)(2). The interim final rule included a new provision in paragraph (c)(1)(xi) to clarify that compliance with the Department's regulation will be required for a covered service provider to avoid the excise taxes imposed by Code section 4975. The final rule includes the same provision, without modification from the interim final rule. Specifically, paragraph (c)(1)(xi) provides that in accordance with the transfer of authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor, pursuant to section 102 of the Reorganization Plan No. 4 of

<sup>35</sup> Two commenters on the interim final rule believe that such rule was not an appropriate place for a preemption provision and that the provision must be proposed. The Department is not persuaded by these commenters and views this provision as a logical outgrowth of the proposed rule. In addition, the interim final rule itself provided notice to affected parties and the opportunity for comment. Therefore, the final rule retains the preemption provision.

1978, 5 U.S.C. App. 214 (2000 ed.), which was effective December 31, 1978, under the final regulation, all references to section 408(b)(2) of ERISA and the regulations thereunder should be read to include references to the parallel provisions of section 4975(d)(2) of the Code and the regulations thereunder at 26 CFR 54.4975-6.

If a covered service provider fails to disclose the information required by the final rule, then the contract or arrangement will not be "reasonable" unless the failure satisfies the rule's cure provision for inadvertent disclosure errors and omissions. The service contract or arrangement will not qualify for the relief from ERISA's prohibited transaction rules provided by section 408(b)(2). The resulting prohibited transaction will have consequences for both the responsible plan fiduciary and the covered service provider. The responsible plan fiduciary, by causing the transaction, will have violated ERISA section 406(a)(1)(C) and (D). The covered service provider, as a "disqualified person" under the Code's prohibited transaction rules, will be subject to the excise taxes that result from the service provider's participation in a prohibited transaction under Code section 4975.<sup>36</sup> Section 4975(a) of the Code provides that the rate of the excise tax is fifteen percent of the "amount involved" with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The Code goes on to provide in section 4975(b) that if the prohibited transaction is not corrected within the taxable period, the rate of the excise tax increases to 100 percent of the "amount involved."

The Department continues to believe that the application of the excise tax will provide incentives for all parties to service contracts or arrangements to cooperate in exchanging the disclosures required by the final regulation. As noted above, however, the Department does not believe that an otherwise diligent responsible plan fiduciary should be penalized as a result of a failure on the part of a covered service provider to make the required disclosures. Accordingly, the final rule continues to include the exemptive relief described above (see paragraph (c)(1)(ix) of the final rule). But, as required as a condition of that exemptive relief and more generally under ERISA section 404, following the responsible plan fiduciary's discovery

<sup>36</sup> The Code also includes definitions related to plans subject to the prohibited transaction and excise tax provisions in Code section 4975. See Code section 4975(e)(1) and (g).

that the covered service provider failed to disclose required information, the fiduciary must consider what steps should be taken in response to the covered service provider's nondisclosure, and may in certain circumstances have to terminate the contract or arrangement with the service provider.

Several commenters asked how to determine the "amount involved" and what would be required to "correct" the prohibited transaction that results from a failure to satisfy the disclosure requirements in the final rule. Under Reorganization Plan No. 4 described above, the Secretary of the Treasury retained interpretive and regulatory authority over the provisions in Code section 4975(a) and (b) regarding calculation of excise taxes and correction of prohibited transactions.<sup>37</sup> Accordingly, those issues are beyond the scope of this regulation.

#### 12. Effective Date

Commenters on the interim final rule continued to express concern with the effective date for the final regulation and class exemption, which was July 16, 2011 (one year following publication of the interim final rule in the **Federal Register**).<sup>38</sup> Both new and existing contracts and arrangements between covered plans and covered service providers must be in compliance as of and following the rule's effective date. The Department extended the 90-day proposed effective date to a one-year

effective date in the interim final rule in order to accommodate concerns as to the cost and burden associated with transitioning current and future service contracts or arrangements to satisfy the rule's requirements.

Some commenters on the interim final rule asserted that even one year is not enough time, suggesting that the Department delay the regulation's effectiveness, for example, for another year. A few commenters also requested that the Department modify the effective date for existing contracts or arrangements, giving affected parties more time to bring them into compliance with the regulation. However, most of the commenters on this issue primarily were concerned that if significant modifications are made from the interim final to the final rule, then the Department should consider extending the effective date to ensure that parties have sufficient time to revise necessary systems and comply with such modifications.

The Department continues to believe that both existing contracts and arrangements, as well as those entered into on or after the final regulation's effective date, must comply with the final rule. However, given commenters' concerns about the burden associated with updating all existing contracts and arrangements, and the fact that the final rule does reflect some substantive modifications from the interim final rule, the Department was persuaded that the effective date should be delayed. Further, the final rule conforms to the Department's final participant-level disclosure regulation, which applies for plan years beginning on or after November 1, 2011 (so, for calendar year plans, the plan year beginning on January 1, 2012). The Department believes that all parties, including covered service providers, responsible plan fiduciaries (and their plan administrators), and plan participants and beneficiaries, would benefit from closer alignment in the application of these two disclosure initiatives.

Accordingly, the Department previously published a notice in the **Federal Register** extending the effective date for the interim final rule to April 1, 2012.<sup>39</sup>

<sup>39</sup> 76 FR 42539 (July 19, 2011). The Department also made corresponding changes to the transition rule for the participant-level disclosure regulation, which are discussed in the Supplementary Information contained in such **Federal Register** notice. The revised effective date and transition rule published at that time reflected the Department's review of public comments received in response to its proposal to extend these dates, published on June 1, 2011. 76 FR 31544. These comments similarly influenced the Department's decision to further extend the effective date herein. These public comments are available on the Department's

The final rule published in this notice, however, includes a new effective date of July 1, 2012. The Department decided to further extend the effective date due to delays in the publication of this final rule. Given the date of this notice, the Department determined that July 1, 2012 would be a more appropriate effective date to ensure that covered service providers and other parties have sufficient time to prepare for compliance with the final rule. Thus, contracts or arrangements between a covered service provider and a covered plan that are entered into on or after July 1, 2012 must comply with the final rule, and contracts or arrangements in existence prior to July 1, 2012 also must be brought into compliance as of such date.

