



## Plan Fiduciaries Should Be Aware of ERISA Section 408(b)(2)-related Contractual Considerations for Service Provider Contracts

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ERISA-governed retirement plan fiduciaries may be in the process of entering, extending or renewing service provider contracts on behalf of plans before year-end. For those plans that intend to rely on the statutory prohibited transaction exemption under ERISA Section 408(b)(2) in order to enter into the contract with the service provider (the “service provider exemption”), below is a non-exhaustive list of exemption-related contract considerations plan fiduciaries should consider.

- Make sure that the service provider provides you with (and you carefully review) the disclosures required by the Department of Labor rules under ERISA Section 408(b)(2) **reasonably in advance of** the date the contract is entered into, extended, or renewed. This information should **not** be provided **after** the contract is entered, extended or renewed, if you intend to rely on the service provider exemption.
- Use the disclosures mentioned above to determine whether the proposed contract and the service provider’s proposed compensation under the contract are reasonable. Note that the plan fiduciary does **not** have to provide a representation to this effect (*i.e.*, that the contract and/or the service provider’s compensation is/are reasonable) in the contract. This term is increasingly being used in contracts; typically, we seek to delete it because providing such a representation is not specifically required under the 408(b)(2) rules.
- Look for contract terms stating that the service provider, by its provision of the required disclosures:
  - (i) has complied with its obligations under the 408(b)(2) rules; and/or
  - (ii) will be indemnified and held harmless from costs incurred relating to allegations/claims that the service provider exemption was not met with respect to the contract.

These are examples of other terms that are not specifically required by the 408(b)(2) rules, yet are increasingly being used in contracts; we typically seek to delete these, too. With respect to (i), such a provision may not be correct because the service provider has a continuing obligation to notify plan fiduciaries of any changes in the information provided. With respect to (ii), it is unclear whether such a provision would be enforceable under ERISA.

Please do not hesitate to reach out to us with any questions or comments you have concerning these or other issues relating to ERISA Section 408(b)(2).

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