

February 11, 2008  
(delivered electronically to e-ori@dol.gov)

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
United States Department of Labor  
Washington, DC

RE: Proposed Rule under 29 CFR Part 2550, Reasonable Contract or Arrangement under Section 408(b)(2) – Fee Disclosure

The ERISA Industry Committee, the College and University Professional Association for Human Resources, the National Association of Manufacturers, the Profit Sharing / 401k Council of America, the Society for Human Resource Management, and the U.S. Chamber of Commerce are pleased to provide comments on the proposed regulation under ERISA Section 408(b)(2). Our comments reflect the views of America's employers who voluntarily offer ERISA-covered retirement and welfare benefit plans to their workers. As you are aware, the proposed regulation introduces many new concepts and it will take time to determine all of the potential consequences of its practical application. We expect that as the process continues, we will have further comments and questions that extend from these initial comments and recommendations.

The ERISA Industry Committee (ERIC) is a nonprofit association committed to the advancement of America's major employer's retirement, health, incentive, and compensation plans. ERIC's members' plans are the benchmarks against which industry, third-party providers, consultants, and policy makers measure the design and effectiveness of other plans. These plans affect millions of Americans and the American economy. ERIC has a strong interest in protecting its members' ability to provide the best employee benefit, incentive, and compensation plans in the most cost effective manor.

The College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing more than 10,000 HR professionals at over 1,600 colleges and universities across the country, including 85 percent of all U.S. doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and 465 community colleges. Higher education employs 3.3 million workers nationwide, in every State in the country.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The vast majority of NAM members provide 401(k) plans for their employees and thus have a significant interest in this legislation

Established in 1947, the Profit Sharing / 401k Council of America (PSCA) is a national, non-profit association of 1,200 companies and their 6 million plan participants. PSCA represents its members' interests to federal policymakers and offers practical, cost-effective assistance with profit sharing and 401(k) plan design, administration, investment, compliance and communication. PSCA's services are tailored to meet the needs of both large and small companies. Members range in size from Fortune 100 firms to small, entrepreneurial businesses.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Our mission is to serve the needs to HR professionals by providing the

most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 225,000 members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber represents a wide management spectrum by type of business and location. Each major classification of American business - manufacturing, retailing, services, construction, wholesaling, and finance - is represented. Also, the Chamber has substantial membership in all 50 states, as well as 105 American Chambers of Commerce abroad. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

## GUIDING PRINCIPLES

**Disclosures Must be Meaningful.** The changes under Section 2550.408b-2 should be devoted to enhancing the ability of plan sponsors (the responsible plan fiduciary) to gain accurate information regarding plan fees in a meaningful, useful form and to assist them in fulfilling their fiduciary responsibility to ensure that any use of plan assets to defray the expense of administering a plan is reasonable. We believe that the Department of Labor (Department) shares this view and that the proposed regulation is a significant step towards this purpose.

**Plan Sponsors Need Specific Information.** Plan sponsors need the following information to assess the reasonableness of plan fees:

- What are the fees and who is receiving them?
- How are the fees paid?
- What services are provided?
- Who is providing the services?
- What are the relationships amongst service providers to the plan?

**Disclosures Should Address the Needs of All Plan Sponsors.** We believe that the final rule should assure effective disclosure of useful and material information to responsible plan fiduciaries. There is a tremendous range in the resources available to responsible plan fiduciaries when evaluating plan fees. Our most sophisticated members have access to expert advice, often in-house, to help them analyze plan fees. Others plan sponsors, however, have limited resources to expend analyzing plan fees. The final rule must address the needs of the least-sophisticated plan sponsors while not overburdening either them or the most sophisticated plan sponsors.

## COMMENTS

**The Proposed Changes Under Section 2550.408b-2 Should Not Apply to Welfare Plans.**

We recommend that 2550.408b-2(c)(1) be limited to pension plans. We are not aware of a need to increase the transparency of fees related to welfare plans. A 2004 ERISA Advisory Council (Council) study of welfare plan Form 5500 issues did not uncover any glaring deficiencies in the ability of plan sponsors to understand welfare plan costs, despite the very limited role that the Form 5500 plays in

revealing welfare plan costs<sup>1</sup>. The Council even raised the option of completely eliminating the Form 5500 requirements for welfare plans. It does not appear that a substantive record has been created demonstrating the need for such regulation in the health benefits marketplace. The majority of contracts and policies for welfare plan benefits or services are between a service provider and a plan sponsor, not a plan. So long as the plan sponsor does not pay fees from plan assets, Section 408(b)(2) does not apply. In order to facilitate an effective and efficient regulatory scheme, the Department should refrain from applying Section 2550.408b-2(c)(1) beyond pension plans.

