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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: 408(b)(2) Amendment
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Re: Comments on 408(b)(2) Regulation Amendment Proposed by the Department of Labor

Ladies and Gentlemen:

The Stable Value Investment Association (SVIA or Association) is pleased to comment on the proposed amendment to the Department's regulation under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), which was published in the *Federal Register* on December 13, 2007 (referred to herein as the Proposed Regulation). SVIA supports and encourages the Department's efforts to provide transparency in order for fiduciaries to better understand and evaluate the fees paid for services to employee benefit plans governed by ERISA.

The Proposed Regulation is of major importance to SVIA's 100-plus corporate members who represent every segment of the stable value investment community, including public and private retirement plan sponsors, insurance companies, banks, investment managers and consultants. SVIA's members collectively manage $413 billion in stable value assets as of December 31, 2006 for over 109,000 defined contribution plans on behalf of more than 25 million defined contribution plan participants.

SVIA appreciates the Department's significant work in addressing issues related to plan services and fees. As the Department stated in the Preamble to the Proposed Regulation, services to ERISA governed plans have evolved considerably since the passage of ERISA. Additionally, given the changing needs of employees and advancements in technology and related efficiencies, it is anticipated that plan design and the manner in which services are provided will continue to change to be responsive and relevant to the marketplace. SVIA encourages the Department to establish a regulatory framework that provides concise, meaningful, consistent information in a manner that encourages the continuing evolution of service arrangements that are responsive to the changing needs of employees and their employers. SVIA welcomes the opportunity to work with the Department in this effort.

At this time, most of SVIA's comments on the Proposed Regulation ask for clarification in scope and definitions. These clarifications are necessary to provide for meaningful and consistent disclosure among the different types of service providers who service the diverse variety of plans governed by ERISA. SVIA commends the Department for the examples given and encourages the Department to provide more elaboration on these illustrations.

Stable Value Investments. By way of introduction, we point out that there are two possible ways a plan can invest in stable value. First, a plan may invest directly in a stable value product, such as a guaranteed investment contract sold by an insurance company or a bank investment contract sold by a bank. Under the terms of the contract, the insurance company or bank agrees to repay principal, and to credit the principal with an interest rate that is typically set for a predetermined period. The investing plan's assets include its interest in the contract, but not the assets underlying the contract – the contract is backed by the assets of the insurance company (either its general account or, in some arrangements, a dedicated separate account – which provides greater protection in the event of the insurance company's insolvency) or the bank, rather than a separate fund in which the plan is considered to hold an interest. The contract commits to pay out participant withdrawals at the book or contract value of the participant's interest in the contract, namely principal plus interest accrued to date. Another form of stable value product is a "synthetic" guaranteed investment contract, in which the plan owns a portfolio of fixed-income securities and enters into a "wrap" contract with an insurance company or bank (or an affiliate of an insurance company or bank). The wrap contract provides protection for the portfolio against loss of principal and accrued interest (subject to exceptions specified in the contract, such as early termination of the contract), so that participants are able to make withdrawals from the stable value investment at book or contract value even if the fair market value of the underlying portfolio has declined. (The ability of the participants to make withdrawals at book value, referred to as being "fully benefit-responsive," is a key feature of stable value products.)

The second, and currently more common, way for plans to invest in stable value is through a commingled fund, in the form of a bank collective investment fund or an insurance company separate account. Such a fund has the advantage of being able to diversify among multiple stable value providers. Because of the nature of the entity, and because its investors are typically limited to defined contribution plans (traditionally the only permitted investors in stable value products), the assets of the entity are treated as plan assets subject to ERISA. The fund in turn invests in guaranteed investment contracts, bank investment contracts and synthetic investment contracts. It may also use a money market mutual fund or other short-term investment fund for the temporary investment of cash received, being disbursed or awaiting investment.

Effective Date. In recognition of the magnitude of the scope of the Proposed Regulation and the need to provide consistent, comparable disclosures, SVIA encourages the Department to extend the effective date to a minimum of twelve months after the date of publication of the final regulation. SVIA further requests that the Department adopt a phase-in period of up to three years for existing service contracts, requiring them to be revised to comply with the final regulation only upon the earlier of renewal, material modification or the end of the three-year period, in order to encourage an orderly transition to this new standard. The vast number of

contractual arrangements that may be covered by the regulation would not make it feasible to provide the required disclosures and revise all existing contracts in a shorter period.

