BNA, INC.

PENSION & BENEFITS

BNA Employee-Owned Since 1947

REPORTER

Fiduciary Responsibility

With the spotlight turned on participant fee disclosure for 401(k) plans, in this article the authors address what a fiduciary needs to know to satisfy its fiduciary obligations under ERISA and how to avoid participating in a prohibited transaction under ERISA Section 406.

ERISA's Fiduciary Duties: Meeting the 'Reasonable' Contract and Fee Requirements

BY CANDACE L. QUINN AND JOSE M. JARA

Background.

There has been increasing focus on fee arrangements for tax code Section 401(k) plans. This increased focus includes a flurry of litigation, and proposed regulatory and legislative activity surrounding fee arrangements in 401(k) plans. There are multiple class action lawsuits involving *Fortune 100* companies that include allegations of excessive fees and expenses, and failure to provide sufficient investment information to inform participants.[1] Lawsuits regarding allegations of excessive fees and expenses paid, conflicts of interest and breaches of fiduciary duties have not been limited to 401(k) plans, plan participants of

Candace L. Quinn is of counsel in the Employee Benefits & Executive Compensation Department in the New York office of Seyfarth Shaw LLP. Jose M. Jara is the ERISA Project manager in the firm's New York office. The authors focus their practice on tax and legal matters concerning qualified retirement plans, tax sheltered annuity plans, governmental plans and nonqualified deferred compensation programs.

[1] Tussey v. ABB Inc., No. 06-04305-CV-NKL (W.D. Mo, Dec. 3, 2007); Kanawi v. Bechtel Corp., Case No. 175911 (C.D. Cal. filed Sept. 11, 2006); Spano v. Boeing Co., No. 3:06-cv-00743-DRW-DGW (S.D. Ill. Dec. 14, 2007); Martin. v. Caterpillar, Inc., No. 2:06-cv-04208-SOW (W.D. Mo. filed Sept. 11, 2006) ; Nolte v CIGNA Corp., 2:07-cv-02046-HAB-DGB (C.D. Ill. 2007); Hecker v. Deere & Co., 41 EBC 1006, 2007 WL 1874367 (W.D. Wis. 2007); Tibble v. Edison Int'l, CV07-05359-SVW (C.D. Cal.); Loomis v. Exelon Corp., No. 06CV4900 (N.D. Ill. Aug. 16, 2007); Will v. General Dynamics Corp. and John W. Schwartz, No. 06-698-WDS (S.D. Ill filed Sept. 11, 2006); Brewer v. General Motors Inv. Management Corp., No. 1:2007cv02928 (S.D.N.Y April 12, 2007); Young v. General Motors Inv. Management Corp., No. 1:07cv01994 (S.D.N.Y. March 8, 2007); George v. Kraft Foods Global, Inc., 3:06-cv-00798-DRH-PMF (S.D. Ill. Oct. 16, 2006); Beesley v. International Paper Co. No. 06-7030DRH (S.D. Ill. Sept. 11, 2006); Abbott v. Lockheed Martin Corp., No. 06-701-MJR (S.D. Ill. filed Sept. 11, 2006); Waldbuesser v. Northrop Grumman Corp., CV-06-6213-R (C.D. Cal. Sept. 28, 2006); Maxwell v. RadioShack Corp., No. MDL 1875, (N.D. Tex. March 31, 2008); Renfro v. Unisys Corp. CV06-8268-FMC-FFMx (C.D. Cal. May 23, 2007); David S. Taylor v. United Technologies Corp., No. 06CV4895 (N.D. Ill. filed Sept. 11, 2006).

403(b) and 457(b) plans have also challenged the fee arrangements for their plans.[2] In light of this increased scrutiny what does a fiduciary need to know to satisfy its fiduciary obligations under the Employee Retirement Income Security Act (ERISA) and to avoid participating in a prohibited transaction under ERISA Section 406?

The provision for services between a plan and a service provider is a prohibited transaction under ERISA Section 406 but it may satisfy the exemption provided in ERISA Section 408(b)(2). The arrangement must to be covered by the statutory exemption — (1) the contract or arrangement must be reasonable, (2) the services provided must be necessary for the operation of a plan, and (3) the compensation received by the service provider must be reasonable compensation for such services.