#### C. Welfare Plan Disclosure—Reserved

As explained in the Supplementary Information for the interim final rule, the Department reserved paragraph (c)(2) of the final rule for a comprehensive disclosure framework applicable to "reasonable" contracts or arrangements for welfare plans to be developed by the Department. The Department believes that fiduciaries and service providers to welfare benefit plans would benefit from regulatory guidance in this area for the same reasons that apply to defined contribution and defined benefit plans. The Department is persuaded that there are significant differences between service and compensation arrangements of welfare plans and those involving pension plans and that the Department should develop separate, more specifically tailored, disclosure requirements under ERISA section 408(b)(2) for welfare benefit plans. Although one commenter on the interim final rule argued that fee transparency guidance, as a general matter, is unnecessary in the welfare plan context, most of the commenters on this issue supported the Department's decision to separately address welfare plans. To further this distinct regulatory initiative, the Department held a public hearing on December 7, 2010, to explore operational, disclosure, and fee transparency issues concerning welfare benefit plans. Testimony and other materials submitted to the Department in connection with this hearing are available on the Department's Web site.

Web site at <http://www.dol.gov/ebsa/regs/cmt-1210-AB08a.html>.

<sup>37</sup> The Reorganization Plan at Section 102 provides: "Except as otherwise provided in Section 105 of this Plan, all authority of the Secretary of the Treasury to issue the following described documents pursuant to the statutes hereinafter specified is hereby transferred to the Secretary of Labor: (a) Regulations, rulings, opinions, and exemptions under section 4975 of the Code \* \* \* EXCEPT for (i) subsections 4975(a), (b), (c)(3), P(d)(3), (e)(1), and (e)(7) of the Code." Section 105 of the Reorganization Plan further details the scope of the Secretary of the Treasury's authority relating to section 4975(a) & (b): "The transfers provided for in Section 102 of this Plan shall not affect the ability of the Secretary of the Treasury, subject to the provisions of Title III of ERISA relating to jurisdiction, administration, and enforcement, (a) to audit plans and employers and to enforce the excise tax provisions of subsections 4975(a) and 4975(b) of the Code, to exercise the authority set forth in subsections 502(b)(1) and 502(h) of ERISA, or to exercise the authority set forth in Title III of ERISA, including the ability to make interpretations necessary to audit, to enforce such taxes, and to exercise such authority \* \* \*. However, in enforcing such excise taxes and, to the extent applicable, in disqualifying such plans the Secretary of the Treasury shall be bound by the regulations, rulings, opinions, and exemptions issued by the Secretary of Labor. \* \* \* [.]"

<sup>38</sup> One commenter on the interim final rule strongly supported the July 16, 2011, effective date, arguing that the industry dialogue concerning fee transparency has been going on for years and that service providers have been adequately forewarned that increased transparency will be required.

**D. Existing Requirement Concerning Termination of Contract or Arrangement**

The interim final rule contained no amendments to the existing requirements addressing termination of contracts or arrangements for purposes of section 408(b)(2). Although one commenter on the interim final rule generally requested additional guidance on this requirement, no specific suggestions or problems were identified. No further comments or recommendations were received. Accordingly, the Department has not revised this provision and adopted the paragraph, without change, in paragraph (c)(3) of the final rule.

**E. Effect on Other Statutory and Administrative Exemptions**

A few commenters on the interim final rule asked the Department to clarify the effect of the final rule on the availability of previously issued exemptions. The Department is reviewing a number of pertinent class exemptions involving service provider arrangements, and we anticipate providing guidance in this regard in the near future.

**F. Regulatory Impact Analysis**

*1. Executive Orders 12866 and 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. OMB has determined that this action is “economically significant” within the meaning of 3(f)(1) of the executive order because it is likely to have an effect on

the economy of \$100 million or more in any one year. Accordingly, the rule has been reviewed by OMB.

*2. The Need for Regulatory Action*

As documented in the regulatory impact analysis of the July 16, 2010 interim final regulation, compensation arrangements in retirement plan services market are complex. Payments from third parties and among service providers can create conflicts of interest between service providers and their clients. For example, a 401(k) plan vendor may receive “revenue sharing” from a mutual fund that it makes available to its clients, and a consultant may receive a “finder’s fee” from an investment adviser it recommends to its clients.

Such compensation arrangements and the conflicts they can create are myriad and in the past have been largely hidden from view. Their opacity has sometimes prevented plan fiduciaries from assessing the reasonableness of the costs for plan services and allowed harmful conflicts to persist in the market.

In evaluating the reasonableness of contracts or arrangements for services, responsible plan fiduciaries have a duty to consider compensation that will be received by a covered service provider from all sources in connection with the services it provides to a covered plan pursuant to the service provider’s contract or arrangement. However, many plans, especially small plans, lack the knowledge and bargaining power to require service providers to disclose the compensation that they expect to receive from third parties as a result of the service provider’s arrangement with the plan. To the extent that plan fiduciaries are unable to obtain relevant compensation information, or unable to use it to choose among service providers in a manner that upholds their fiduciary duty, a failure exists in the market for services for employee benefit plans. This final rule will improve the transparency of service arrangements by

requiring specific disclosures of service provider compensation before a service contract or arrangement can be considered reasonable under ERISA Section 408(b)(2).

*3. Summary of Impacts*

As further discussed below, the Department is confident that this final rule will provide substantial benefits by reducing search time and costs for fiduciaries to identify the relevant fee and compensation information that they need to fulfill their fiduciary responsibility under ERISA. The final rule will also discourage harmful conflicts, reduce information gaps, improve fiduciary decision-making about plan services, enhance value for plan participants, and increase the Department’s ability to redress abuses committed by service providers. Covered service providers will incur compliance and implementation costs to create and provide disclosures that satisfy the requirements of the final rule, but the Department is confident that the benefits of the final regulation will exceed its costs.

The final regulation retains the structure of the interim final rule by requiring covered service providers to provide certain disclosures to responsible plan fiduciaries in order to qualify for the statutory exemption under ERISA section 408(b)(2). Generally, the Department has retained most of the disclosure concepts and requirements from the interim final rule. The modifications in this final rule do not significantly affect the costs and benefits of the interim final rule.

In accordance with OMB Circular A-4,<sup>40</sup> Table 2 below depicts an accounting statement showing the Department’s assessment of the benefits and costs associated with the final rule. The estimates vary from those in the interim final rule by updating the analysis to reflect 2008 Form 5500 data (the latest available data) and 2011 labor rates.

