CONFLICT OF INTEREST FAQS
(408B-2 DISCLOSURE TRANSITION PERIOD, RECOMMENDATIONS TO INCREASE CONTRIBUTIONS AND PLAN PARTICIPATION)

U.S. Department of Labor
Employee Benefits Security Administration
August 2017

The following FAQs provide information on (1) a "fiduciary status disclosure" issue under the Department of Labor's ERISA section 408(b)(2) service provider disclosure regulation that applies to ERISA pension plans, (2) whether recommendations to plan participants and IRA owners to contribute to or increase contributions to a plan or IRA constitute fiduciary investment advice under the Fiduciary Rule, and (3) whether recommendations to employers and other plan fiduciaries on plan design changes intended to increase plan participation and contribution rates constitute fiduciary investment advice under the Fiduciary Rule. This guidance, like the Fiduciary Rule and related exemptions, is generally limited to advice concerning investments in IRAs, ERISA-covered plans, and other plans covered by section 4975 of the Internal Revenue Code.

Fiduciary Rule and 408b-2 Service Provider Disclosure Regulation

Q1. Service providers for ERISA plans generally must satisfy a statutory exemption in section 408(b)(2) of ERISA and implementing regulations that requires service contracts and arrangements to be reasonable and that prohibits service providers from receiving more than reasonable compensation. Under an implementing regulation that became applicable in 2012, "covered service providers" (which includes various fiduciary and non-fiduciary service providers) to ERISA 401(k) and other covered pension plans must make certain disclosures to the plan regarding the services to be provided to the plan and the compensation the covered service provider expects to receive.[1] The primary purpose of the disclosures is to ensure that plan fiduciaries have the information they need to select and monitor service providers and to assess the reasonableness of service contracts, including the reasonableness of service providers' compensation and the magnitude of any potential conflicts of interest. If services are to be

[1] See 29 CFR 2550.408b-2(c). A "Fact Sheet" regarding the regulation is available at www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-regulation-service-provider-disclosures-under-408b2.pdf. For purposes of the 408b-2 regulation, 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 regulation 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.

provided to the plan (or to certain investment contracts, products, or entities that hold plan assets) in a fiduciary capacity, the service provider is generally required to notify the plan of that fact. Do service providers who are providing fiduciary investment advice as a result of the Fiduciary Rule becoming applicable on June 9, 2017, need to update their disclosures under the 408b-2 regulation, in particular to disclose their status as fiduciaries?

A1. Among other disclosures required under the Department's 408b-2 regulation, if a service provider under a contract or arrangement with an ERISA pension plan reasonably expects that the service provider, an affiliate or a subcontractor will provide services as a fiduciary within the meaning of ERISA section 3(21), the service provider generally has an obligation to disclose to an appropriate plan fiduciary that services will be rendered in a fiduciary capacity.[2] In general, if a covered service provider will continue after the Fiduciary Rule to provide services only in a non-fiduciary capacity, or has already effectively disclosed investment advice fiduciary status, no additional disclosure would be required under the 408b-2 regulation. Following is a short description of the disclosure obligations and the timing of those obligations under the 408b-2 regulation, including transitional guidance for service providers who became investment advice fiduciaries as a result of the Fiduciary Rule becoming applicable on June 9, 2017.

Service Providers Who Do Not Reasonably Expect to Provide Fiduciary Investment Advice under the Fiduciary Rule

In the case of a non-fiduciary service provider to an ERISA pension plan that has structured its service contract or arrangement so that it reasonably and in good faith believes that it will not be providing services to the plan that would make it an investment advice fiduciary under the Fiduciary Rule, the service provider would not be required to disclose investment advice fiduciary status under the 408b-2 regulation. The Department's conclusion in this regard would not be affected by the fact that it is possible that actions of individual agents, representatives or employees involved in implementing a service contract or arrangement (e.g., call center employees) may exceed, in individual circumstances, contract limits that may result in communications that constitute investment recommendations covered by the Fiduciary Rule. The Department would not treat such unauthorized and irregular actions that may exceed service contract limitations as necessitating a disclosure of investment advice fiduciary status under the 408b-2 regulation.

Service Providers Who Will or Reasonably Expect to Provide Fiduciary Investment Advice Services under the Fiduciary Rule

On April 7, 2017, the Department announced that the applicability dates for the Fiduciary Rule and related prohibited transaction exemptions would be delayed from April 10, 2017 to June 9,

[2] 29 CFR 2550.408b-2(c)(1)(iv)(B).