In light of the increased scrutiny on 401(k) plan fees, the U.S. Department of Labor (''DOL'') has taken a variety of steps. To improve fee disclosure by plans to the DOL, the DOL has revised the Form 5500 Annual Report/Report of Employee Benefit Plan, including Schedule C. In addition, it has published proposed regulations on Dec. 13, 2007, addressing the reasonable contract or arrangement requirements under ERISA Section 408(b)(2). [3]

Concurrently, the House Education and Labor Committee Chairman George Miller (D-Calif.) introduced the Fair Disclosure for Retirement Security Act of 2007 to address hidden fees and conflicts of interest, two perceived areas of concern regarding 401(k) plans. The House bill would require plan administrators to list the service fee assessed against participant accounts, require service providers to provide information to plan sponsors regarding any conflicts of interest (financial or otherwise), and also require service providers to disclose to plan sponsors all plan related fees including sales commissions, trading costs, and termination or surrenders charges. Recently, on April 16, 2008, the committee voted and passed a revised version of the bill, which included additional protections should the plan contain an index fund as an investment option.

In addition, Rep. Richard E. Neal (D-Mass.) introduced the Defined Contribution Fee Transparency Act of 2007, which requires fee arrangements to be separated and disclosed to participants.[4] Also, Sen. Tom Harkin (D-Ia.) sponsored the Defined Contribution Fee Disclosure Act of 2007 with similar disclosure requirements regarding plan fee arrangements. [5]

ERISA's Statutory and Regulatory Framework.

Fiduciary Duties—ERISA Section 404. Under ERISA you are a fiduciary with respect to a plan to the extent that you exercise discretionary authority or control regarding plan management, management of the plan's assets, or to the extent that you have any discretionary authority or responsibility in plan administration.[6] Courts have interpreted the definition of a fiduciary under a functional test. Thus, a person's actions, not official titles, determine fiduciary status.[7]

When selecting and monitoring service providers, ERISA Section 404 requires a fiduciary 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.[8] A fiduciary must have sufficient information to make informed decisions about the services, the costs, and the qualifications of the service provider.[9]

To comply with ERISA, however, the DOL has stated that a fiduciary must consider the compensation or fees, the service provider's qualifications, and quality of services being retained. In this regard, a fiduciary should not consider the compensation or fees, to the exclusion of other factors. Thus, a fiduciary is not required to select the lowest-cost service provider, so long as the compensation or fees paid to the service provider are reasonable in light of the particular facts and circumstances.

Prohibited Transactions Section 406 and Statutory Exemption Section 408(B)(2). ERISA prohibits the furnishing of services between a plan and a party in interest.[10] A party in interest would include any person providing services to a plan.[11] Furthermore, ERISA prohibits a fiduciary from causing a plan to engage in a transaction which he knows constitutes a transfer to, or use by or for the benefit of, a party in interest of any assets of the plan.[12] Accordingly, any provision for services between a plan and a service provider is a prohibited transaction under ERISA.

Without exemptions to these prohibitions, a plan could not operate. ERISA Section 408(b)(2) provides a statutory exemption from these prohibition for certain arrangements between plans and service providers if: (1) the contract or arrangement is reasonable;[13] (2) the services are necessary for the establishment or operation of the plan;[14] and (3) no more than reasonable compensation is paid for the services.[15]

The DOL proposes to amend the regulations under ERISA Section 408(b)(2) to expand its guidance on when a contract or arrangement is ''reasonable.'' The proposed amendment requires additional disclosures by the service providers to fiduciaries concerning all compensation it will receive and any conflicts of interest that may adversely affect the service provider's performance. Without these additional disclosures, a service contract will not meet the reasonableness standard. The original DOL regulations explain that under ERISA Section 408(b)(2), service provider compensation will not be reasonable if it is excessive under 26 C.F.R. Section 1.162-7 (regulations under the Internal Revenue

---

[2] *See, e.g.*, Beary v. Nationwide Life Ins. Co., 2007 U.S. Dist. LEXIS 83137 (D. Ohio 2007); Montoya v. ING Life Ins. & Annuity Co., No. 1:07-cv-02574 (S.D.N.Y. March 28, 2007).

[3] 72 Fed. Reg. 70,988 (Dec. 13, 2007).

[4] H.R. 3765.

[5] S. 2473.

[6] 29 U.S.C. § 1002(21); ERISA § 3(21).

[7] *See generally* Blatt v. Marshall & Lassman, 812 F.2d 810, 812, 8 EBC 1495 (2d Cir. 1987); Eaves v. Penn, 587 F.2d 453, 458-59, 1 EBC 1592 (10th Cir. 1978).

[8] 29 U.S.C. § 1104; ERISA § 404.