TABLE 2—ACCOUNTING TABLE (TOTAL IMPACT OF THE FINAL RULE)

Category	Primary estimate	Year dollar	Discount rate	Period covered
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Benefits:

Qualitative: The final regulation will increase the amount of information that service providers disclose to plan fiduciaries. Non-quantified benefits include information cost savings, discouraging harmful conflicts of interest, service value improvements through improved decisions and value, better enforcement tools to redress abuse, and harmonization with other EBSA rules and programs.

The Department believes that the non-quantified benefits are substantial and exceed the quantified costs of the rule. A detailed analysis of the non-quantified benefits exceeding the quantified costs is contained in the impact analysis of the July 16, 2010 interim final regulation. The Department is confident that the benefits of the final rule exceed the costs.

<sup>40</sup> Available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

TABLE 2—ACCOUNTING TABLE (TOTAL IMPACT OF THE FINAL RULE)—Continued

Category	Primary estimate	Year dollar	Discount rate	Period covered
Costs:				
Annualized Monetized (\$millions/year) .....	\$63.7	2011	7%	2012–2021
	58.9	2011	3%	2012–2021
Transfers .....	Not Applicable.			

**Note:** Quantified costs include costs for service providers to perform compliance review and implementation, for disclosure of general, investment-related, and additional requested information, for responsible plan fiduciaries to request additional information from service providers to comply with the exemption and to prepare notices to the Department if the service provider fails to comply with the request.

4. Affected Entities and Other Assumptions

This final rule will affect about 48,000 defined benefit pension plans with over 42 million participants and almost 669,000 defined contribution pension plans with approximately 83 million participants. Out of these pension plans, about 38,000 are small defined benefit plans and 597,000 small individual account plans.<sup>41</sup> Most of the defined contribution pension plans, approximately 498,000, are participant-directed individual account plans.

The final regulation applies to contracts or arrangements between covered plans and covered service providers. In order to estimate the number of covered service providers and the number of service provider-plan arrangements, the Department has used data from plan year 2008 submissions of the Form 5500 and its Schedule C.

In general, only plans with 100 or more participants that have made payments to a service provider of at least \$5,000 are required to file the Form 5500 Schedule C. These plans are also required to report the type of services provided by each service provider. The Department counted the service providers most likely to provide the services described in paragraph (c)(1)(iii) of the final rule, which defines which service providers are “covered.”<sup>42</sup> In total, there were nearly 9,500 unique covered service providers reported in the Form 5500 Schedule C data, almost 1,000 of which were reported to have received in aggregate \$1 million or more in direct and indirect compensation.

The Department acknowledges that this estimate may be imprecise. On the

one hand, some of the service providers counted here may not be covered service providers, but the Department is unable to further refine this group due to the limitations of the Schedule C data. On the other hand, because small plans generally do not file Schedule C, the number of covered service providers will be understated if a substantial number of them service only small plans. However, the Department believes that most small plans use the same service providers as large plans; therefore, the estimate based on the Schedule C filings by large plans is reasonable.<sup>43</sup>

Schedule C data was also used to count the number of covered plan-service provider arrangements. On average, defined benefit plans employ more covered service providers per plan than defined contribution plans, and large plans use more covered service providers per plan than small plans. In total, the Department estimates that defined benefit plans have over 120,000 arrangements with covered service providers, while defined contribution plans have over 836,000 arrangements.

In the interim final rule, the Department assumed that 50 percent of disclosures would be delivered electronically. The Department did not receive any comments regarding this assumption; therefore, the Department continues to assume that about 50 percent of disclosures between covered service providers and responsible plan fiduciaries are delivered only in electronic format.

5. Benefits

As explained in the regulatory impact analysis for the interim final rule,

mandatory proactive disclosure will reduce the plan’s information costs, discourage harmful conflicts, and enhance service value. Additional benefits will flow from the Department’s enhanced ability to redress abuse. Although the benefits and costs are difficult to quantify, the Department is confident that the benefits more than justify the costs.

6. Costs

This section summarizes the total costs of the final regulation. The Department estimated costs for the rule over a ten-year time frame for purposes of this analysis. In addition to the costs to service providers, the Department also considered the potential costs to plans.

These costs include the following: Cost incurred for compliance review and implementation; costs to make initial and investment disclosures and to disclose additional information on request; costs for responsible plan fiduciaries to request additional information from service providers to comply with the class exemption and to prepare notices to the Department if the covered service provider fails to comply with the request, and costs to prepare the guide. These costs are identical to the estimates in the interim final regulation except they have been updated to reflect more recent Form 5500 data and 2011 labor rates.

As shown in Table 3 below, total costs for covered service providers and covered plans total approximately \$164 million for the year 2012.

<sup>41</sup> Estimates of the number of plans and participants are taken from the EBSA’s 2008 Pension Research File, [http://www.dol.gov/ebsa/publications/form5500dataresearch.html#plan\\_bulletins](http://www.dol.gov/ebsa/publications/form5500dataresearch.html#plan_bulletins). Small pension plans are plans with generally less than 100 participants, as specified in the Form 5500 instructions.

<sup>42</sup> In order to provide a reasonable estimate, service providers with reported type codes corresponding to contract administrator, administration, brokerage (real estate), brokerage (stocks, bonds, commodities), consulting (general), custodial (securities), insurance agents and brokers, investment management, recordkeeping, trustee (individual), trustee (corporate) and investment

evaluations were assumed to be covered service providers.  
<sup>43</sup> While in general small plans are not required to file a Schedule C, some voluntarily file. Looking at Schedule C filings by small plans, the Department verified that most small plans reporting data on Schedule C used the same group of service providers as larger plans.

TABLE 3—TOTAL DISCOUNTED COSTS RULE (SHOWN WITH 7 PERCENT DISCOUNT RATE)

Year	Cost of legal review (A)	Cost of general information disclosure (B)	Cost of investment information disclosure (C)	Cost of qualifying for exemption (D)	Total costs A + B + C + D
2012 .....	\$64,061,000	\$82,842,000	\$14,584,000	\$2,588,000	\$164,076,000
2013 .....	7,248,000	23,690,000	8,471,000	1,209,000	40,619,000
2014 .....	6,774,000	22,140,000	7,917,000	1,130,000	37,962,000
2015 .....	6,331,000	20,692,000	7,399,000	1,056,000	35,478,000
2016 .....	5,917,000	19,338,000	6,915,000	987,000	33,157,000
2017 .....	5,530,000	18,073,000	6,463,000	923,000	30,988,000
2018 .....	5,168,000	16,891,000	6,040,000	862,000	28,961,000
2019 .....	4,830,000	15,786,000	5,645,000	806,000	27,066,000
2020 .....	4,514,000	14,753,000	5,275,000	753,000	25,296,000
2021 .....	4,219,000	13,788,000	4,930,000	704,000	23,641,000
Total with 7% Discounting .....	.....	.....	.....	.....	447,244,000
Total with 3% Discounting .....	.....	.....	.....	.....	502,475,000

**Note:** The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

### 7. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have such an impact, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis (FRFA) describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities. Small entities include small businesses, organizations and governmental jurisdictions.

