BB&T

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February 11, 2008

Filed Electronically

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

Re: Proposed Regulation Relating to Service Provider Disclosures

Dear Sir or Madam:

We applaud the effort of the Department of Labor to bring clarity to the issue of fee disclosure from service providers to benefit plans. We support a "level playing field," with all providers held to the same disclosure standard. Thank you for the opportunity to comment on the proposed amendment to Labor Regulation 2550.408b-2 (the Proposed Regulation).

BB&T is a diversified financial services company. Through various departments and subsidiaries, we offer a wide range of services to benefit plans, ranging from traditional trustee services, benefits consulting services, third-party administration and recordkeeping, and investment advisory services to insurance products. Owing to the breadth of our services, the Proposed Regulations will have substantial impact on our businesses. For that reason, we contribute the following comments.

Recast regulations towards the duty of the Plan Fiduciary

The plain language of the statute underlying the Proposed Regulation (ERISA Sections 406(a)(1)(C) and 408(b)(2)) places the onus on the Plan Fiduciary (rather than service providers) to ensure compliance with the "reasonable contract or arrangement" exemption. The Proposed Regulation appears to modify this assignment of responsibilities, imposing near-fiduciary duties of disclosure and loyalty on often non-fiduciary service providers.

An alternative statutory foundation for regulating fees and disclosure may exist, however. Under ERISA Section 404(a)(1)(A) and (B), a Plan Fiduciary has the duty to ensure prudent fee arrangements for the plan. It may be more effective to recast the proposed regulations under that statutory authority. The objective of such a regulatory scheme would be to give the responsible Plan Fiduciary sufficient notice of potential fees, so that it could exercise its fiduciary judgment to determine if additional inquiries are needed. Such a scheme would correctly allocate duties to the plan, yet still allow the Plan Fiduciary sufficient information to make an informed decision.

Implement a "notice" disclosure paradigm, rather than a strict "contract" paradigm.
The Proposed Regulation refers almost exclusively to a "contract" for services. This language is more restrictive than the underlying statute, which contemplates a "contract *or arrangement*." The drafters of the statute must have intended to allow alternatives beyond a formal contract. If the objective of the regulatory scheme is to give the responsible Plan Fiduciary sufficient notice of potential fees, such disclosure can be made in many ways other than by formal contract. Recasting the regulations under ERISA Section 404(a)(1), as discussed above, would segregate the contract and disclosure issues, potentially resulting in greater clarity for each individual issue.

Limit required disclosure to amounts deducted from plan assets.
If implemented by multiple service providers to the same plan, the Proposed Regulation could result in multiple disclosures made to the Plan Fiduciary relating to the same revenue-sharing arrangement. Such duplicate reporting could be very misleading to the Plan Fiduciary. Greater clarity could be achieved by limiting any required disclosure to amounts deducted directly from (or earned on) plan assets, reported solely by the service provider first receiving the fee. Additional detail on the ultimate distribution or sharing of deducted amounts adds limited protection. Limiting disclosure to all amounts deducted directly from (or earned on) plan assets substantially achieves the regulatory objectives of informing the responsible Plan Fiduciary and protecting plan participants.

Clarify the definition of Compensation
Our ability to comply with the definition of Compensation or Fees in the Proposed Regulation would be greatly enhanced by the following clarifications or changes.

- We request that the Department confirm that all existing guidance related to compensation of fees (Class Exemptions, statutory exemptions, etc.) continues in effect without modification to the disclosure requirements found in the applicable guidance.
- Due to the variability of some forms of fees, they are not susceptible to estimation prior to the engagement of the service provider. We request that the Proposed Regulation explicitly allow generic disclosure in terms of the <u>forms</u> of fees to be paid, and anticipated <u>ranges</u> of fees versus specific dollar amounts.
- We suggest that the requirement to disclose explicit client-paid fee amounts be eliminated. The Plan Fiduciary should be aware of what is directly remitted in explicit fee payments. Additional "disclosure" of such amounts would not be helpful to the Plan Fiduciary.
- The Proposed Regulations speak very broadly of "banking" services and "indirect" compensation. In theory, the Proposed Regulation could compel disclosure by a bank where the only relationship with a plan is a checking account opened by the Plan Sponsor to process distributions. In this situation, the bank is providing services to the plan and is indirectly compensated by any account fees or by the internal "spread" earned in lending or investing the deposited funds. We would request that the Proposed Regulation exclude bank accounts if they are the only service provided by a bank to a plan.

Eliminate self-characterization disclosures

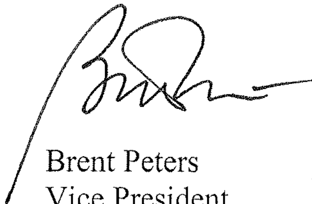
- The Department should eliminate the required self-disclosure of fiduciary status. As the Department itself states in a preamble footnote to the Proposed Regulations, fiduciary status

is determined by conduct, not by contract. Fiduciary status may be subject to change without formal notice or action. Furthermore, a party may be a fiduciary to a plan for some purposes (safekeeping of assets, e.g.) but not for others (investment management, for example). A single disclosure could be misleading to the Plan Fiduciary. For these reasons, we suggest that the requirement be eliminated.

- The Department should eliminate the required self-disclosure of relationships with potential for conflict of interest. Such a disclosure requirement may place near-fiduciary responsibilities of disclosure and loyalty on non-fiduciary service providers. Also, increased specialization of service providers has greatly expanded the number of subcontractors involved in plan administration and investment. The exponential increase in relationship will make any disclosure scheme costly to implement and maintain. For these reasons, we suggest that the requirement be eliminated.

We appreciate the opportunity to submit these comments. If you have any questions concerning these comments, please call the undersigned at (336) 733-2179.

Sincerely,



Brent Peters
Vice President