

ERISA SECTION 408(B)(2) REGULATION for Cash Management Services provided by U.S. Bank, National Association Business Accounts and Global Treasury Management Services

Frequently Asked Questions

- 1. What is the Department of Labor’s ERISA § 408(b)(2) Regulation and what is the purpose for it?** Section 408(b)(2) of ERISA provides a statutory exemption from the legal prohibition against payment for services from a Covered Plan to any party-in-interest including a Fiduciary provided: (1) such service is necessary for the establishment or operation of the plan; (2) such service is furnished under a contract or arrangement that is reasonable; and (3) no more than reasonable compensation is paid for such service. In January 2012, the Department of Labor (“DOL”) issued a final regulation under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), which requires a “covered service provider” to provide the responsible plan fiduciary with certain disclosures concerning fees and services provided to certain of their ERISA governed plans. This regulation is commonly known as the service provider fee disclosure rule and is referred to herein as the “408(b)(2) Regulation”. To be subject to the 408(b)(2) Regulation, the covered service provider must anticipate receiving \$1,000 or more in compensation over the life of the agreement or arrangement with the plan. Under the 408(b)(2) Regulation, a prohibited transaction could occur if a covered service provider fails to provide the responsible plan fiduciary with this information. The full text of the Department of Labor’s final 408(b)(2) Regulation is located at: <https://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2262.pdf>. The required disclosures must be furnished in advance of a plan fiduciary entering into or extending a contract or arrangement for covered services. The Department of Labor has said that having this information will permit a plan fiduciary to make a more informed decision on whether or not to enter into or extend such contract or arrangement by allowing to them assess the reasonableness of compensation paid for the services and to identify any conflicts of interest.
- 2. What types of retirement plans and accounts are covered by these regulations and what is the effective date?** The types of qualified retirement plans which are required to receive the 408(b)(2) Disclosures include 401(k), profit-sharing and money purchase plans. These regulations do not apply to Traditional or Roth IRAs, SEP-IRAs, SIMPLE IRAs, 403(b) plans with no deposit obligations prior to January 1, 2009, or plans sponsored by sole proprietors with no employees such as individual 401(k) plans. Under the 408(b)(2) Regulation, the required disclosures must be provided prior to the time the contract or arrangement is entered into or extended. The regulation was effective on July 1, 2012 and disclosures for existing contracts or arrangements were required to be furnished by that date.

The Consolidated Appropriations Act of 2021 (“CAA”) amended Section 408(b)(2) now also includes health and welfare plans in the definition of “covered plans” for purposes of the disclosure requirement. Contracts and engagements entered into, extended or renewed on or after December 27, 2021, are subject to disclosure.

Disclosures are not required for government and church plans, both of which are exempt from ERISA. Disclosures are also not required for other ERISA-covered life and disability plans.

3. **Who is a “Covered Service Provider” under the 408(b)(2) Regulations?** Covered Service Providers are defined in one of three categories:
 - ERISA Fiduciaries or Investment Advisors who are registered under Investment Advisors Act of 1940 and who provide services directly to the plan or to an investment that holds plan assets in which the plan has a direct equity interest
 - Providers of recordkeeping or brokerage services to individually directed plans (i.e., plans that permit participants to direct investments in their plan account, such as a self-directed 401(k) plan)
 - Providers of other services (along with their affiliates and sub-contractors) that expect to receive direct or indirect compensation for services such as accounting, auditing, actuarial, appraisal, banking, consulting, legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services.
4. **What responsibility does a Covered Service Provider have under the 408(b)(2) Regulation?** Every Covered Service Provider to a retirement plan subject to this regulation is responsible for providing compensation-related disclosures to the responsible plan fiduciary when the Covered Service Provider expects to receive \$1,000 or more in direct or indirect compensation over the life of the contract or arrangement to enable a Plan Fiduciary to comply with any reporting and disclosure requirement (e.g. Form 5500 and any related schedules).
5. **What responsibility do you have as the responsible plan fiduciary under the 408(b)(2) Regulation?** As a plan sponsor and/or responsible plan fiduciary under the 408(b)(2) Regulation, ERISA imposes certain duties on you, including the duty to prudently select and monitor the services provided to the plan and those who provide them, the investments made by the plan and to ensure the plan pays no more than reasonable compensation for such services and products. Having detailed compensation related information from a Covered Service Provider is intended to allow you to perform a more informed evaluation of all contracts and arrangements between the plan and each Covered Service Provider so that you can determine if the contract or arrangement is, or continues to be, reasonable and prudent.
6. **Are the contracts or arrangements entered into by the Covered Service Provider with subcontractors and affiliates subject to disclosure under the 408(b)(2) Regulation?** Certain contracts or arrangements between a Covered Service Provider and a subcontractor or affiliate are subject to disclosure if they are part of the contract or arrangement between the plan and the Covered Service Provider.
7. **What compensation is required to be disclosed and in what form must this disclosure take?** The disclosure must include a description of all direct compensation (amounts paid directly by the plan, amounts paid by the plan sponsor that is reimbursed by the plan, and amounts paid directly from participant accounts in the plan) that the covered service provider (including all affiliates and subcontractors) expect to receive in connection with the covered

services to the plan, as well as the manner in which the compensation will be received. Compensation can be disclosed as a formula, an amount, a range, or an estimate. The disclosure must also include a description of all indirect compensation that the service provider and its affiliates and subcontractors expect to receive in connection with the covered services to the plan, including the manner in which the compensation will be received. Indirect compensation is compensation received from sources other than directly from the plan or plan sponsor. A Covered Service Provider only has to provide a disclosure for the services it provides to the plan. As such, it is possible for a responsible plan fiduciary to receive multiple disclosures from a covered service provider providing different services for the plan.

8. **Can the disclosures be made electronically?** Yes, they can be made electronically, such as having them located to a web site, on a disc or similar electronic media either provided to or made available to the responsible plan fiduciary.
9. **What happens if there are changes in the disclosures previously provided to the responsible plan fiduciary?** Changes to disclosures must be provided by Covered Service Providers to the responsible plan fiduciary no later than 60 days from the date on which the Covered Service Provider is made aware of the change. However, changes to investment fund information must be reported annually. The Bank will post any changes to these disclosures on this web site when changes are required to be made to them. The Bank will not notify you when these changes are made. It is your responsibility to consult this web site frequently to learn about any changes that have been made to these disclosures.
10. **What happens if a Covered Service Provider does not provide the disclosures required by the 408(b)(2) Regulation?** Failure of a Covered Service Provider to provide the responsible plan fiduciary with the information required under the 408(b)(2) Regulation may result in a prohibited transaction being entered into. Under the 408(b)(2) Regulation, the responsible plan fiduciary must take certain actions if the required disclosures are not received or if the plan fiduciary thinks they are insufficient in order to avoid liability under the prohibited transaction provisions of ERISA. Failure to do so could result in a breach of fiduciary duty.
11. **Where can I obtain these disclosures?** The Bank has posted the disclosures required by the 408(b)(2) Regulation at: <https://www.usbank.com/corporate-and-commercial-banking/treasury-payment-solutions/treasury-management/terms-and-conditions.html>
This information will be updated periodically for changes in fees, services, etc. and it is your responsibility to check this web site periodically for changes. A hard-copy disclosure document is also available by contacting your Commercial Support Representative at 866-856-9063 or email them at commercialsupport@usbank.com.