#### a. Need for and Objectives of the Rule

Service providers to pension plans increasingly have complex compensation arrangements that may present conflicts of interest. Thus, small plan fiduciaries face increasing difficulty in carrying out their duty to assess whether the compensation paid to their service providers is reasonable. This rule is necessary to help both large and small plan fiduciaries get the information they need to negotiate with and select service providers who offer high quality services at reasonable rates and to comply with their fiduciary duties. The Department's requirement for covered service providers to provide disclosures to responsible plan fiduciaries will be especially helpful to small plan fiduciaries.

#### b. Affected Small Entities

The Department estimates that the final rule will apply to approximately 9,300 small service providers (generally, those with revenue less than \$7.0 million per year). These service providers generally consist of professional service enterprises that provide a wide range of services to plans, such as investment management or advisory services for plans or plan participants, and accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, legal, recordkeeping, brokerage, third party administration, or valuation services. Many of these service providers have special education, training, and/or formal credentials in fields such as ERISA and benefits administration, employee compensation, taxation, actuarial science, law, accounting, or finance.

#### c. Compliance Requirements

The classes of small service providers subject to the final rule include service providers who are ERISA fiduciaries (for example, because they manage plan investments or are fiduciaries to investment vehicles holding plan assets), who provide services as registered investment advisers to plans, who receive indirect compensation (or certain compensation from related parties) in connection with provision of specified services (namely, accounting, auditing, actuarial, appraisal, banking, certain consulting, custodial, insurance, participant investment advisory, legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services) or who provide recordkeeping or brokerage services involving an investment

platform of investment options for participant-directed individual account plans.

These small covered service providers will be required to disclose certain written information to responsible plan fiduciaries in connection with their covered service arrangements. Such information will include a description of the services that will be included in the arrangement and what direct and indirect compensation the covered service provider will receive, or that will be paid among related parties, in connection with the arrangement. Service providers whose arrangements include making investment products available to plans additionally must disclose specified investment-related information about such products. The required disclosures must be provided to the responsible plan fiduciary reasonably in advance of the parties entering into the contract or arrangement for covered services. Preparing compliant disclosures often will require one or more professional skills such as financial or legal expertise, and knowledge of financial products and services and related compensation and revenue sharing arrangements.

#### d. Agency Steps To Minimize Negative Impacts

The Department took a number of steps to minimize any negative impact of the interim final rule on small service providers. These include clarifying the scope of the rule's application to include only those categories of service providers likely to be involved in undisclosed or indirect compensation arrangements, excepting from the rule's requirements contracts or arrangements for which compensation or fees are less

than \$1,000, omitting from the rule a requirement that all arrangements be maintained under formal contracts, and not requiring covered service providers to disclose information in any particular format. Moreover, the disclosure requirements included in the final rule are necessary to ensure that plan fiduciaries can efficiently and effectively carry out their duties in purchasing services for plans.

The policy justification for these requirements includes benefits to fiduciaries, who will realize savings in the form of reduced search costs more than commensurate to the compliance costs shouldered by service providers. Small plan fiduciaries are likely to benefit most—lacking economies of scale and negotiating power, they would otherwise face the greatest potential cost to obtain and consider the information necessary to the performance of their fiduciary duty. Small service providers, while shouldering the cost of providing disclosure, will likely often pass these costs to their plan clients, who in turn will reap a net benefit on average that will more than offset this shifted compliance cost.

The Department rejected as unnecessarily costly approaches that would have applied disclosure requirements to arrangements involving compensation or fees of less than \$1,000, or to a broader scope of service providers, or that would have required a formal, written contract. The Department also rejected these approaches as inadequate to achieve a central policy and legal goal—namely, enabling responsible plan fiduciaries, including especially small plan fiduciaries, to efficiently and effectively carry out their duty to assess information needed to purchase of plan services at a reasonable rate.

8. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the Department submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the interim final regulation, for OMB’s review. OMB approved the ICR under OMB Control

Number 1210–0133 on May 20, 2010, which will expire on May 31, 2013.

Although no public comments were received that specifically addressed the paperwork burden analysis of the information collections at the interim final rule stage, the comments that were submitted and described earlier in this preamble, contained information relevant to the costs and administrative burdens attendant to the proposals. The Department took into account such public comments in connection with making changes to the final rule and in developing the revised paperwork burden analysis summarized below.

In connection with publication of this final rule, the Department submitted a revised ICR to OMB for approval. The Department intends to publish a notice announcing OMB’s decision regarding the revised ICR upon completion of OMB review. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>. PRA Addressee: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers.

The information collection requirements of the final rule are contained in paragraph (c)(1)(iv), which requires service providers to disclose, in writing, specific information to responsible plan fiduciaries related to the compensation to be received under the contract or arrangement. Generally, the information must be disclosed reasonably in advance of the date the contract or arrangement is entered into, or extended or renewed. These disclosure requirements are discussed fully in Section B of this **SUPPLEMENTARY INFORMATION**.

Annual Hour Burden

In order to estimate the potential costs of the disclosure provisions of the final rule, the Department estimated the

number of service providers, plans, and arrangements covered by the rule. Based on information from the 2008 Form 5500, the Department estimates that approximately 48,000 defined benefit pension plans (DB plans) covering more than 42 million participants and approximately 669,000 defined contribution plans (DC plans) covering almost 83 million participants are covered by the rule.<sup>44</sup>

The Department also estimates that based on data from the 2008 Form 5500 Annual Return/Report and Schedule C that there are about 9,500 covered service providers. The 2008 Form 5500 Schedule C data was also used to count the number of covered plan-covered service provider arrangements. On average, DB plans employ more covered service providers per plan than DC plans, and large plans use more covered service providers per plan than small plans. In total, the Department estimates that DB plans have approximately 120,000 arrangements with covered service providers, while DC plans have an estimated 836,000 arrangements. For purposes of this analysis, the Department assumes that about 50 percent of disclosures between covered service providers and responsible plan fiduciaries are made only electronically.

