

THE ASPPA Journal

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Practical ERISA 408(b)(2) Guidance for Service Agreements

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The Department of Labor has now given us all a little more time to prepare, with the new effective date of January 1, 2012, for 408(b)(2) disclosure and service agreement requirements. While you have been given a slight reprieve, the job of updating your service agreements still exists – so let's take a practical approach to help you get that accomplished. What exactly do you, as a TPA and/or recordkeeper, need to consider when drafting your new service agreements in order to disclose all of the information that will be required?

The ASPPA Service Provider Certification program (formerly known as the ASPPA Recordkeeper Certification program) is sponsored by ASPPA and administered by the Centre for Fiduciary Excellence (CEFEX). An ASPPA Certification Task Force, a cross-disciplined industry group established in 2007, developed and continues to maintain the Standards of Practice, which form a uniform standard of excellence for firms providing plan administration and/or recordkeeping services. When 408(b)(2) guidance is finalized, the ASPPA Service Provider Certification program will adopt a detailed checklist as part of those standards to verify that firms seeking initial certification and firms seeking re-certification have incorporated the new regulation's requirements. This checklist will be shared in advance with firms who participate in the certification program to help those firms prepare for 2012 compliance.

In conjunction with Reish & Reicher, CEFEX has summarized the requirements of the new regulation as follows:

1. Do you have a signed Service Agreement in place with each of your clients?
2. Does your Service Agreement:
 - Describe each of the services you provide?
 - Describe the direct or indirect compensation you or your affiliate receives?



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- Describe compensation that will be paid among you and an affiliate that is determined on a transaction basis or charged directly against the investment and reflected in the investment's net value?
- State whether you will bill the client, deduct fees directly from plan assets, or be paid in some other manner?
- Describe how prepaid fees (if applicable) will be calculated and refunded if the agreement terminates before the fees are fully earned?

“ExpertPlan has successfully undertaken four consecutive CEFEX assessments to the ASPPA Standard since the program’s inception and is very proud of the certification. We appreciate and value its relevance to us as a means of continually improving our operation. We want to be assessed to the highest standard and be transparent to our stakeholders and clients. We believe the program is critical to increasing accountability in our industry, thereby serving retirement plan participants.”

—Sid Garai, Chief Administrative Office, ExpertPlan, Inc., East Windsor, NJ

- Describe compensation, if any, that you or an affiliate will receive in connection with termination of the agreement?
 - Provide a mechanism for a responsible fiduciary to agree with changes, either affirmatively or through a “negative election” (if you’re able to change your fee structure from time to time)?
 - Provide a reasonable and good faith estimate of the cost of the recordkeeping services (assuming you provide recordkeeping services to an ERISA plan and such recordkeeping services are provided without explicit compensation or the compensation is offset by other compensation received)?
 - State you are not a fiduciary when performing services under the Agreement?
 - State that you agree to disclose all information related to the Agreement and your compensation received there under that is requested by a client in order to comply with any reporting or disclosure requirements applicable to the client?
 - State that you will disclose any changes to the information provided to a client within a reasonable period of time after you become aware of the change?
3. Do you have the ability to affect your own compensation or that of an affiliate without the prior approval of a fiduciary for the client (for example, as a result of incentive, performance-based, float or other contingent compensation)?
4. If you are providing recordkeeping services to an ERISA-governed participant-directed individual account plan with at least one designated investment alternative, do you provide the following information for each designated investment alternative:
- Compensation that will be charged against the investment in connection with the acquisition, sale, transfer or withdrawal from the investment;
 - A description of the annual operating expenses if the return is not fixed; and
 - A description of any ongoing expenses in addition to annual operating expenses?
5. Do you or an affiliate expect to participate in or otherwise acquire a financial or other interest in any transaction to be entered into by the client?
6. Do you or an affiliate have any material financial, referral or other relationship or arrangement with a money manager, broker, other client of Service Provider or other person or entity that creates or may create a conflict of interest for you in performing services under your agreement?
7. Do you or an affiliate have policies to address conflicts of interest, such as procedures for offsetting revenue sharing received against the amount that it charges the client or paying such revenue sharing to the plan?
8. For ERISA plans, are you aware that if you discover an error or omission in the required disclosures, you must notify the Client of the error or omission within 30 days of discovery?
- The ASPPA Standard of Practice describes how a service provider candidate of any size or type can help plan sponsors fulfill their fiduciary obligations. CEFEX uses two certifications classifications: “recordkeeping services” and “administration services;” a firm can be certified in either category or both categories. The Standards of Practice include best practices for governance, organization, human resources, operations, planning, systems and disclosure.

“Our ASPPA certification assures our clients that DailyAccess Corporation is adhering to both best practices and the latest regulations. We believe our clients are best served by a recordkeeper that adheres to the proposed ERISA 408(b)(2) regulation as soon as possible. Plan Sponsors should be asking these important questions about disclosure and conflicts of interest.”

—Tommy Thomasson, President & CEO, DailyAccess Corporation, Mobile, AL

Through the CEFEX assessment process, recordkeepers and administrators receive the benefit of an independent review of the practices, allowing for confidential feedback in the form of “Opportunities for Improvement” or “Non-conformance Reports,” effectively providing certification candidates with industry-wide best practice benchmarking.

Plan sponsors who hire ASPPA-certified service providers can be assured that these firms have addressed the requirements of ERISA 408(b)(2) and comply with industry best practices. Certified firms have been independently assessed for adherence to these best practices by expert analysts, using the international ISO 19011 audit process. If a service provider is not certified, the plan sponsor should specifically inquire about the Service Agreement provisions summarized above.

We hope that this information will assist you in drafting your new service agreements in preparation for the finalized regulation and has raised your awareness as to how your firm will benefit by going through the process required for the ASPPA Service Provider Certification. In addition to business improvements, certified firms can realize up to 25% on Errors and Omissions insurance premiums, thereby helping them offset the cost of the certification.

For more information on the ASPPA Service Provider Certification program, visit

www.asppa.org/home-page/rkcert.aspx. 



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