**Further Consideration of the Rules Should be Given to Defined Benefit Plans.** With respect to defined benefit plans, we believe a similar thorough examination of the particular issues affecting defined benefit plans would be warranted prior to the proposed regulation's applicability to defined benefit plans.

**Clarification in the Disclosure of Investment Management Fees is Needed.** Fees resulting from the investment of plan assets are, in most circumstances, the largest single expense for employer-provided retirement plan. It is imperative that the proposed rule provides full disclosure of all investment-related plan fees to the degree that the Department believes that a responsible plan fiduciary has a duty to ensure that such fees are reasonable.

We understand that some members of the retirement plan community are concerned about some, perhaps unintended, consequences of requiring managers of investments the assets of which are not considered plan assets under ERISA (e.g., mutual funds and certain other collective investments) to provide disclosures under the proposed rule. While we repeat our belief that all investment-related fees subject to fiduciary review under Section 404(a) should be disclosed pursuant to this rule, we urge the Department to explore approaches that will minimize any unintended consequences for these investment managers.

The disclosure of investment-related fees presents problems that may not exist for other plan services. A primary problem is that a mutual fund investment manager is often unaware that it holds assets of a specific plan because the investments are made at an omnibus level. Additionally, in the case of a mutual fund investment, there is often no contract, arrangement, or even a direct connection between the plan and the investment manager, regardless of the investment manager's status as a service provider under the proposed rule. While the responsible plan fiduciary selects the mutual fund investment, the link between the two parties is the intermediary responsible for operationally directing the investment of the plan assets, such as a recordkeeper, trustee, investment fiduciary or third party administrator. These entities are considered to be service providers under the proposed rule. Sometimes the intermediaries are affiliated with the investment manager holding plan investments, but often they are not. One approach to this problem is to recognize that the intermediary will be the conduit for providing disclosure of investment-related fees to the responsible plan fiduciary under the proposed rule. When an intermediary offers a platform of investment options, disclosure of the costs for all investment options is appropriate as a term of the contract. An intermediary should not be required to obtain or transmit any disclosures from an unaffiliated investment manager that is not required under the rule.

As a conduit, barring any affiliate relationship, the intermediary is severely limited in its ability to vouch for the accuracy of any disclosures made by an investment manager, or to compel disclosure. We recommend that relief be provided to these intermediaries that is similar to the relief provided under the

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<sup>1</sup> Final Report of the 2004 ERISA Advisory Council Working Group, Health and Welfare Form 5500 Requirements, November 10, 2004.

## Proposed Class Exemption for Plan Fiduciaries When Plan Service Arrangements Fail to Comply with ERISA Section 408(b)(2).

Some investment related costs, such as float income or a mutual fund's brokerage fees, cannot be stated in advance. We recommend that the Department clarify that its position in Field Assistance Bulletin 2002-3 regarding float income is not changed as the result of the proposed rule. In addition, we recommend that prior brokerage cost experience be disclosed if available. For example, for mutual funds, the Statement of Additional Information reports brokerage costs for the three preceding years. A service provider could report the costs for each of the three preceding years or a rolling three year past average. An alternative may be to report a rolling three year past average. Some mutual funds report this amount as a percent of assets in addition to actual dollars. The rule should require disclosure in both actual dollars and as a percent of assets.

### **An Appropriate Level of Detail in Disclosures Should be Established.**

The Department should establish a de minimus amount, expressed as a percentage of assets, for the reporting of investment-related fees and a materiality threshold for reporting plan services. Further study is required. We can envision situations that might require the disclosure of a large number of service providers that receive compensation as the result of their relationship with a primary service provider. While responsible plan fiduciaries need to be aware of the cost and nature of the services provided to a plan, it may not be necessary in all cases to list each component provider. For example, a brokerage entity for an investment manager will receive compensation in connection with the provision of investment management services to a plan. The investment manager may contract with several dozen brokers. While the plan fiduciary should be informed about the cost of the brokerage service, there is no apparent value to subjecting the plan fiduciary to a long list of names and how much each broker received.

### **Clarification in the Manner of Disclosure is Needed.**

The proposed rule states, "The manner in which compensation or fees are expressed shall contain sufficient information to enable the responsible plan fiduciary to evaluate the reasonableness of such compensation or fees." However, the proposal does not mandate a specific manner in which to make disclosures. The preamble reports that written disclosures may be provided from separate documents from separate sources. The Department invited specific comment whether this manner of disclosure will ensure that a responsible plan fiduciary will receive "comprehensive, straightforward, and helpful" information.

We do not believe that the provision of disclosures "from separate documents from separate sources" will result in adequate disclosure to all responsible plan fiduciaries. Many responsible plan fiduciaries will likely have difficulty aggregating and analyzing information provided in this manner. We recommend that the service provider be required to collect any required disclosures and present them in a single document, to the extent the service provider is able to get the information. Beyond this, the service provider should have flexibility in formatting the disclosure. This process will likely be necessary to meet the requirement that the disclosure be presented in a manner that will enable the plan fiduciary to evaluate the reasonableness of any compensation or fees.