The final regulation retains the basic structure of the interim final rule by requiring covered service providers to provide certain disclosures to responsible plan fiduciaries in order to qualify for the statutory exemption under ERISA section 408(b)(2). Generally, the Department has retained most of the disclosure concepts and requirements from the interim final rule. As noted above, the Department estimates that there are approximately 9,500 covered service providers and 960,000 arrangements with covered plans that are affected by this rule.

Summary

Table 4 shows the total hour burden of the information collection and Table 5 shows the total equivalent cost. The total three-year average hour burden for covered service providers and covered plans is estimated to be 1.6 million hours with an equivalent cost of \$134.7 million.

TABLE 4—HOUR BURDEN

	Year 1	Year 2	Year 3	Average
Service Providers .....	2,315,000	813,000	813,000	1,313,000

<sup>44</sup> Out of these pension plans, about 38,000 are small DB plans and 597,000 small DC plans. Small

plans generally are those with less than 100 participants.



TABLE 4—HOUR BURDEN—Continued

	Year 1	Year 2	Year 3	Average
Plans .....	758,000	117,000	117,000	331,000
Total .....	3,072,000	930,000	930,000	1,644,000

**Note:** The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

TABLE 5—EQUIVALENT COST

	Year 1	Year 2	Year 3	Average
Service Providers .....	\$202,623,000	\$68,769,000	\$68,769,000	\$113,387,000
Plans .....	48,912,000	7,563,000	7,563,000	21,346,000
Total .....	251,535,000	76,332,000	76,332,000	134,733,000

**Note:** The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals.

Annual Cost Burden

Table 6 reports the estimated printing and postage costs associated with each required disclosure and notices. The Department assumes that 50 percent of

the disclosures will be sent electronically at no cost, and that the cost of printing and paper for the remaining 50 percent of documents will be 5 cents per page. The Department

estimates that the total cost burden of the rule in 2012 will be \$9.5 million, and \$1.5 million in subsequent years. The three-year average cost burden is estimated to be more than \$4.2 million.

TABLE 6—COST BURDEN

	Year 1	Year 2	Year 3	Average
Initial Disclosure .....	\$401,000	\$54,000	\$54,000	\$170,000
Update Initial Disclosure .....	0	107,000	107,000	71,000
Information Upon Request .....	45,000	45,000	45,000	45,000
General Information Total .....	446,000	206,000	206,000	286,000
Investment Disclosure .....	8,929,000	1,210,000	1,210,000	3,783,000
Update Investment Disclosure .....	116,000	116,000	116,000	116,000
Investment Disclosure Total .....	9,045,000	1,326,000	1,326,000	3,899,000
Request for Additional Information for Exemption .....	19,000	10,000	10,000	13,000
Notice to the Department .....	2,000	1,000	1,000	1,000
Total .....	9,513,000	1,543,000	1,543,000	4,200,000

**Note:** The displayed numbers are rounded to the nearest thousand and therefore may not add up to the totals

These paperwork burden estimates are summarized as follows:

*Type of Review:* Revision of existing collection

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure.

*OMB Control Number:* 1210–0133.

*Affected Public:* Business or other for-profit; not-for-profit institutions.

*Estimated Number of Respondents:* 81,000 (first year); 57,000 (three-year average).

*Estimated Number of Responses:* 1,628,000 (first year); 1,274,000 (three-year average).

*Frequency of Response:* Annually; occasionally.

*Estimated Annual Burden Hours:* 3,072,000 (first year); 1,644,000 (three-year average).

*Estimated Annual Burden Cost:* \$9,513,000 (first year); \$4,200,000 (three-year average).

Congressional Review Act

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The final rule is a “major rule” as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of \$100 million or more.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, the final rule does not include any Federal mandate that may result in

expenditures by State, local, or tribal governments in the aggregate of more than \$100 million, adjusted for inflation, or increase expenditures by the private sector of more than \$100 million, adjusted for inflation.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. The final rule does not have federalism implications because it has no substantial direct

effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and, as such, have no implications for the States or the relationship or distribution of power between the national government and the States.

#### List of Subjects in 29 CFR Part 2550

Employee benefit plans, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Reporting and recordkeeping requirements, and Securities.

For the reasons set forth in the preamble, the Department of Labor is amending chapter XXV, subchapter F, part 2550 of title 29 of the Code of Federal Regulations as follows:

#### PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 1. The authority citation for part 2550 continues to read as follows:

**Authority:** 29 U.S.C. 1135 and Secretary of Labor's Order No. 6–2009, 74 FR § 21524 (May 7, 2009). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–1 also issued under sec. 657, Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972, and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 2. Section 2550.408b–2(c) is revised to read as follows:

#### § 2550.408b–2 General statutory exemption for services or office space.

\* \* \* \* \*

(c) *Reasonable contract or arrangement—*

(1) *Pension plan disclosure.*

(i) *General.* No contract or arrangement for services between a covered plan and a covered service provider, nor any extension or renewal, is reasonable within the meaning of section 408(b)(2) of the Act and paragraph (a)(2) of this section unless

the requirements of this paragraph (c)(1) are satisfied. The requirements of this paragraph (c)(1) are independent of fiduciary obligations under section 404 of the Act.

(ii) *Covered plan.* For purposes of this paragraph (c)(1), a “covered plan” is an “employee pension benefit plan” or a “pension plan” within the meaning of section 3(2)(A) (and not described in section 4(b)) of the Act, except that the term “covered plan” shall not include a “simplified employee pension” described in section 408(k) of the Internal Revenue Code of 1986 (the Code); a “simple retirement account” described in section 408(p) of the Code; an individual retirement account described in section 408(a) of the Code; an individual retirement annuity described in section 408(b) of the Code; or annuity contracts and custodial accounts described in section 403(b) of the Code issued to a current or former employee before January 1, 2009, for which the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the contract or account for periods before January 1, 2009, and for which all of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer, and for which such individual owner is fully vested in the contract or account.