Scope of Regulation Issue. Proposed Section 2550.408b-2(c)(1)(i) would apply to a "contract or arrangement to provide services to an employee benefit plan," or an extension or renewal of such contract or arrangement. SVIA requests that the Department clarify the intended scope of the contracting and disclosure rules described in the Proposed Regulation, to resolve uncertainty as to what types of arrangements are covered. Specifically, SVIA requests that the Department make clear that the final regulation would not apply to services arrangements to funds that do not hold plan assets, investment contracts, wrap contracts, and services furnished to a service provider rather than the plan. We note that investment funds and contracts are subject to disclosure requirements under applicable banking, insurance and securities laws, so that coverage under the proposed regulation is unnecessary.

1. No Plan Assets. Contracts or arrangements for services to a pooled investment fund that does not hold plan assets subject to ERISA under the rules of the Department's plan asset regulation, 29 C.F.R. § 2510.3-101, as modified by Section 3(42) of ERISA, including a registered investment company, should not be subject to the Proposed Regulation. These services are not treated under ERISA as being provided to an employee benefit plan, so that the ERISA rules should not apply. This would be consistent with the language of Proposed Section 2550.408b-2(c)(1)(i), which focuses on services provided to plans.

It appears that some confusion on this point has arisen from the statement in the Preamble (72 Fed. Reg. at 70,990) that "persons or entities that provide investment management, recordkeeping, participant communication and other services to the plan as a result of an investment of plan assets will be treated as providing services to the plan." Because this statement specifies "to the plan," it should only include services provided to the investment fund if the fund, through holding plan assets subject to ERISA, is treated as equivalent to an ERISA plan. If the fund is paying indirect compensation to persons providing services to the plan, such as 12b-1 fees or shareholder servicing fees to a plan trustee or recordkeeper, that would trigger separate disclosure requirements under the Proposed Regulation, but should not require disclosure under these rules of fund fees that are not used to pay indirect compensation, such as investment advisory fees or custody fees.

2. Investment Contracts and Other Products. Investment by a plan or stable value fund in an investment product, such as a guaranteed or bank investment contract or money market mutual fund, should not be subject to the Proposed Regulation. In the case of a guaranteed or bank investment contract, the obligation to the plan is the return of principal and crediting of interest, so that there is no associated fee or other compensation that could be disclosed. Treating these as outside the scope of the Proposed Regulation is consistent with the Department's observation in the Preamble that an "investment of plan assets ... is not, in and of itself, compensation to a service provider for purposes of this regulation." 72 Fed. Reg. at 70,990. For purposes of clarity, SVIA believes the Department should incorporate this statement in the final regulation, specifying that investment-only contracts do not give rise to a service provider relationship.

A similar issue arises under the provision in the Proposed Regulation on "bundled" services. It requires separate disclosure of charges directly against a plan's investment, implying that an investment could be considered part of the bundle. While a plan or stable value fund may invest in an investment contract or mutual fund, those should be considered investments of the plan or stable value fund, not as part of a bundle of services obtained by the plan or provided through such a fund. Therefore, no disclosure obligation under the Proposed Regulation should be triggered solely as a result of such an investment.

The Department should also provide additional guidance as to when services that are incidental to the investment do not rise to the level of services to the plan for the purpose of the Proposed Regulation. For example, the reporting of net asset value or crediting rate information relating to an investment product should not make the issuer of the product a service provider under the rules of the Proposed Regulation. SVIA asks the Department to clarify that if a plan purchases an investment contract, the services provided to it by the issuer of such contract to fulfill its duties under the contract (e.g., accounting, disbursements, Form 5500 information and descriptions of the investment option or performance information that may be provided to plan participants) will not result in the contract issuer becoming a service provider. This further clarification will lead to uniformity in application of the Proposed Regulation, permitting plan sponsors to make more meaningful and valuable comparisons.

3. "Wrap" Contracts. As described above, wrap contracts are contracts entered into by a plan or stable value fund with an insurance company, a bank, or an affiliate of an insurance company or bank, to provide assurance that the crediting rate on a designated portion of the assets of the plan or fund will not fall below zero, thereby protecting the principal and accrued interest on those assets. The effect of the wrap contract is to permit the plan or fund to make payments in response to plan participant withdrawal requests at the book or contract value of their investments, even if the fair market value of the covered assets is lower. These contracts do not involve the provision of a service, and therefore should not be treated as contracts for services within the scope of the Proposed Regulation.