2017, with certain provisions in the exemptions delayed for a Transition Period extending to January 1, 2018. One provision in the Best Interest Contract (BIC) Exemption and the Principal Transactions Exemption that was delayed to January 1, 2018, required disclosure of fiduciary status by the financial institution and adviser who use the exemptions. Accordingly, disclosure of fiduciary status is not a current condition of these exemptions or the relief provided in these exemptions. However, service providers may still have a separate obligation to disclose fiduciary status under the 408b-2 regulation in the manner set forth below.

During the Transition Period, Service Providers Need Not Use the Term "Fiduciary" to Satisfy the 408b-2 Regulation as Long as They Accurately Disclose Their Services

The 408b-2 regulation generally requires covered fiduciary service providers to state that they will provide services "as a fiduciary" to satisfy a disclosure requirement in 29 CFR 2550.408b-2(c)(1)(iv)(B). Some affected service providers, however, have expressed concern about potential confusion resulting from such an express statement on fiduciary status during the Transition Period, noting that the BIC and Principal Transactions Exemptions do not require such a statement. Other service providers have expressed an additional concern about making such an express disclosure during the Transition Period because of continued uncertainty about possible changes the Department may make to the Fiduciary Rule and associated exemptions (although they believe they are providing fiduciary investment advice services under the currently applicable Fiduciary Rule).

In light of those concerns, during the Transition Period, the Department would treat a covered service provider as satisfying the 408b-2 regulation fiduciary status disclosure requirement in connection with the person's provision of fiduciary investment advice as a result of the Fiduciary Rule becoming applicable on June 9, 2017, if, in addition to any other required disclosures under the 408b-2 regulation, the covered service provider furnishes an accurate and complete description of the services that will be performed under the contract or arrangement with the plan, including the services that would make the covered service provider an investment advice fiduciary under the currently applicable Fiduciary Rule. Under the unique circumstances of the Department's ongoing review of the Fiduciary Rule and related exemptions, the Department would not treat the failure to expressly use the term "fiduciary" as a violation of the 408b-2 regulation's fiduciary disclosure requirement until the applicability date of the BIC and Principal Transactions Exemptions' requirement to disclose fiduciary status (currently January 1, 2018).[3] To the extent that circumstances surrounding this interim compliance standard give rise to the

[3] On March 28, 2017, the Treasury Department and the IRS issued IRS Announcement 2017-4 stating that the IRS will not apply § 4975 (which provides excise taxes relating to prohibited transactions) and related reporting obligations with respect to any transaction or agreement to which the Labor Department's temporary enforcement policy described in FAB 2017-01, or other subsequent related enforcement guidance, would apply. The Treasury Department and the IRS have confirmed that, for purposes of applying IRS Announcement 2017-4, this FAQ constitutes "other subsequent related enforcement guidance."

need for other temporary relief, including prohibited transaction relief, EBSA will consider taking such additional steps as necessary.

The Department notes, in this connection, that many financial institutions and advisers have already communicated with their current ERISA plan customers about the Fiduciary Rule and related exemptions. We understand that many of those communications describe changes in the services to be provided in light of the Fiduciary Rule and exemptions. The Department expects that those communications will, in many cases, be sufficient to satisfy the 408b-2 regulation disclosure requirements described above. However, in the case of a service provider who is providing or reasonably expects to provide fiduciary investment advice services within the meaning of the currently applicable Fiduciary Rule and whose contract with or disclosures to an ERISA pension plan client include a statement that the service provider is *not* a fiduciary or is *not* providing fiduciary services, the Department would not treat the service provider as having furnished the plan with an accurate and complete description of the services that will be performed under the contract or arrangement until a revised contract or disclosure is provided that removes or corrects that affirmatively incorrect statement.