(iii) *Covered service provider.* For purposes of this paragraph (c)(1), a “covered service provider” is a service provider that enters into a contract or arrangement with the covered plan and reasonably expects \$1,000 or more in compensation, direct or indirect, to be received in connection with providing one or more of the services described in paragraphs (c)(1)(iii)(A), (B), or (C) of this section pursuant to the contract or arrangement, regardless of whether such services will be performed, or such compensation received, by the covered service provider, an affiliate, or a subcontractor.

(A) *Services as a fiduciary or registered investment adviser.*

(1) Services provided directly to the covered plan as a fiduciary (unless otherwise specified, a “fiduciary” in this paragraph (c)(1) is a fiduciary within the meaning of section 3(21) of the Act);

(2) Services provided as a fiduciary to an investment contract, product, or entity that holds plan assets (as determined pursuant to sections 3(42) and 401 of the Act and 29 CFR 2510.3–

101) and in which the covered plan has a direct equity investment (a direct equity investment does not include investments made by the investment contract, product, or entity in which the covered plan invests); or

(3) Services provided directly to the covered plan as an investment adviser registered under either the Investment Advisers Act of 1940 or any State law.

(B) *Certain recordkeeping or brokerage services.* Recordkeeping services or brokerage services provided to a covered plan that is an individual account plan, as defined in section 3(34) of the Act, and that permits participants or beneficiaries to direct the investment of their accounts, if one or more designated investment alternatives will be made available (e.g., through a platform or similar mechanism) in connection with such recordkeeping services or brokerage services.

(C) *Other services for indirect compensation.* Accounting, auditing, actuarial, appraisal, banking, consulting (i.e., consulting related to the development or implementation of investment policies or objectives, or the selection or monitoring of service providers or plan investments), custodial, insurance, investment advisory (for plan or participants), legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services provided to the covered plan, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation (as defined in paragraph (c)(1)(viii)(B)(2) of this section or compensation described in paragraph (c)(1)(iv)(C)(3) of this section).

(D) *Limitations.* Notwithstanding paragraphs (c)(1)(iii)(A), (B), or (C) of this section, no person or entity is a “covered service provider” solely by providing services—

(1) As an affiliate or a subcontractor that is performing one or more of the services described in paragraphs (c)(1)(iii)(A), (B), or (C) of this section under the contract or arrangement with the covered plan; or

(2) To an investment contract, product, or entity in which the covered plan invests, regardless of whether or not the investment contract, product, or entity holds assets of the covered plan, other than services as a fiduciary described in paragraph (c)(1)(iii)(A)(2) of this section.

(iv) *Initial disclosure requirements.* The covered service provider must disclose the following information to a responsible plan fiduciary, in writing—

(A) *Services.* A description of the services to be provided to the covered

plan pursuant to the contract or arrangement (but not including non-fiduciary services described in paragraph (c)(1)(iii)(D)(2) of this section).

(B) *Status.* If applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan (or to an investment contract, product or entity that holds plan assets and in which the covered plan has a direct equity investment) as a fiduciary (within the meaning of section 3(21) of the Act); and, if applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan as an investment adviser registered under either the Investment Advisers Act of 1940 or any State law.

(C) *Compensation—(1) Direct compensation.* A description of all direct compensation (as defined in paragraph (c)(1)(viii)(B)(1) of this section), either in the aggregate or by service, that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described pursuant to paragraph (c)(1)(iv)(A) of this section.

(2) *Indirect compensation.* A description of all indirect compensation (as defined in paragraph (c)(1)(viii)(B)(2) of this section) that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described pursuant to paragraph (c)(1)(iv)(A) of this section; including identification of the services for which the indirect compensation will be received, identification of the payer of the indirect compensation, and a description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid.

(3) *Compensation paid among related parties.* A description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services described pursuant to paragraph (c)(1)(iv)(A) of this section if it is set on a transaction basis (e.g., commissions, soft dollars, finder's fees or other similar incentive compensation based on business placed or retained) or is charged directly against the covered plan's investment and reflected in the net value of the investment (e.g., Rule 12b-1 fees);

including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor). Compensation must be disclosed pursuant to this paragraph (c)(1)(iv)(C)(3) regardless of whether such compensation also is disclosed pursuant to paragraph (c)(1)(iv)(C)(1) or (2), (c)(1)(iv)(E), or (c)(1)(iv)(F) of this section. This paragraph (c)(1)(iv)(C)(3) shall not apply to compensation received by an employee from his or her employer on account of work performed by the employee.

(4) *Compensation for termination of contract or arrangement.* A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

(D) *Recordkeeping services.* Without regard to the disclosure of compensation pursuant to paragraph (c)(1)(iv)(C), (c)(1)(iv)(E), or (c)(1)(iv)(F) of this section, if recordkeeping services will be provided to the covered plan—

(1) A description of all direct and indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with such recordkeeping services; and

(2) If the covered service provider reasonably expects recordkeeping services to be provided, in whole or in part, without explicit compensation for such recordkeeping services, or when compensation for recordkeeping services is offset or rebated based on other compensation received by the covered service provider, an affiliate, or a subcontractor, a reasonable and good faith estimate of the cost to the covered plan of such recordkeeping services, including an explanation of the methodology and assumptions used to prepare the estimate and a detailed explanation of the recordkeeping services that will be provided to the covered plan. The estimate shall take into account, as applicable, the rates that the covered service provider, an affiliate, or a subcontractor would charge to, or be paid by, third parties, or the prevailing market rates charged, for similar recordkeeping services for a similar plan with a similar number of covered participants and beneficiaries.

(E) *Investment disclosure—fiduciary services.* In the case of a covered service provider described in paragraph (c)(1)(iii)(A)(2) of this section, the following additional information with

respect to each investment contract, product, or entity that holds plan assets and in which the covered plan has a direct equity investment, and for which fiduciary services will be provided pursuant to the contract or arrangement with the covered plan, unless such information is disclosed to the responsible plan fiduciary by a covered service provider providing recordkeeping services or brokerage services as described in paragraph (c)(1)(iii)(B) of this section—

(1) A description of any compensation that will be charged directly against an investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees; and that is not included in the annual operating expenses of the investment contract, product, or entity;

(2) A description of the annual operating expenses (e.g., expense ratio) if the return is not fixed and any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees), or, for an investment contract, product, or entity that is a designated investment alternative, the total annual operating expenses expressed as a percentage and calculated in accordance with 29 CFR 2550.404a-5(h)(5); and

(3) For an investment contract, product, or entity that is a designated investment alternative, any other information or data about the designated investment alternative that is within the control of, or reasonably available to, the covered service provider and that is required for the covered plan administrator to comply with the disclosure obligations described in 29 CFR 2550.404a-5(d)(1).

