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Filed Electronically

Ivan Strasfeld  
Director, Office of Exemption Determinations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave, NW  
Washington, DC 20210

Attn: Plan Fiduciary Class Exemption for Section 408(b)(2) Amendment

Dear Director Strasfeld:

The Investment Company Institute<sup>1</sup> is pleased to comment on the Department's proposed class exemption for plan fiduciaries for failures associated with the proposed regulation under ERISA section 408(b)(2).<sup>2</sup> The exemption is an essential complement to the Department's 408(b)(2) regulation. We have two suggestions on how the Department could improve the exemption by assuring that it provides sufficient relief.

***1. The Department should expand the exemption to cover service providers that serve as conduits of information from other parties.***

Relief under the proposed class exemption is available only to plan fiduciaries and covers only transactions otherwise prohibited under ERISA section 406(a)(1)(C). No relief is provided to service providers who could be subject to a significant excise tax penalty under Internal Revenue Code section 4975.

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$12.68 trillion and serve almost 90 million shareholders.

<sup>2</sup> 72 Fed. Reg. 70893 (Dec. 13, 2007). We are filing comments simultaneously on the associated proposed regulation under ERISA section 408(b)(2).

The breadth of the proposed regulation may require service providers to serve as conduits of information from unaffiliated parties. For example, the text of the regulation could be read to require a recordkeeper to disclose a payment that an unaffiliated investment option makes to an unaffiliated consultant hired by plan fiduciaries to assist them in selecting investment options. As we explain in our comment letter on the 408(b)(2) proposal, we do not believe the Department intended this result. The recordkeeper would be completely unaware of this payment unless the investment provider discloses it.

Similarly, the regulation also may require service providers to be aware of the existence of other service providers to the plan. For example, the conflict of interest disclosures, as written, could require the disclosure of a relationship that a service provider, such as a bank, has with another plan service provider, such as the plan's legal counsel, solely because the plan's legal counsel has a checking account with the bank.

We expect the Department to clarify the reach of the requirements of the 408(b)(2) regulation when finalizing the proposal. If the final rule requires service providers to serve as conduits of information, or rely on others (including plan fiduciaries) to make the provider aware of other service providers or relationships the plan has, then the Department must make the relief in the class exemption available to service providers ensnared in a prohibited transaction despite their reasonable efforts to comply with the regulation. We recommend that a service provider be entitled to relief from Code sections 4975(c)(1)(C) and (D), provided that (1) if the provider knows or has reason to know that information from another party necessary to satisfy the 408(b)(2) regulation is incomplete, the provider requests the information in writing, and (2) if the information is not provided to the service provider within 90 days, the service provider notifies the Department of Labor.


**2. *The relief under the proposed class exemption should include ERISA section 406(a)(1)(D).***

The proposed class exemption provides relief only from ERISA section 406(a)(1)(C), which prohibits the furnishing of goods, services, and facilities between a plan and a party in interest. We believe the class exemption also should provide relief from section 406(a)(1)(D), which prohibits the transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. In many cases, if section 408(b)(2) is not available with respect to a service arrangement, section 406(a)(1)(D) will be triggered because plan assets were used to compensate the service provider.

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Please feel free to contact the undersigned at 202.326.5826 ([podesta@ici.org](mailto:podesta@ici.org)) or Michael Hadley at 202.326.5810 ([mhadley@ici.org](mailto:mhadley@ici.org)) with any questions.

Sincerely,

A handwritten signature in black ink that reads "Mary P. Podesta". The signature is written in a cursive style with a large, stylized initial "M".

Mary Podesta  
Senior Counsel – Pension Regulation