Requirement to Update Disclosures "As Soon As Practicable" After Being "Informed" of a Change in Fiduciary Status

In the case of current service providers who will, or reasonably expect to, provide fiduciary investment advice services to their ERISA pension plan customers, the 408b-2 regulation says that the service provider must disclose the change in fiduciary status 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 circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable.[4] In the Department's view, for purposes of the 408b-2 regulation, an existing service provider to a pension plan would not have been "informed" of a fiduciary status change that is the result of the Fiduciary Rule until the applicability date of the Fiduciary Rule, i.e., June 9, 2017. Further, the Department believes that the broad range of service providers who may have experienced changes in fiduciary status as a result of the Fiduciary Rule taken together with the uncertainty regarding the substance and timing of the Department's past decision on whether to delay the applicability date of the Fiduciary Rule and related exemptions, constitute a unique and extraordinary circumstance beyond the control of current plan service providers that makes a 60-day disclosure period for changes in required 408(b)(2) regulation disclosures impractical and unreasonably short, at least for a significant percentage of affected service providers. Accordingly, in the Department's view, covered service providers will be in compliance with the timing of the "change in fiduciary status" disclosure requirement in the 408b-2 regulation if they

[4] 29 CFR 2550.408b-2(c)(1)(v)(B).

disclose such change, or make a transition period disclosure described above, as soon as practicable after June 9, 2017, even if more than 60 days after June 9, 2017.

Manner of Delivery and Electronic Communications

The 408b-2 regulation allows service providers to use electronic means to disclose information under the regulation to responsible plan fiduciaries provided that the covered service provider's disclosures on a website or other electronic medium are readily accessible to the plan fiduciary, and the fiduciary has received clear notification on how to access the information.

Recommendations to Contribute to a Plan or IRA

Q2. Plans and their service providers often encourage plan participants to make contributions to the plan at levels that maximize the value of employer matching contributions or to otherwise increase participants' contributions or savings to meet objective financial retirement milestones, goals, or parameters based upon the participant's age, time to retirement or other similar measures, without recommending any particular investment or investment strategy. Would it be fiduciary investment advice under the Fiduciary Rule to encourage additional savings or contributions to a plan or IRA in this manner?

A2. No. The Fiduciary Rule generally does not treat communications "about the benefits of plan or IRA participation, [and] the benefits of increasing plan or IRA contributions" as fiduciary investment advice, provided that the information and materials do not include recommendations with respect to specific investment products or recommendations with respect to investment management of a particular security or other investment property. The following are intended as illustrative examples of such communications that would not constitute fiduciary investment advice under the Fiduciary Rule:

Communication 1. A plan enrollment brochure that is sent to individuals at or near the date on which they become eligible to participate (or are automatically enrolled) in a defined contribution plan that includes a section on generally how people should save for retirement expressed as a percentage of pay. For example, the plan's mutual fund provider may provide plan participants an enrollment brochure, which states that most people should consider saving at least 15 percent of their pay each year, including matching employer contributions. The brochure recommends that the participant contribute to the plan 2 percent of his or her pay and increase that amount each year by 1 or 2 percent toward the goal of saving 15 percent of pay when considering voluntary employee contributions and employer matching contributions.

Communication 2. A targeted email that is sent on the anniversary date of a participant's enrollment that contains no reference to a specific investment, but suggests that the

individual increase his or her contribution to the plan by a specific percentage because the participant is short of a particular savings goal and should increase his contributions by a certain percent this year and every year for three years in order to reach that goal.

Communication 3. A targeted email that is sent to an employee on his or her birthday that makes a suggestion as to the amount to contribute based on the amount that the individual has already saved in his plan, but that is silent with respect to specific investment choices. For example, each year active plan participants receive targeted emails during participants' birth month. A 50 year old participant receives a targeted email which states that, as a rule of thumb, most retirees should aim for as much as 75 percent of their preretirement income to maintain their current lifestyle. The email goes on to state that the participant is short of that goal and should increase his contributions by 2 percent this year and every year for three years in order to reach that goal.

Communication 4. A telephone call with an ERISA plan participant in which a call center employee suggests a specific overall retirement savings goal (e.g., 15 percent of pay when considering voluntary employee contributions and employer matching contributions) and recommends that the participant, who is currently contributing 4% of her salary to the plan, increase her contribution by 3% to a total of 7% of her annual salary to take full advantage of the employer matching contribution of up to 7% of the participant's annual salary.

Recommendations on Increasing Plan Participation and Contribution Rates

Q3. Would it be investment advice under the Fiduciary Rule if a person makes recommendations or suggestions to a plan administrator or other plan fiduciary relating to methods to increase employees' participation in, or level of contributions to, an ERISA plan?

A3. No. Provided that the information and materials do not include recommendations with respect to specific investment products or recommendations with respect to investment management of a particular security or other investment property, the Department would not view such communications as investment advice recommendations within the meaning of the Fiduciary Rule even in cases in which the recommendation is based on specific attributes of the plan or its demographics, such as correlations between participation or contribution rates and specific participant attributes.