(F) *Investment disclosure—recordkeeping and brokerage services.*

(1) In the case of a covered service provider described in paragraph (c)(1)(iii)(B) of this section, the additional information described in paragraph (c)(1)(iv)(E)(1) through (3) of this section with respect to each designated investment alternative for which recordkeeping services or brokerage services as described in paragraph (c)(1)(iii)(B) of this section will be provided pursuant to the contract or arrangement with the covered plan.

(2) A covered service provider may comply with this paragraph (c)(1)(iv)(F) by providing current disclosure materials of the issuer of the designated investment alternative, or information replicated from such materials, that include the information described in such paragraph, provided that:

(j) The issuer is not an affiliate;  
 (ii) The issuer is a registered investment company, an insurance company qualified to do business in any State, an issuer of a publicly traded security, or a financial institution supervised by a State or federal agency; and

(iii) The covered service provider acts in good faith and does not know that the materials are incomplete or inaccurate, and furnishes the responsible plan fiduciary with a statement that the covered service provider is making no representations as to the completeness or accuracy of such materials.

(G) *Manner of receipt.* A description of the manner in which the compensation described in paragraph (c)(1)(iv)(C) through (F) of this section, as applicable, will be received, such as whether the covered plan will be billed or the compensation will be deducted directly from the covered plan's account(s) or investments.

(H) *Guide to initial disclosures.*  
 [Reserved]

(v) *Timing of initial disclosure requirements; changes.*

(A) A covered service provider must disclose the information required by paragraph (c)(1)(iv) of this section to the responsible plan fiduciary reasonably in advance of the date the contract or arrangement is entered into, and extended or renewed, except that—

(1) When an investment contract, product, or entity is determined not to hold plan assets upon the covered plan's direct equity investment, but subsequently is determined to hold plan assets while the covered plan's investment continues, the information required by paragraph (c)(1)(iv) of this section must be disclosed as soon as practicable, but not later than 30 days from the date on which the covered service provider knows that such investment contract, product, or entity holds plan assets; and

(2) The information described in paragraph (c)(1)(iv)(F) of this section relating to any investment alternative that is not designated at the time the contract or arrangement is entered into must be disclosed as soon as practicable, but not later than the date the investment alternative is designated by the covered plan.

(B) (1) A covered service provider must disclose a change to the information required by paragraph (c)(1)(iv)(A) through (D), and (G) of this section as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the

covered service provider's control, in which case the information must be disclosed as soon as practicable.

(2) A covered service provider must, at least annually, disclose any changes to the information required by paragraph (c)(1)(iv)(E) and (F) of this section.

(vi) *Reporting and disclosure information; timing.*

(A) Upon the written request of the responsible plan fiduciary or covered plan administrator, the covered service provider must furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements of Title I of the Act and the regulations, forms and schedules issued thereunder.

(B) The covered service provider must disclose the information required by paragraph (c)(1)(vi)(A) of this section reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator states that it must comply with the applicable reporting or disclosure requirement, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable.

(vii) *Disclosure errors.* No contract or arrangement will fail to be reasonable under this paragraph (c)(1) solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to paragraph (c)(1)(iv) of this section (or a change to such information disclosed pursuant to paragraph (c)(1)(v)(B) of this section) or paragraph (c)(1)(vi) of this section, provided that the covered service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

(viii) *Definitions.* For purposes of paragraph (c)(1) of this section:

(A) *Affiliate.* A person's or entity's "affiliate" directly or indirectly (through one or more intermediaries) controls, is controlled by, or is under common control with such person or entity; or is an officer, director, or employee of, or partner in, such person or entity. Unless otherwise specified, an "affiliate" in this paragraph (c)(1) refers to an affiliate of the covered service provider.

(B) *Compensation.* Compensation is anything of monetary value (for example, money, gifts, awards, and

trips), but does not include non-monetary compensation valued at \$250 or less, in the aggregate, during the term of the contract or arrangement.

(1) "Direct" compensation is compensation received directly from the covered plan.

(2) "Indirect" compensation is compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate. Compensation received from a subcontractor is indirect compensation, unless it is received in connection with services performed under the subcontractor's contract or arrangement described in paragraph (c)(1)(viii)(F) of this section.

(3) A description of compensation or cost 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 or cost cannot reasonably be expressed in such terms, by any other reasonable method. The description may include a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and the covered service provider explains the methodology and assumptions used to prepare such estimate. Any description, including any estimate of recordkeeping cost under paragraph (c)(1)(iv)(D), must contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

(C) *Designated investment alternative.* A "designated investment alternative" is any investment alternative designated by the covered plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term "designated investment alternative" shall not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the covered plan.

(D) *Recordkeeping services.*

"Recordkeeping services" include services related to plan administration and monitoring of plan and participant and beneficiary transactions (e.g., enrollment, payroll deductions and contributions, offering designated investment alternatives and other covered plan investments, loans, withdrawals and distributions); and the maintenance of covered plan and participant and beneficiary accounts, records, and statements.

(E) *Responsible plan fiduciary.* A "responsible plan fiduciary" is a

fiduciary with authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement.

(F) *Subcontractor*. A “subcontractor” is any person or entity (or an affiliate of such person or entity) that is not an affiliate of the covered service provider and that, pursuant to a contract or arrangement with the covered service provider or an affiliate, reasonably expects to receive \$1,000 or more in compensation for performing one or more services described pursuant to paragraph (c)(1)(iii)(A) through (C) of this section provided for by the contract or arrangement with the covered plan.