[9] *See, e.g.*, Field Assistance Bulletin 2002-3 (Nov. 5, 2002) and Advisory Opinions 97-16A (May 22, 1997) and 97-15A (May 22, 1997).

[10] 29 U.S.C. § 1106; ERISA § 406(a)(1)(C).

[11] *See* ERISA § 3(14)(B).

[12] 29 U.S.C. § 1106(a)(1)(D); ERISA § 406(a)(1)(D).

[13] *See* 29 C.F.R. § 2550.408b-2(c) for the DOL's clarification on ''reasonable contract or arrangement.''

[14] *See* 29 C.F.R. § 2550.408b-2(b) for the DOL's clarification on ''necessary service.''

[15] *See* ERISA § 408(b)(2); *see* 29 C.F.R. § 2550.408c-2 for the DOL's clarification ''reasonable compensation.''

ISSN 1069-5117

Code relating to compensation for personal services that constitute an ordinary and necessary trade or business expense).[16] The DOL carefully notes that even if compensation is not excessive under 26 C.F.R. Section 1.162-7, it may still be unreasonable based on the facts and circumstances.

The Internal Revenue Service (''IRS'') has stated that ''reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances.''[17] The IRS made clear that such circumstances that need to be taken into account must be at the time the contract for services is being made, not later when the contract is questioned.[18]

DOL Proposed Regulations.

DOL has proposed regulations regarding when a contract is reasonable under ERISA Section 408(b)(2). The new requirements would apply to contracts or arrangements that are with:

(1) service providers who provide services as a fiduciary under ERISA or under the Investment Advisers Act of 1940;

(2) service providers who provide banking, consulting, custodial, insurance, investment advisory (plan or participants), investment management, recordkeeping, securities or other investment brokerage, or third party administration services, regardless of the type of compensation or fees that they receive; and

(3) service providers who receive any indirect compensation in connection with accounting, actuarial, appraisal, auditing, legal, or valuation services.

The proposed regulation requires that a reasonable contract require the service provider to issue written disclosures, prior to executing a service contract, and acknowledge that such information is complete and accurate. The contract or arrangement also must require the service provider to disclose all the services it will provide to the plan and all compensation it will receive in connection with the services. The DOL states ''[f]or example, if a plan consultant will provide appraisal, legal, and administrative services to the employee benefit plan in addition to its consulting services, then all of these services must be described.''[19]

The proposed amendment defines compensation or fees to include money and any other thing of monetary value. The DOL provides the following ''[e]xamples of compensation or fees that are covered ..., but are not limited to: gifts, awards, and trips for employees, research, finder's fees, placement fees, commissions or other fees related to investment products, sub-transfer agency fees, shareholder servicing fees, Rule 12b-1 fees, soft dollar payments, float income, fees deducted from investment returns, fees based on a share of gains or appreciation of plan assets, and fees based upon a percentage of the plan's assets.''[20]

In addition, the fiduciaries must receive comprehensive information about indirect compensation, which includes fees that service providers receive from parties other than the plan, the plan sponsor, or the service provider.

Service providers also must disclose compensation or fees received by their affiliates from third parties. An ''affiliate'' is any person directly or indirectly, controlling, controlled by, or under common control with the service provider, or any officer, director, agent, or employee of, or partner in, the service provider.

The proposed regulation allows, in the case of a service provider that cannot disclose compensation or fees in terms of a specific monetary amount, disclosure by using a formula, a percentage of the plan's assets, or a per capita charge for each participant or beneficiary. However, this disclosure must enable the fiduciary to determine reasonableness.

Bundled arrangements are services provided in a bundle and are priced as a package, rather than on a service-by-service basis. The proposed regulations requires bundle providers to disclose information concerning all services to be provided in the bundle, regardless of who provides them. The bundle provider may use other affiliated service providers, or unaffiliated subcontractors, to provide some of the services. Disclosure must be made of the aggregate direct compensation or fees that will be paid for the bundle, as well as all indirect compensation that will be received by the service provider, or its affiliates or subcontractors within the bundle, from third parties.

The proposed regulation further provides that the bundled provider must separately disclose the compensation or fees of any party providing services under the bundle that receives a separate fee charged directly against the plan's investment reflected in the net value of the investment, such as management fees paid by mutual funds to their investment advisers, float revenue, and other asset-based fees such as 12b-1 distribution fees, wrap fees, and shareholder servicing fees if charged in addition to the investment management fee. Also, the proposed regulation requires the separate disclosure of compensation or fees that are set on a transaction basis, such as finder's fees, brokerage commissions, or soft dollars. Transaction basis fees must be separately disclosed even if paid from mutual fund management fees or other similar fees.

