

February 11, 2008

**VIA E-MAIL**

Daniel Maguire  
Director  
Office of Regulations and Interpretations  
Employee Benefit Security Administration  
Room N-5669  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Re: Reasonable Contract or Arrangement Under Section 408(b)(2)--Fee Disclosure**

Dear Mr. Maguire:

The Financial Planning Association (“FPA”) welcomes the opportunity to submit these comments to the Employee Benefits Security Administration (“EBSA”) in response to the proposed regulations regarding reasonable contracts or arrangements under 29 CFR Sec. 2550.408b-2 (“proposed regulation”). The FPA is the largest organization in the United States representing financial planners and affiliated firms, with approximately 28,500 members.<sup>1</sup>

Retirement planning is a core area of practice for financial planners. Many FPA members act as fiduciaries to qualified plans by serving as investment managers who select and manage the plan options as well as providing personalized investment advice to plan participants and their beneficiaries. And, in fact, financial planners who are also CFP® Certificants,<sup>2</sup> are obliged to disclose compensation and conflicts of interest to their clients.<sup>3</sup>

FPA strongly supports the broad intent of the EBSA to improve disclosure of fees and conflicts to “responsible plan fiduciaries.” These disclosures are critical in order for plan sponsors to meet their legal obligations. Without transparency of fees and disclosure of conflicts, responsible plan fiduciaries are left in the dark without information essential to fulfilling their

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<sup>1</sup> Most individual FPA members are affiliated with investment adviser firms registered with the Securities and Exchange Commission (“SEC”), state securities administrators, or both. FPA is incorporated in Washington, D.C., where it maintains an advocacy office, with headquarters in Denver.

<sup>2</sup> Certified Financial Planner Board of Standards Inc. (CFP Board) is a separate nonprofit organization whose goal is to benefit and protect the public by establishing and enforcing education, examination, experience and ethics requirements for persons authorized to use its certification marks. CFP Board is the largest such organization in the U.S. with over 55,000 CFP® Certificants.

<sup>3</sup> See, CFP Board’s *Rules of Conduct*, Rule 1.2b and CFP Board’s *Practice Standards*, 100-1.

fiduciary obligations. Notwithstanding our strong support for such disclosures, however, we wish to recommend that EBSA move deliberately and cautiously in implementing the proposed regulation. As discussed below, we believe the services providers who will be affected by the proposed regulation will need time to fully understand their new obligations and begin compliance. In fact, as they prepare for complying with the proposed regulations, many questions and issues are likely to arise that will require clarification from EBSA, and additional time may be crucial in resolving any outstanding issues. Finally, and not least significantly, we note that there is currently no impediment to responsible plan fiduciaries asking service providers to furnish the same information that EBSA proposes requiring here, or more for that matter. In fact, some may argue that responsible plan fiduciaries are currently obliged to ascertain this information, even in absence of the proposed regulation.

### ***I. FPA Strongly Supports Disclosure***

Section 408(b)(2) allows plan sponsors to enter into agreements with service providers that would otherwise be prohibited by ERISA. In order to avail itself of the 408(b)(2) exemption the plan sponsor is obligated to ensure any contract is reasonable. The plan sponsor (or other fiduciary) normally selects and monitors the investment options and plan service providers, and is required under ERISA fiduciary rules to do so prudently. In carrying out its fiduciary responsibilities, plan sponsors, among other things, must determine the reasonableness of the costs. In order to make this determination, the employer must ascertain and understand all fees and expenses incurred in connection with the investments offered under the plan.

The proposed regulation details the fees and other compensation that service providers would be required to furnish to the plan sponsor. The purpose of these disclosures is to facilitate the sponsor in fulfilling its fiduciary obligations. FPA generally supports requiring these disclosures, and we would encourage EBSA to work with service providers to ensure that compensation is disclosed in a manner that is understandable and that facilitates comparison.

The proposed regulation also requires disclosure of actual or potential conflicts of interest. FPA supports requiring such disclosures, as it is essential for the responsible plan fiduciary to know and understand these conflicts in order to carry out its fiduciary obligations.

We also wish to underscore that the service provider disclosures that would be mandated under the proposed regulation in no way diminish the fiduciary obligations of the responsible plan fiduciary or otherwise shift any part of the fiduciary responsibility to the service provider.

### ***II. FPA Suggests Later Implementation and Dialogue with Service Providers***

The proposed regulation calls for an implementation date 90 days following publication of the final regulation. FPA respectfully suggests that implementation date be set for 180 days after publication of the final rule. We also suggest that in the interim, EBSA maintain a dialogue with a cross-section of services providers to ascertain if there are unanticipated compliance issues or problems that could be resolved through EBSA guidance or amendments to the final regulation, consistent with the intent of the regulation.

As you consider an appropriate implementation date, it is important to remain mindful that the responsible plan fiduciary already has the responsibility for ensuring contracts or agreements

with services providers are reasonable and that the proposed regulation is not intended to limit that responsibility in any way. Rather, the proposed regulation imposes a new regulatory responsibility on *service providers* as a tool to assist *responsible plan fiduciaries* in fulfilling their fiduciary obligations. Further, in absence of any new regulation, responsible plan fiduciaries may, and arguably, should ask service providers to disclose all the information that would be required under the proposed regulation.

With that in mind, we do not believe there is an urgency in implementing the proposed regulation. We would expect that it will take some time for the wide array of services providers covered by the proposed regulation to fully digest, understand, and work through the compliance issues related to their new disclosure obligations. In particular, insofar as the service providers will need to make disclosures regarding their affiliates, they should be provided reasonable time to establish mechanisms and procedures to ensure compliance.

As the service providers move closer to compliance, it is likely that questions or issues will arise that were not anticipated by either they or EBSA (or by those currently commenting on the proposed regulation). By providing additional time prior to implementation of the regulation, EBSA would also be allowing time to work through any compliance issues, consistent with carrying out the intent of the proposed regulation. As mentioned above, given that responsible plan fiduciaries may already ask for, and indeed require service providers to furnish this information, we believe there is no detriment to extending the implementation date.

### **III. FPA Suggests EBSA Study Impact**

Aside from generally monitoring the impact of the proposed regulation once it is finalized, FPA suggests that EBSA study whether the regulation directly or indirectly results in any new trends in fee structure or overall costs. Specifically, we note that the proposed regulation requires a rather specific disclosure of fees and other compensation. However, where fees and services are bundled, service providers may generally disclose the bundled fee and list the services covered by that fee. We think it would be worthwhile for EBSA to assess whether the regulation results in a trend toward bundled services and whether the trend, if any, is accompanied by any increase or decrease in costs to the plans.

### **IV. Conclusion**

FPA strongly supports requiring service providers to disclose relevant information on compensation and conflicts to responsible plan fiduciaries. This information is essential to the plan fiduciary in carrying out its legal obligations. Given the scope of the proposed regulation and the potential compliance burdens, we would encourage EBSA to provide sufficient time for service providers to prepare before implementing the final regulation. We would also encourage EBSA to engage in an active dialogue with service providers to resolve any issues consistent with the intent of the proposed regulation. Finally, we suggest that EBSA study the impact of the regulation on market practices and costs. One particular area of focus could be the bundling of services by service providers.

We very much appreciate having the opportunity to comment on the proposed regulation and believe through Department of Labor's leadership on fee and conflict disclosures that plan fiduciaries will be better able to fulfill their fiduciary and legal obligations.

Please do not hesitate to contact me at 202-449-6343, if you have any questions or require additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'DB', with a long horizontal line extending to the right.

Daniel Barry  
Director of Government Relations