(ix) *Exemption for responsible plan fiduciary*. Pursuant to section 408(a) of the Act, the restrictions of section 406(a)(1)(C) and (D) of the Act shall not apply to a responsible plan fiduciary, notwithstanding any failure by a covered service provider to disclose information required by paragraph (c)(1)(iv) or (vi) of this section, if the following conditions are met:

(A) The responsible plan fiduciary did not know that the covered service provider failed or would fail to make required disclosures and reasonably believed that the covered service provider disclosed the information required by paragraph (c)(1)(iv) or (vi) of this section;

(B) The responsible plan fiduciary, upon discovering that the covered service provider failed to disclose the required information, requests in writing that the covered service provider furnish such information;

(C) If the covered service provider fails to comply with such written request within 90 days of the request, then the responsible plan fiduciary notifies the Department of Labor of the covered service provider’s failure, in accordance with paragraph (c)(1)(ix)(E) of this section;

(D) The notice shall contain the following information—

- (1) The name of the covered plan;
- (2) The plan number used for the covered plan’s Annual Report;
- (3) The plan sponsor’s name, address, and EIN;
- (4) The name, address, and telephone number of the responsible plan fiduciary;
- (5) The name, address, phone number, and, if known, EIN of the covered service provider;
- (6) A description of the services provided to the covered plan;
- (7) A description of the information that the covered service provider failed to disclose;
- (8) The date on which such information was requested in writing from the covered service provider; and

(9) A statement as to whether the covered service provider continues to provide services to the plan;

(E) The notice shall be filed with the Department not later than 30 days following the earlier of—

(1) The covered service provider’s refusal to furnish the information requested by the written request described in paragraph (c)(1)(ix)(B) of this section; or

(2) 90 days after the written request referred to in paragraph (c)(1)(ix)(B) of this section is made;

(F) The notice required by paragraph (c)(1)(ix)(C) of this section shall be sent to the following address: U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement, 200 Constitution Ave. NW., Suite 600, Washington, DC 20210; or may be sent electronically to *OE-DelinquentSPnotice@dol.gov*; and

(G) If the covered service provider fails to comply with the written request referred to in paragraph (c)(1)(ix)(C) of this section within 90 days of such request, the responsible plan fiduciary shall determine whether to terminate or continue the contract or arrangement consistent with its duty of prudence under section 404 of the Act. If the requested information relates to future services and is not disclosed promptly after the end of the 90-day period, then the responsible plan fiduciary shall terminate the contract or arrangement as expeditiously as possible, consistent with such duty of prudence.

(x) *Preemption of State law*. Nothing in this section shall be construed to supersede any provision of State law that governs disclosures by parties that provide the services described in this section, except to the extent that such law prevents the application of a requirement of this section.

(xi) *Internal Revenue Code*. Section 4975(d)(2) of the Code contains provisions parallel to section 408(b)(2) of the Act. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 214 (2000 ed.), transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. All references herein to section 408(b)(2) of the Act and the regulations thereunder should be read to include reference to the parallel provisions of section 4975(d)(2) of the Code and regulations thereunder at 26 CFR 54.4975–6.

(xii) *Effective date*. Paragraph (c) of this section shall be effective on July 1, 2012. Paragraph (c)(1) of this section shall apply to contracts or arrangements between covered plans and covered service providers as of the effective date,

without regard to whether the contract or arrangement was entered into prior to such date; for contracts or arrangements entered into prior to the effective date, the information required to be disclosed pursuant to paragraph (c)(1)(iv) of this section must be furnished no later than the effective date.

(2) *Welfare plan disclosure*.

[Reserved]

(3) *Termination of contract or arrangement*. No contract or arrangement is reasonable within the meaning of section 408(b)(2) of the Act and paragraph (a)(2) of this section if it does not permit termination by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous. A long-term lease which may be terminated prior to its expiration (without penalty to the plan) on reasonably short notice under the circumstances is not generally an unreasonable arrangement merely because of its long term. A provision in a contract or other arrangement which reasonably compensates the service provider or lessor for loss upon early termination of the contract, arrangement, or lease is not a penalty. For example, a minimal fee in a service contract which is charged to allow recoupment of reasonable start-up costs is not a penalty. Similarly, a provision in a lease for a termination fee that covers reasonably foreseeable expenses related to the vacancy and reletting of the office space upon early termination of the lease is not a penalty. Such a provision does not reasonably compensate for loss if it provides for payment in excess of actual loss or if it fails to require mitigation of damages.

\* \* \* \* \*

Signed at Washington, DC, this 25th day of January 2012.

**Phyllis C. Borzi,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

#### **Appendix—Sample Guide to Initial Disclosures**

##### **ABC Service Provider, Inc. (ABC)**

##### **Guide to Services and Compensation**

##### **Prepared for the XYZ 401(k) Plan**

The following is a guide to important information that you should consider in connection with the services to be provided by ABC to the XYZ 401(k) Plan.

Should you have any questions concerning this guide or the information provided to you

concerning our services or compensation,  
please do not hesitate to contact [enter name

of person and/or office] at [enter phone  
number and/or email address].

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Required Information	Location(s)
Description of the services that ABC will provide to your Plan.	Master Service Agreement § 2.4, p. 1
A statement concerning the services that ABC will provide as [an ERISA fiduciary][a registered investment adviser].	Master Service Agreement § 2.6, p. 2
Compensation ABC will receive from your Plan ("direct" compensation).	Master Service Agreement § 3.2, p. 4
Compensation ABC will receive from other parties that are not related to ABC ("indirect" compensation").	Master Service Agreement § 3.3, p. 4  Stable Value Offering Agmt § 3.1, p. 4
Compensation that will be paid among ABC and related parties.	Master Service Agreement § 3.5, p. 6
Compensation ABC will receive if you terminate this service agreement.	Master Service Agreement § 9.2, p. 11
The cost to your Plan of recordkeeping services.	Master Service Agreement § 3.4, p. 5
Fees and Expenses relating to your Plan's investment options.  *Total Annual Operating Expenses	(1) <u>Capital and Income Fund</u>  Trans. Fees: InvestCo Prospectus, Fund Summary, p. 2 TAOE: * InvestCo Prospectus, Fund Summary, p. 2  (2) <u>International Stock Fund</u>  Trans. Fees: www.weblink/ABCProspInv2/trans.com TAOE: www.weblink/ABCProspInv2/taoe.com  (3) <u>Small Cap Fund</u>  Trans. Fees: www.ABCweblink/ProspInv3/trans.com TAOE: www.weblink/ABCProspInv3/taoe.com  (4) <u>Bond Market Index Fund</u>  Trans. Fees: www.weblink/ABCProspInv4/trans.com TAOE: www.weblink/ABCProspInv4/taoe.com  (5) <u>Stable Value Fund</u>  Trans. Fees: Stable Value Offering Agmt, § 2.4, p. 3 TAOE: Stable Value Offering Agmt, § 2.3, p. 3  (6) <u>Money Market Fund</u>  Trans. Fees: www.weblink/ABCProspInv6/trans.com TAOE: www.weblink/ABCProspInv6/taoe.com