

**Testimony of Hewitt Associates Before the  
DEPARTMENT OF LABOR  
Employee Benefits Security Administration**

**Hearing on Reasonable Contracts or Arrangements Under  
Section 408(b)(2)--Fee Disclosure**

**March 31, 2008**

**Introduction**

Good afternoon. My name is Alison Borland, and on behalf of my colleague Cindy Milstead and Hewitt Associates, I thank you for inviting us today. I lead our defined contribution consulting practice. Cindy is a senior Benefits attorney in Hewitt's office of General Counsel.

For more than 65 years, Hewitt Associates (NYSE: HEW) has provided clients with best-in-class human resources consulting and outsourcing services. Hewitt consults with more than 3,000 large and mid-size companies around the globe to develop and implement HR business strategies covering retirement, financial and health management; compensation and total rewards; and performance, talent and change management. As a market leader in benefits administration, Hewitt delivers health care and retirement programs to millions of participants and retirees, on behalf of more than 300 organizations worldwide. Additionally, as the largest independent record-keeper not affiliated with an investment management firm, Hewitt has a unique perspective to share on these proposed rules. We are going to focus on three areas of the proposed regulations: Uniform Fee Disclosure, Conflict of Interests, and the Timeline for Compliance.

**Uniform Fee Disclosure**

**Hewitt supports thorough fee disclosure to plan fiduciaries, but revisions to the proposed rules are required in order for fiduciaries to fulfill their fiduciary responsibilities with respect to plan fees.**

Disclosure of plan fees is critical for two reasons:

1. To enable fiduciaries to determine whether the service provider's fees constitute reasonable compensation, thus satisfying the requirements for the prohibited transaction exemption under Section 408(b)(2) of ERISA, and
2. To provide information needed to fiduciaries in order to act prudently, and solely in the best interest of plan participants and beneficiaries, as required by Section 404(a) of ERISA.

The proposed disclosure rules do not support the two stated goals for two reasons. First, they fail to facilitate meaningful comparison of costs across plan providers because of different levels of disclosure for bundled and unbundled service providers. Second, they fail to provide sufficient information to understand reasonable changes in plan expenses over time because of the lack of required disclosure of fees that vary by the number of participants versus the fees that vary by asset size. In order to determine the reasonableness of costs, fiduciaries must understand the major components of plan expenses, regardless of the packaging, as well as the services covered by those costs.

Consider the two primary components of services needed for an individual account plan, which generally account for more than 90% of plan costs:

1. Investment management (costs depend on the value of assets). These generally comprise the majority of costs.
2. Administrative, including recordkeeping, communication and education (costs vary by number of participants, not by the asset value—a key difference)

Bundled providers generally build all of these fees into the basis point charge, so that the fees are paid as a percentage of assets each year. While we are not arguing that this approach is unreasonable, we want to walk through a simple example to illustrate what can result if the underlying component costs, included in the bundled basis point charge, are not disclosed to and monitored by the fiduciary.

### **Example**

- Consider a plan with \$100 million in assets with 3,000 participants. The total fee charged is 90 bps. This covers the 60 bps required for asset management fees, and the 30 bps for the other costs of the plan. That 30 bps translates to \$300,000 in total, or \$100 per participant. Only the 90 bps is disclosed.
- Over a period of three years, assets increase to \$300 million through contributions, rollovers, and investment return. The participant count increases to 4,000. Fees remain 90 bps.
- However, with the growth of the assets, the fees for the administration and other non-asset related costs have now grown to \$900,000 from \$300,000. Per participant, they have grown from \$100 to \$225. Because the costs to provide these services are tied more to the number of participants, rather than to the level of assets, this cost increase is difficult to justify.

Looking at this example, it is impossible to argue that paying more than twice the per person administrative costs over a three year period is reasonable, when the participant count has increased by only one third. If the plan sponsor was aware of this increase it could use this information to consider alternate providers, or to negotiate lower fees with the current provider, and receive the same services for a much lower price.