The requirement to provide disclosures in a manner that is understood by responsible plan fiduciaries requires satisfying a subjective criterion that cannot be determined without input from plan sponsors and service providers. We believe that the Department should collaborate with plan sponsors and service

providers on a project to develop a template for such disclosure. We also believe that those who use the template should be deemed to be in compliance with the regulations.

Insurance and annuity products used to fund benefits under ERISA plans are subject to State regulation. A part of this State regulation often requires that the products be submitted to the State regulators for approval. The Department should clarify that the proposed rule does not require any change or modification to the insurance or annuity products. This review process can be costly and time consuming. Sometimes a state regulator may raise issues not related to the material that the submission addresses. Subjecting insurance and annuity products to these processes can delay the delivery of new or improved products to plans. There will be an additional cost to the plans. The need for review may also interfere with approval of custom contracts negotiated by plans.

There is no reason to expose compliance with a Federal mandate to a State review; which will result in extra delays and costs and put providers and plans at risk that a state may have a different view on the issues and try to impose its own “take” on the wording of the document.

Most insurance or annuity contracts have an associated service agreement, which is a more appropriate vehicle for memorializing any requirement of disclosure, of the type described in paragraph (c)(1)(iii). For situations where there is no service agreement, then the “terms of the contract or arrangement” as used in paragraph (c)(1)(iii) should be defined to allow the provider to describe any requirement of disclosure required by paragraph (c)(1)(iii) in a separate written statement, rather than in the contract. This alternative method should be permitted for all service providers, in order to avoid any problems with the negotiation or execution of contracts or agreements.

### **Services Provided by Employers Should Not be Subject to Disclosure Requirements**

The proposed rule reflects the Department’s position, as stated in the preamble, that the disclosures required under Section 2550.408b-2(c)(1) are not always needed by plan fiduciaries to evaluate the reasonableness of a service provider’s compensation.

While some in-house services, such as legal, appear to be exempt from the rule, many other services that may fall under the jurisdiction of Section 2550.408b-2(c)(1)(i)(A) of the proposed rule are routinely performed by employees of the plan sponsor. For example, managing a payroll deduction process, delivering COBRA notices, and tracking records used to determine vesting might be viewed as providing recordkeeping or third party administration services. An executive who advises on plan features may be considered as providing consulting services. Furthermore, some employers provide plan recordkeeping, investment management services and nondiscrimination testing for a plan. Often these in-house services do not result in any fees paid by the plan, but they do result in compensation to a service provider from the plan sponsor. Regardless, we believe that an exemption should apply as long as no indirect compensation is received.

Services provided by an employer to its own employer-sponsored ERISA plans, which are paid by the employer, and for which no reimbursement is sought or obtained from the plan (other than the reimbursement of direct expenses) should be exempt from the proposed disclosure requirements. A clarification in this regard would be consistent with the existing DOL Reg. Section 408b-2(e)(3) regarding services provided by fiduciaries without compensation which provides that the provision of services by an employer under such circumstances is not a prohibited transaction within the meaning of section 406 of

ERISA. As such, services provided under these circumstances would not need to fit within the “reasonable contract or arrangement” prohibited transaction exemption provision under ERISA Section 408(b)(2) as further amplified by the proposed DOL Reg. Section 2550.408b-2(c).

In addition, we interpret Section 2550.408b-2(c)(1)(i)(C) to exempt providers of accounting, actuarial, appraisal, auditing, legal, or valuation services from the requirements of Section 2550.408b-2(c)(1) unless they receive indirect compensation (compensation from any source other than the plan, the plan sponsor, or the service provider). We recommend that Section 2550.408b-2(c)(1) should not apply to any services provided by an employee of the plan sponsor or its affiliates unless the service provider receives indirect compensation.

In all of these circumstances there is complete transparency regarding all features of the services provided to the plan. As noted, often there is no charge to the plan for the services. The disclosures provided under the proposed rule are not needed in this situation. There is no benefit that will offset the cost of requiring the disclosure of plan services provided by an employer sponsoring the plan. Therefore, the final rule should clarify that it does not apply in these situations.

**Disclosure of Fiduciary Status Not Dispositive of Actual Status.**

Section 2550.408b-2(c)(1)(iii)(B) requires a service provider to disclose whether it will provide any services to the plan as a fiduciary. We applaud this provision. We also request that the preamble to the final rule, consistent with footnote 11 of the proposed rule, explain that fiduciary status under ERISA is based on certain activities and that disclosure under Section 2550.408b-2(c)(1)(iii)(B), or lack thereof, is not dispositive of a service provider’s fiduciary status with a plan.