Most important, the DOL stated that classifying revenue sharing arrangements or bookkeeping practices among affiliates as proprietary or confidential will not excuse the service provider from disclosing such information. Further, the DOL believes that investment-based charges, commissions, and other transaction-based fees paid to affiliates are just as likely to be relevant to the responsible plan fiduciary's evaluation of potential conflicts of interest.

Conflicts of Interest.

Under proposed regulation, service providers must disclose information that will help fiduciaries assess any real or potential conflicts of interest. Service providers will have to identify themselves as an ERISA fiduciary under Section 3(21) of ERISA or as a fiduciary under the Investment Advisers Act of 1940.

The service provider must disclose any financial or other interest in transactions in which the plan will partake in connection with the contract or arrangement. The fiduciary can then weigh the nature and extent of the conflict in analyzing the objectivity of the service provider when making the recommendations. A service provider will be obligated to describe any material financial, referral, or other relationship it has with vari-

[16] 29 C.F.R. § 2550.408c-2(b)(5) (1987).
[17] 26 C.F.R. § 1.162-7(b)(3) (1987).
[18] *Id.*
[19] 72 Fed. Reg. 70,990 (Dec. 13, 2007).
[20] 72 Fed. Reg. 70,990 (Dec. 13, 2007).

ous parties. Also, a service provider must identify whether it can affect its own compensation without the prior approval of an independent fiduciary and describe the nature of this compensation.

Last, service providers must state whether or not any policies or procedures exist to manage real or potential conflicts of interest and if so, describe them. Any material changes to the information must be disclosed within 30 days of knowledge of the change. Materiality is anything that would be viewed by a fiduciary as significantly altering the ''total mix'' of information made available to the fiduciary, or as significantly affecting a reasonable plan fiduciary's decision to hire or retain the service provider.

Relief From Prohibited Transaction Excise Tax.

If the DOL proposed regulation is adopted, a service arrangement that does not meet the new requirements will be a nonexempt prohibited transaction. As a party in interest, the service provider could be held liable under ERISA for the prohibited transaction. The service provider, as a "disqualified person" under the Internal Revenue Code's (''code''), will be subject to the excise taxes that result from the service provider's participation in a prohibited transaction under code Section 4975.

The DOL has proposed a class prohibited transaction to provide relief to a fiduciary when a service provider, unbeknownst to the fiduciary, fails to satisfy its disclosure obligations under these new rules.[21] To qualify for this protection, the fiduciary must notify the DOL of the particular circumstances relating to the service provider's failure to comply with its disclosure requirements. In addition, the fiduciary must determine whether to terminate or continue the contract.

DOL Final Rule — Annual Reporting Form 5500.

The DOL revised the annual reporting Form 5500 requirements to provide for additional disclosures in Schedule C, effective for the 2009 plan year filings[22] The new Schedule C requires the plan to report service providers who receive directly or indirectly $5,000 or more in compensation during the plan year. The new schedule C also requires that direct compensation paid by a plan to a service provider be reported in a separate line item from indirect compensation received by the service provider from sources other than the plan or plan sponsor.[23]

The final rule provides an alternative reporting option for service providers whose only compensation is limited to ''eligible indirect compensation,'' which is certain specified types of common investment-related fees. Such a service provider must provide the plan administrator with written disclosures of: (1) the existence of indirect compensation; (2) the services provided for or the purpose of the indirect compensation; (3) the amount or a description of the formula used to calculate the compensation; and, (4) the identity of the parties paying and receiving the compensation.[24]

If a service provider fails or refuses to provide such necessary compensation disclosures, the plan administrator must identify the service provider on the new Schedule C.

[21] 72 Fed. Reg. 70,893 (Dec. 13, 2007).
[22] 72 Fed. Reg. 64,710 (Nov. 16, 2007).
[23] 72 Fed. Reg. 64,712 (Nov. 16, 2007).
[24] *Id.*

The DOL believes that these revisions will assist plan administrators in monitoring compensation arrangements, better understanding the impact of fees, and better evaluating the value of the services retained. The DOL expects that plan administrators will be armed with the tools to better negotiate fair prices for necessary plan services.[25]

DOL's Amicus Brief.