Under the proposed rules, with the bundled fee arrangement, and the lack of disclosure of the cost of the underlying services, a plan fiduciary would never have the knowledge needed to identify the issue described in this example. The result is that plan participants are paying significantly more than needed for the services provided—which erodes the ultimate value of their retirement nest egg.

Ultimately, much of the problem here resides in the fact that a significant proportion of plan costs are not dependent on asset size, but on number of participants. When all costs are bundled into the asset-based fee, it is critical that the underlying components be fully disclosed in order for a fiduciary to make an informed, and prudent, decision.

Further, the example I just outlined reflects just one facet of the problem, although the most common one. Similar issues arise in many other instances when various other plan changes occur, such as changing funds, shifting asset allocation, and varying investment performance.

Consequently, because of the importance of complete disclosure in order for fiduciaries to make prudent decisions about the reasonableness of fees, we respectfully request that the final rules require the disclosure of the allocation of fees to affiliates and subcontractors in a bundled fee arrangement to promote uniform disclosure and a better understanding of plan fees.

## Conflicts of Interest

**The conflicts of interest disclosure provision should be omitted from the final regulations.** If not omitted, the conflicts of interest provision needs to be tightened up, with more detail and examples. Existing law and the other provisions of the proposed regulations should provide employers with sufficient information to judge whether any other business relationship of a service provider will compromise its performance under a contract. Both fiduciaries and service providers have always had to be alert to possible conflicts caused by other business relationships that might result in a prohibited transaction. Moreover, prudent business practices dictate that clients should be made aware of any relationship that might appear to compromise a relationship. Therefore, the conflicts of interest requirements are duplicative and unnecessary.

If the conflicts of interest provision is not omitted from the final rules, then it needs to be clarified. The provision requires a service provider to disclose any relationship with any entity that creates or “may create” a conflict of interest in performing services under the contract. This requirement could be interpreted to encompass almost any business relationship a service provider may have. Given that the consequences of noncompliance with these requirements may include the cancellation of service contracts, loss of business relationships, and prohibited transaction penalties, most service providers may be inclined to interpret this conservatively and over-disclose.

Hewitt has over 5,500 different U.S. business relationships. Accordingly, for some types of services, it is possible that we have business relationships with several hundred different business entities. Most of those entities will not be related to the provision of our services for a specific client. However, given that our business relationships relate to the same type of service, without additional guidance, we may be inclined, to over-disclose. Our clients would then have to perform due diligence and evaluate each such relationship as a potential conflict of interest.

Practically, we are concerned that clients might look at our disclosure and determine that we have too many “conflicts” or “potential conflicts.” They might think it is better to go with a smaller provider with fewer relationships in need of evaluation. In reality, we believe that our many business relationships allow us to provide better and more effective service for our clients. However, if these relationships are categorized as potential “conflicts” some clients and potential clients might mistakenly feel differently.

Therefore, if included in the final rules, this provision could result in an inefficient process of mountainous disclosure, resulting in overwhelming review obligations for the plan fiduciary. The time, effort, and cost to all parties would be unjustifiably burdensome. We therefore request that this provision be omitted from the final regulations, or at least better defined.

## Timing of Compliance

**The effort to comply with the final regulations will take much longer than 30 days after finalization. Additionally, to address the sheer volume of existing contracts a good faith transition period is required. We suggest that the final regulations not be effective for at least one year after the effective date for existing contracts.** The preamble to the proposed regulations indicates that the regulations will be effective 90 days after publication. Given the amount of clarification that will be necessary in order to comply with these regulations, we request that service providers should be required to make a good faith effort to comply with these regulations, but that the regulations are not effective for at least one year after publication.

Additionally, the proposed rules are not specific regarding the treatment of existing contracts or arrangements. For large service providers, such as Hewitt, there are several thousands of contracts. If the intent of the proposed regulations is that service providers must also provide required disclosure for existing contracts on the effective date, it would be impossible to comply within a 90 day window. We therefore request that for at least one year after the effective date of the final rules, service providers will be deemed

compliant as long as they make the required disclosures by the end of the transition period. We also request that the Department provide clarification that existing contracts do not have to be amended. Rather, service providers may meet these requirements by providing the required disclosures only.