**Disclosures Should Depend upon Material Relationships and not “Conflicts of Interest.”**

Section 2550.408b-2(c)(1)(iii)(D) requires the disclosure of whether a service provider or an affiliate has any “material financial, referral, or other relationship or arrangement” with certain other entities that “creates or may create a conflict of interest” for the service provider in performing a plan service.

We applaud the requirement to disclose certain relationships, but we recommend the removal of the requirement that such disclosures be contingent upon a finding of an actual or potential “conflict of interest.” The conflict of interest concept is, in the scope of ERISA’s prohibited transaction rules, new and undefined. “Conflict of interest” apparently is not a condition that is prohibited under Section 406, beyond what is described in Section 2550-408b-2(e). It is generally understood to apply only when a party to an agreement has a duty to the other party beyond those duties applied to normal commerce. The term “conflict of interest” connotes a level of impropriety by the service provider. Large service providers will have more relationships that may be considered conflicts than small service providers. A responsible plan fiduciary may be in a position where he might conclude that the prudent, or at least most expedient, course of action would be to avoid any relationship with a service provider making lengthy disclosures. The fiduciary may unwisely avoid selecting the best service provider because they disclose relationships that under the regulation carry the opprobrium, “conflicts of interest.”

On the other hand, a service provider may reasonably conclude that a conflict of interest does not exist and therefore fail to disclose a relationship described in the provision. In that case, the responsible plan fiduciary would be deprived of potentially useful information.

Instead, we believe a better approach is to require disclosure of “material” relationships and remove the language pertaining to a conflict of interest.

The requirement to disclose “material relationships” is undefined and the source of significant confusion in the retirement plan community. We recommend that the Department convene a workgroup of plan sponsors and service providers. The goal of such a workgroup would be the creation of a uniform disclosure template that, absent false statements or other misfeasance, be deemed by the Department to satisfy the requirements of Section 2550.408b-2(c)(1)(iii)(D).

**Disclosure of Material Changes Should be Required as Soon as Practicable.**

Section 2550.408b-2(c)(1)(iv) requires the disclosure of any material change to any information required to be disclosed in paragraph (c)(1)(iii) not later than thirty days from the date on which the service provider acquires knowledge of the material change. We recommend that the provision be amended to require disclosure as soon as practicable, but no later than ninety days from the date on which the service provider acquires knowledge of the material change.

**The Final Rule Should Extend the Effective Date and Include Transition Rules.**

Responsible plan fiduciaries and service providers will have difficulty in complying with an effective date that is ninety days after publication of the final regulation in the Federal Register. We urge the Department to consider giving responsible plan fiduciaries and service providers additional time to comply with these rules. We are cognizant that, in the Department’s view, the information required to be disclosed under the rule is necessary for a responsible plan fiduciary to assess the reasonableness of plan fees and service provider compensation. However, ninety days is clearly an insufficient amount of time for both responsible plan fiduciaries and service providers to come into compliance with the rules. We recommend an effective date that is no earlier than the first day of the plan year beginning one year after the issuance of final regulations. For example, if the proposed 408(b)(2) regulations are finalized in November 2008, a contract in existence on the issuance date will need to comply on January 1, 2010 (given a calendar year plan year).

The proposed rule is not specific regarding the treatment of contracts or arrangements in existence on the effective date. One interpretation is that any existing contracts on the effective date do not satisfy the requirements of Section 408(b)(2) because they do not meet the new disclosure requirements. Under such a scenario, new contracts and arrangements, meeting the new disclosure requirements, would have to be consummated by the effective date. In excess of one million contracts could be involved. Meeting such a requirement is impossible. We recommend that a transition period ending on the effective date of the final rule (which we recommend to be one plan year following publication of the final rule) be provided to bring existing contracts or arrangements into compliance with the rule. We also recommend that the transition period requirement can be met by providing the required disclosures rather than by actually amending the agreement.

**Participant Disclosure May be Provided Upon Request.**

Section 2550.404c-1(b)(2)(i)(B)(2) requires that a participant or beneficiary be provided, either directly or upon request, information regarding plan investments under the plan. At a minimum, much of the information required to be disclosed under the proposed regulation would also be required to be disclosed under Section 2550.404c-1(b)(2)(i)(B)(2). As the Department considers fee disclosure for participants in the near future, we recommend that it consider requiring that the disclosures provided under this rule be provided to participants, but only upon the request of a participant.

**CONCLUSION**

We appreciate the Department's efforts and believe that the proposed regulations will go a long way toward improving disclosures between service providers and responsible plan fiduciaries. Nonetheless, as mentioned above, there are still many issues to work through and we look forward to continued discussions with you in the near future. Thank you for your consideration of these comments.

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