In *Hecker v. Deere*,[26] participants in a 401(k) plan filed suit alleging that the plan sponsor and trustee breached their ERISA fiduciary duties by providing investment options that had excessive and unreasonable fees and costs and failed to disclose this information. The district court granted the defendants' motion to dismiss. In this regard the district court ruled, in part, that the plan sponsor/administrator's disclosure were fully compliant with ERISA and Section 404(c) foreclosed any claim based on amount of total fees.

Recently, the DOL has voiced its opinion in the courtroom. The DOL filed with the Seventh Circuit an amicus brief in *Hecker v. Deere*.[27] The DOL opined that the district court was incorrect in ruling that ERISA Section 404(c) immunizes fiduciaries from liability for imprudence in selecting and monitoring plan investment options. The DOL stated that the court's reasoning that such fee disclosure is not specifically required by ERISA's disclosure requirements does not mean that fee disclosure is not required by the general ERISA fiduciary obligations. The district court in relying on ERISA Section 404(c) stated that revenue sharing is specifically not required to be disclosed by the regulations. It further concluded that because participants can choose from more than 2,500 other mutual funds through ''BrokerageLink'' that ''[i]t is untenable to suggest'' that all the investment options had excessive fees.[28]

The DOL stated that ERISA Section 404(c) does not protect fiduciaries who failed to implement a process for ensuring that the plan's fees and expenses are reasonable. In this regard, any losses relating to the unreasonable fees and expenses would not be a direct and necessary result of the participant's exercise of control. Accordingly, the DOL expressed its opinion that ERISA Section 404(c) would not protect fiduciaries from any fiduciary obligations regarding the fees relating to the mutual funds offered under the plan. Another point the DOL hammered was that the statutory duties of prudence and loyalty may require disclosures in addition to those specifically provided in ERISA's disclosure and reporting requirements. The DOL opined that ''ERISA Section 404 imposes strict duties of 'care, diligence, and loyalty' on plan fiduciaries that are 'far more exacting than the duty imposed by tort law not to mislead a stranger.''' [29] Thus, the DOL stated that satisfying ERISA's statutory disclosure requirements may not be enough in certain circumstances and that the general fiduciary duties of prudence and loyalty may require additional disclosures to plan participants. The DOL did pull back a bit it that it stated that it is ''skeptical that,

[25] 72 Fed Reg. 64,719 (Nov. 16, 2007).
[26] 496 F. Supp. 967, 41 EBC 1006 (W.D. Wis. 2007).
[27] Brief of the Secretary of Labor as Amicus Curie in Support of Plaintiffs-Appellants, Hecker v. Deere, No. 07-3605, 08-1224 (7th Cir. March 20, 2008).
[28] 496 F.Supp. 967 (W.D. Wis. 2007).
[29] DOL Amicus Brief citing to Harzewski v. Guidant, 489 F.3d 799, 805 (7th Cir. 2007).

  BPR ISSN 1069-5117

absent any misrepresentations, ERISA's duties of prudence and loyalty would have required disclosure to plan participants of revenue sharing among [the service provider's] affiliates."[30]

Legislation.

At the same time, Congress has been looking into retirement plan fees closely. Chairman George Miller of the House Education and Labor Committee introduced last year the 401(k) Fair Disclosure for Retirement Act (H.R. 3185). The bill, in its original form, proposed substantial disclosures to be written in plain English from plans to participants including, a "fee menu" for all investment options in the plan, risk and strategy of each investment option, and historical returns and fees.

Additionally, service providers would be required to disclose a variety of fees and expenses including the following to plan fiduciaries: sales commissions and estimated trading costs; start-up costs; investment advice and management fees, administration, legal compliance, trusteeship and record keeping fees; terminations and surrender charges. Service providers must also disclose any financial or other conflicts of interest it may have with the plan. Last, the bill would require that the plan offer at least one investment option that is a lower-cost, balance index fund.

A similar bill, the Defined Contribution Fee Disclosure Act of 2007, has been proposed by Senators Tom Harkin and Herb Kohl (D-Wisc.), which mainly differs in that there is no requirement to have such index fund as an investment option. Another House bill was proposed by Rep. Neal, The Defined Contribution Plan Fee Transparency Act (H.R. 3765).

On April 16, 2008, the House committee passed a revised version of H.R. 3185 with an approved amendment by a 25 to 19 vote. The revised version requires service providers to provide to plan administrators disclosure of fee in four categories: administrative, investment management, transactional, and other. Also, service providers must outline any financial relationship of interest. Plan administrators have to, among other things, disclose to participants fees assessed on their accounts into four similar categories. Lastly, the bill contained an amendment to eliminate the required inclusion of an index fund. However, the inclusion of an index fund would provide liability protection to the plan administrator.

