

February 11, 2008

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Re: Class Exemption for Plan Fiduciaries When Plan Service Arrangements Fail To Comply With ERISA Section 408(b)(2)

Ladies and Gentlemen:

The Investment Adviser Association<sup>1</sup> appreciates the opportunity to provide comments concerning the proposed class exemption<sup>2</sup> for plan service arrangements that fail to comply with the proposed regulation under section 408(b)(2) of ERISA.<sup>3</sup>

Under the Proposed Exemption, the restrictions of section 406(a)(1)(C) of ERISA would not apply to a plan fiduciary who uses its authority to cause an employee benefit plan to enter into (extend or renew) a written service contract or arrangement, notwithstanding the service provider's failure to comply with its contractual obligation to disclose certain information under the final version of the Proposed Regulation.

### **Substantive Comments**

According to the preamble to the Proposed Exemption, failure to comply with the final section 408(b)(2) regulation may subject service providers to excise taxes under section 4975 of the Internal Revenue Code. We question this statement, given that the Department has not proposed changes to the regulations under section 4975(d)(2). We therefore request that the Department confirm that the excise tax provisions do not apply

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<sup>1</sup> The Investment Adviser Association (formerly the Investment Counsel Association of America) is a not-for-profit association that represents the interests of SEC-registered investment advisers. Founded in 1937, the IAA's membership today is comprised of more than 500 firms that collectively manage in excess of \$9 trillion for a wide variety of individual and institutional clients. For more information, please visit our web site: [www.investmentadviser.org](http://www.investmentadviser.org).

<sup>2</sup> *Proposed Class Exemption for Plan Fiduciaries When Plan Service Arrangements Fail To Comply With ERISA Section 408(b)(2)*, 72 Fed. Reg. 70893 (2007) ("Proposed Exemption").

<sup>3</sup> *Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988 (2007) ("Proposed Regulation"). The IAA has filed separate comments on the Proposed Regulation.

to prohibited transactions that occur solely because of a failure to satisfy the final regulation under section 408(b)(2).

In the alternative, we request that the Proposed Exemption be expanded to provide protection for service providers in two contexts. First, we request that the Proposed Exemption include within its scope an exemption for a service provider that is responsible under the Proposed Regulation to provide compensation and other disclosure on behalf of a third party, but does not receive the requested information from the third party.

Proposed Regulation section 2550.408b-2(c)(1)(iii)(a)(3) would require a service provider offering a bundle of services to be responsible for disclosing to the responsible plan fiduciary the aggregate compensation or fees to be received by “the service provider, any affiliate or subcontractor of the service provider, or any other party in connection with the bundle of services.” The bundled service provider therefore could be responsible for disclosing to the fiduciary information about the compensation received by a variety of parties, although it might not have direct access to this information. To the extent, therefore, that a third party failed to provide the required disclosure to the bundled services provider, the bundled services provider might be deemed to have failed to fulfill its obligations under the section 408(b)(2) regulation to provide this information to the responsible plan fiduciary, and a prohibited transaction may result. If the excise tax were to apply, then the bundled service provider might be subject to an excise tax under section 4975, even though it did not have access to the required information.

We submit that bundled services providers - or other providers that would have to rely on third parties for information - should not be subject to excise taxes for failing to provide information that they have not received from third parties. We therefore request that the Proposed Exemption be expanded to include an exemption from the excise tax provisions of section 4975 of the Code for a service provider that fails to comply with the requirements of section 408(b)(2) solely because a third party fails to provide the information necessary for compliance. The conditions to such relief should parallel those in the Proposed Exemption, including a requirement that the bundled services provider request the information from the third party in writing.

Second, we request that the Proposed Exemption be revised to extend the same protection to a service provider in the event that a plan fiduciary fails to execute a contract reflecting the requirements of the final regulation. In the period following the finalization of the regulation under section 408(b)(2), service providers will be providing disclosures and amending contracts with numerous plan fiduciaries, some of whom may not respond in a timely manner to communications asking that they sign revised agreements. To the extent that such revised agreements are required, we submit that the service provider should not be penalized for a plan fiduciary’s failure to act. We also request clarification from the Department that revised agreements under the final regulation would not be precluded from incorporating negative consent provisions under which the revised contracts would become effective automatically unless the plan fiduciaries took some action. This approach would assure that plans will continue to

operate without interruption during the implementation of the final regulation, and without triggering prohibited transactions.

### **Procedural Comments**

As we have noted above and in our separate comments concerning the Proposed Regulation, plan fiduciaries and service providers will need much more information concerning the scope of the Proposed Regulation and its application to particular circumstances before they can assess its full effect. We are concerned also that the final regulation under section 408(b)(2) might raise new prohibited transaction issues. We therefore request that the Department reopen the comment period concerning the Proposed Exemption upon finalization of the regulation under section 408(b)(2) so that affected parties can update their comments to reflect any changes. Furthermore, we have requested in a separate letter that the effective date of the final regulation be extended. Such extension would accommodate, among other things, supplemental comments on the Proposed Exemption and the Department's consideration thereof.

Please do not hesitate to contact me if you have any questions or would like any additional information.

Sincerely,

A handwritten signature in cursive script that reads "Karen L. Barr".

Karen L. Barr  
General Counsel