4. Services to the Service Provider Rather Than the Plan. The Proposed Regulation should make clear that it does not cover contracts or arrangements for services to a plan service provider, paid for by the service provider, that are not attributable to any particular plan, such as an arrangement under which the service provider obtains accounting or legal services. These services are to the provider itself rather than to any of the plans it serves, so that ERISA and any ERISA-related disclosure requirements should not apply to these services.

By contrast, if the service provider obtains services that are attributable to a particular plan, such as by subcontracting out the obligation to perform investment management or recordkeeping services for that plan, those services would presumably be within the scope of the Proposed Regulation. For example, the trustee of a stable value fund – a service provider – may retain an investment advisor to assist it in managing the fund, and may pay the investment advisor out of its trustee fee. Where such a subcontractor is paid out of the service provider's fee, we request the Department to clarify that the services would be considered part of a "bundled" service arrangement under Proposed Section 2550.408b-2(c)(1)(iii)(*3*), so that the services and related fees can be disclosed in the aggregate, avoiding duplicative reporting.

5. Services Covered by Another Exemption. SVIA also requests that the Proposed Regulation be clarified not to require disclosure of services (and any related compensation arrangements) that are covered by another statutory or administrative exemption. Existing exemptions already contain numerous reporting obligations, and we do not believe that duplicative, overlapping and/or possibly conflicting reporting will be useful.

Disclosure of Fees. The Proposed Regulation would require compensation to be disclosed in terms of dollar amounts, percentages or formulas. However, the Preamble to the Proposed Regulation (at 72 Fed. Reg. 70990) suggests that formulas for determination of compensation and fees can only be used if the service provider cannot disclose a specific monetary amount. SVIA encourages the Department to clarify that formulas and other methods can be utilized without regard to whether exact dollar amounts can be ascertained. For example, it should be permissible to disclose that certain services may be provided at hourly rates or other method, so long as they are agreed to pursuant to a written services agreement that otherwise meets the requirements of the Proposed Regulation. In addition, these disclosures will be required before entering into the contracted-for arrangement, at which point it may not be possible to accurately predict the exact dollar amounts of the fees.

A potential problem under the fee disclosure rule is that it is not readily applicable to certain arrangements – specifically, where an insurance company provides plan services that are paid for in part out of an investment option that does not have specifically identifiable fees. The insurance company provides a net rate product that typically is combined with plan recordkeeping, trusteeship and similar services, in the nature of a bundled arrangement. Instead of being paid directly by the plan, the insurer is paid indirectly by the investments utilized by the plan. In addition to mutual funds that pay 12b-1 and similar fees to the insurance company, which would be disclosable under the rules of the Proposed Regulation as indirect compensation, the plan may use a stable value product supported by the insurer's general account. Instead of charging fees to the plan for this investment, the insurer credits the plan with interest at a crediting rate that is "net" of the insurer's expenses and costs as determined not with respect to the particular plan, but based on the overall experience of the general account. As a result, there is no explicit fee that can be disclosed. As any fee implied for the use of this product would be at best speculative, no disclosure of any indirect compensation that could in theory be attributed to the stable value product investment should be required. SVIA asks the Department to describe this as a type of bundled services arrangement and to carve out this situation from the disclosure rules for such an arrangement. If the Department has questions regarding these arrangements, we are available to meet with you to provide further information.

Fiduciary Status. The Proposed Regulation would require service providers to indicate whether they are performing services as a fiduciary. While it may be helpful to plan fiduciaries to have this declaration, the Proposed Regulation should also recognize that many service providers acting as fiduciaries may provide both fiduciary and non-fiduciary services, and that the service provider will only be a fiduciary under ERISA or the Investment Advisers Act of 1940 to the extent it provides fiduciary services. If the final regulation continues to require the service provider to indicate if it is performing services as a fiduciary, it should allow the service

provider to appropriately limit this declaration to the services and actions that are performed in a fiduciary capacity.

Contract Issues. The Proposed Regulation would require disclosure of fees for a service "contract." The use of the term contract raises unique issue for stable value arrangements that involve insurance companies. Insurance companies issue contracts that are subject to individual state regulation and approval by the respective state insurance commissioner, and any changes to these contracts must be reviewed and approved by these state regulators. To ease and minimize compliance costs with the Proposed Regulation, SVIA urges the Department to permit insurance companies to provide plan fiduciaries with a separate document that conforms to the Proposed Regulation's disclosure requirements rather than incorporate these requirements in existing contracts.