The committee has commented on the DOL's proposed regulation (discussed earlier) and believes that the DOL "must go much further . . . in order to achieve clear and understandable disclosure of fees and conflicts."[31] Specifically, the Committee believes the DOL must put more emphasis on the 401(k) contracting process, including understanding how the employers, plan administrators and fiduciaries make decisions regarding the investment options in a 401(k) plan.

Concerning bundled providers, the committee believes the DOL should consider a more comprehensive rule that will enable a fiduciary to determine the compensation paid for individual services as opposed to in the aggregate. Lastly, the committee believes that the DOL should actively work with other agencies, survey the industry for compliance with the joint DOL/SEC "Selecting and Monitoring Pension Consultants-Tips for Plan Fiduciaries" (discussed in more detail below), and review actual disclosure documents from financial service firms.

Currently, with the congressional oversight of 401(k) plans, the U.S. General Accountability Office ("GAO") is preparing a congressional study on 401(k) plan sponsor practices. The GAO is seeking input from plan sponsors through an online survey.

Concerted Efforts From The SEC.

While not officially in concert, DOL and the Securities and Exchange Commission certainly appear to be pushing for fee transparency. In a report by the GAO, it concluded that the DOL and the SEC periodically coordinate efforts on multiple issues and that the agencies must explore opportunities to identify questionable activities through a more systematic coordination effort through the regional offices.[32] The DOL's Assistant Secretary and SEC's Enforcement Director both agreed on this point.

In 2005, the SEC and DOL issued a questionnaire called "Selecting and Monitoring Pension Consultants—Tips for Plan Fiduciaries."[33] The questionnaire was designed to solicit more information about conflicts of interest. The questionnaire included a variety of questions including:

- Whether all disclosures were provided to the plan fiduciary as required by the SEC, including disclosures required by Part II of Form ADV.
- If you are hired, will you acknowledge in writing that you have a fiduciary obligation as the plan's investment advisor while providing the consulting services being sought?
- Do you consider yourself a fiduciary under ERISA with respect to recommendations you provide the plan?

Aside from the DOL, the SEC has issued its own proposed regulations. The SEC has proposed amendments to the Form ADV, essentially requiring that it be written in plain English. It is intended to provide clear, current, and more meaningful disclosure of business practices, conflicts of interests, and background of investment advisers and their personnel. Specifically relating to fees, the proposal would require disclosure of performance based fees and receipt of soft dollars in connection with securities transactions.[34]

Further, the SEC has proposed changes to the mutual fund prospectus rules to require that they be written in plain English. The SEC noted that millions of Americans are relying on mutual funds for their retirement and that the "[c]urrent commission rules require mutual fund prospectuses to contain key information about investment objectives, risks, and expenses that while important to investors, can be difficult for investors to extract." Further the SEC stated that too frequently, the language in prospectuses is complex and legalistic. Thus, the SEC proposed changes to the prospectus rules to make them easier to understand, including a

[30] DOL Amicus Brief at 20.

[31] Letter from Committee on Education and Labor to Assistant Secretary Brad Campbell, dated Feb. 14, 2008.

[32] GAO Report, "Employee Benefits Security Administration - Enforcement Improvements Made but Additional Actions Could Enhance Pension Plan Oversight." January 2007.

[33] *See* DOL, SEC Issue Tips for Plan Fiduciaries Selecting and Monitoring Pension Consultants, *reported at* 105 PBD, 6/1/ 2005.

[34] SEC Release No IA-2711 Amendments to Form ADV, 73 Fed. Reg. 13,958 (March 14, 2008).

summary of investment objectives and strategies, risks, costs and performance.

Implications For Plan Fiduciaries.

With the focus of the proposed regulations and legislation on the reasonableness of the fees paid under the contract or arrangement for plan services, plan fiduciaries should take steps to ensure continued compliance with the requirements of ERISA Section 408(b)(2). These steps begin with the plan fiduciary reviewing the existing contracts and arrangements to ensure that they satisfy the current requirements of ERISA Section 408(b)(2), and identify changes that may be required if the DOL finalizes its proposed regulation. Remember that failure of the service provider's arrangement to qualify for the ERISA Section 408(b)(2) exemption means that the contract or arrangement constitutes a prohibited transaction. The plan fiduciary by participating in such an arrangement will violate Section 406(b) of ERISA's prohibited transaction rules and the service provider who is a disqualified person under I.R.C. Section 4975 would be subject to excise taxes.

   ISSN 1069-5117