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(Via Electronic Delivery e-ORI@dol.gov)

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, NW.  
Washington, DC 20210

Ladies and Gentlemen:

Jackson Kelly PLLC (“Jackson Kelly”) respectfully submits these comments on the proposed amendment to the regulations under ERISA § 408(b)(2). We commend the Employee Benefits Security Administration (“EBSA”) in its efforts to assist plan fiduciaries with assessing the reasonableness of fees and potential conflicts of interest. Members of the EBSA staff have done a wonderful job and should be rewarded for their excellent work. It is greatly appreciated.

Although we are submitting these comments late, we request that EBSA nonetheless consider them. We have reviewed every comment letter that was posted on the EBSA web site ([http://www.dol.gov/ebsa/regs/cmt-408\(b\)\(2\).html](http://www.dol.gov/ebsa/regs/cmt-408(b)(2).html)) and have determined that, with only one exception (regarding the definition of consulting services), these issues have not been directly addressed.

**I. Summary of Services Provided by Jackson Kelly for Employee Benefit Plans**

Jackson Kelly is a law firm that provides legal services to plan sponsors, service providers, and employee benefit plans, as well as recordkeeping and third party

administrative services to employee benefit plans. The legal services generally include helping plan sponsors ensure that their pension and welfare benefit plans comply with applicable laws, assisting service providers with compliance, and litigating ERISA claims. The recordkeeping and third party administrative services generally include contribution calculations, discrimination testing, plan allocations, participant statements, beneficiary elections, distributions, plan loan documentation, and preparing governmental reports.

## **II. Request for Clarification of Definitions**

We request that EBSA clarify the distinctions between consulting services and legal services. We also request that EBSA clarify the difference between (1) recordkeeping or third party administrative services and (2) accounting services.

## **III. Indirect Compensation**

We request that EBSA clarify whether indirect compensation paid to an entity that is already a party in interest differs from indirect compensation paid to an entity that is not a party in interest. Under ERISA § 3(14), an entity that provides services to a service provider but not to the plan (and which is not otherwise a party in interest) is not a party in interest with respect to that plan. There is no such thing as an indirect party in interest. The prohibited transaction rules do not apply to payments to an entity that is not a party in interest, and thus no exemption should be needed. In contrast, if an entity is otherwise a party in interest, then ERISA § 406(a)(1) would cover indirect payments to that entity.

#### **IV. Potential Effect of Proposed Regulations**

At least one person commented that the proposed regulations may have the effect of shifting fiduciary burdens to service providers. *See* Council of Insurance Agents & Brokers Comment Letter at 5 (February 11, 2008). ERISA prohibits fiduciaries from causing the plan to engage in a prohibited transaction. *See* ERISA § 406(a)(1). Fiduciaries are subject to ERISA's fiduciary standard of prudence set forth in Part 4 of Title I of ERISA. *See* ERISA § 404. Moreover, the statute prohibits the fiduciary's actions only if the fiduciary "knows or should know" that the transaction is a prohibited transaction. *See* ERISA § 406(a)(1). Furthermore, the fiduciary is not subject to the excise tax in I.R.C. § 4975 if the fiduciary is only acting in its fiduciary capacity. *See* I.R.C. § 4975(a). In contrast, party in interest service providers are generally considered to be strictly liable for the excise tax in the event of a prohibited transaction.

Some employers do not review the disclosures they are currently provided, and there is nothing to suggest they would read even more disclosures. For example, in one case pending in federal court, the two owners (husband and wife) of a plan sponsor generally stated in a deposition that they had never read any document that the service provider furnished to them, including the plan document, the SPD, any contract with the service provider, or any disclosures in any contract.<sup>1</sup> Although this is only one anecdotal example, we believe it is not an isolated incident. In such a case, requiring more

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<sup>1</sup> Incredibly, although they approved the compensation after it was disclosed, the husband and wife are now suing the service provider asserting it engaged in a prohibited transaction because it allegedly received unreasonable compensation from the plan.

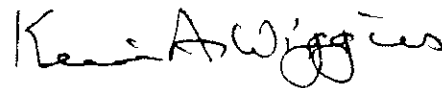
disclosure to avoid a prohibited transaction would do nothing to help the plan's participants but could, potentially, penalize the service provider for even a minor, inadvertent error in disclosure. Enhanced disclosure requirements would also increase the costs of maintaining records to avoid litigation as well as the cost of demonstrating compliance in the event the plan's participants or sponsor sues the service provider for a prohibited transaction. We respectfully request that EBSA takes these issues into consideration as it finalizes the regulations.

**V. Summary Annual Reports**

The regulations at 29 C.F.R. § 2520.104(b)-10 generally require the summary annual report ("SAR") to include the plan's administrative expenses. We request that EBSA clarify how the new disclosures would impact this requirement (if at all). For example, would indirect compensation be included in the expenses reported in the SAR?

Thank you for your attention to these matters.

Very truly yours,

A handwritten signature in black ink that reads "Kevin A. Wiggins". The signature is written in a cursive style with a large, stylized "K" and "W".

Kevin A. Wiggins

cc: Mike Foster