Disclosures of Conflicts of Interest. SVIA requests that the Department define and clarify the requirement that service providers disclose "any material financial, referral, or other relationship or arrangement" with certain entities that "creates or may create a conflict of interest for the service provider in performing services." ERISA, through its prohibited transaction rules in section 406, currently prohibits service providers and plan sponsors from having a broad range of conflicts of interest. Given this long-standing prohibition, it is unclear to the Association what disclosures the Department expects from this requirement. To better make clear the scope of the required disclosures, this provision should, if retained, be limited to relationships and arrangements that could potentially violate the ERISA prohibited transaction rules, as that would tie the disclosure requirement directly to the types of conduct regulated by ERISA. Additionally, SVIA suggests that the Department harmonize the indirect compensation provisions with the "material" relationship or arrangement concept, to use a standard of materiality to determine if disclosure is warranted.

Restrictions on Termination of Contracts. The requirements under the Proposed Regulation for service contracts may apply to investments in a stable value fund that is treated as holding plan assets subject to ERISA. Therefore, SVIA asks the Department to clarify that the payment of fees or adjustments charged for unwinding stable value investments, such as market value adjustments, are not impermissible "penalties" under the regulation. This position would be consistent with the Department's position in exemptions for synthetic guaranteed investment contract arrangements[1] and other guidance[2] regarding such payments. These fees or adjustments

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1 In these exemptions, the applicants described the arrangements as being subject to a market value adjustment or similar charge on early termination, and the exemptions do not restrict or limit the applicants' ability to impose those adjustments. *See* PTE 2000-05 (Business Men's Assurance Company of America), 65 Fed. Reg. 6223 (Feb. 8, 2000); PTE 2000-13 (Deutsche Bank AG), 65 Fed. Reg. 13333 (Mar. 13, 2000); PTE 99-44 (Pacific Life Corporation), 64 Fed. Reg. 61136 (Nov. 9, 1999); PTE 98-17 (Metropolitan Life Insurance Company), 63 Fed. Reg. 19955 (Apr. 22, 1998);PTE 96-75 (Pacific Mutual Life Insurance Company), 61 Fed. Reg. 51469 (Oct. 2, 1996);PTE 95-10 (Peoples Security Life Insurance Company), 60 Fed. Reg. 8093 (Feb. 10, 1995); PTE 94-55 (Hartford Life Insurance Company), 59 Fed. Reg. 35760 (July 13, 1994); PTE 94-19 (Penn Mutual Life Insurance Company), 59 Fed. Reg. 8028 (Feb. 17, 1994).

2 *See* Department of Labor Regulation § 2550.401c-1(e)(1), dealing with the termination of an insurance policy supported by the assets of the insurance company's general account. The regulation requires the insurer to

are necessary to provide parity for and protect those plans remaining in a pooled stable value product after other plans withdraw, as they reflect the relationship of the value of underlying investments to plan sponsor book values. Moreover, these adjustment features are standard and well-understood termination provisions of these products.

Plan sponsors also may elect to terminate their interest in certain pooled stable value funds at book value, without a market value adjustment. The plan sponsor provides notice of intent to redeem, and the fund manager or administrator agrees to redeem at book value over a period of no longer than twelve months. This is made possible by financial guarantees included in the investment contracts held in the fund, including stable value wrap agreements that also contain a twelve-month book value termination provision. Twelve-month notice period rules for withdrawals are an integral part of pooled bank-sponsored stable value products, having their roots in long-standing interpretations of the Office of the Controller of the Currency (*see* Comptroller's Handbook – Collective Investment Funds (Oct. 2005), page 52). SVIA requests that the Department clarify that these twelve-month termination notice periods are not considered unreasonable for the purpose of the Proposed Regulation.

Good Faith Reliance. The Proposed Regulation would require service providers to disclose all fees they receive as well as fees that may be received indirectly by subcontractors and other parties. SVIA asks that the Department clarify that service providers can rely upon data provided among and between other service providers for disclosure of compensation and conflicts. SVIA also requests that the Department establish a cure period, should a service provider discover information that was disclosed in good faith was incorrect, and that the service provider be allowed to modify and correct this error in the disclosure within the cure period without being treated as violating the terms of the Section 408(b)(2) exemption. Furthermore, service providers should be able to rely on the same exemption applicable to the plan fiduciaries responsible for retaining the service providers, should the service provider act in good faith to obtain information from other service providers but nonetheless such information is not timely received or is inaccurate.

SVIA thanks the Department for consideration of these comments. The Association is happy to answer any questions and to work with the Department on this important regulation.

Sincerely,

Gina Mitchell
President

permit termination of the policy without penalty, and specifies that a market value adjustment or recovery of costs actually incurred is not considered a penalty for this purpose.