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Office of Regulations and Interpretations
Employee Benefits Security Administration **VIA EMAIL**
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Attention: 408(b)(2) Amendment

Re: Comment Letter on Proposed Regulation relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure

Dear Sir or Madam:

This letter comments on the Proposed Regulation relating to fee disclosures under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"). This rule was published in the Federal Register on December 13, 2007 (29 CFR Part 2550). Eggertsen & Associates, P.C. ("E&A") welcomes the opportunity to submit our comments for consideration by the Department of Labor (the "Department").

Comments/Questions:

(1) ***Does the Department intend to exercise its authority under ERISA Section 502(i) to assess civil penalties?***

Under Part B (Proposed Amendment to Regulations under ERISA Section 408(b)(2)), subpart (2) of the Proposed Regulation (Consequences of Failure to Satisfy the Proposed Regulation), failure to provide information described in the Proposed Regulation would result in a prohibited transaction that would have consequences for both the responsible plan fiduciary and the service provider.

The Proposed Regulation indicates that the service provider, as a "disqualified person" under the prohibited transaction rules of the Internal Revenue Code (the "Code"), would be subject to excise taxes pursuant to Code Section 4975. However, these proposed regulations are silent as to the penalty assessed to the service provider/party-in-interest in cases where Code Section 4975 does not apply, such as for ERISA welfare plans and certain other Title II plans. Is it the intent of the Department to exercise its authority under ERISA Section 502(i) to assess civil penalties to non-compliant service providers/party-in-interests?

(2) ***Has the Department considered what the impact may be on the enforceability of existing service contracts (pursuant to federal or state law) when the Proposed Regulation becomes final?***

We request clarification as to the impact that the Proposed Regulation will have on existing service contracts. Paragraph (c)(2) of the regulation continues to require that service contracts or arrangement permit termination by the plan without penalty and on reasonably short notice. Will existing service contracts become void and unenforceable 90 days after the final regulation becomes effective unless

amended or renewed to be compliant, or a class exemption applies? How will this affect the enforceability of any service contract under state law?

It is certainly arguable that any service contract that fails to meet the requirements of ERISA Sections 406(a)(1)(C) and 408(b)(2) (as explained in the Proposed Regulation) is unenforceable unless a class exemption applies. For example, if a fiduciary cancelled a service agreement because the service provider did not supply the required information, this would mean that the service provider could not sue the plan sponsor/fiduciary for breach of contract under state law, because the agreement would be illegal and unenforceable pursuant to federal law and any state law attempting to make such a service agreement legal and enforceable would be preempted.

(3) ***Are the proposed regulations completely prospective?***

ERISA Sections 406(a)(1(C) and 408(b)(2) have remained unchanged for over 30 years. Currently, the only relevant interpretive regulation is 29 CFR §2550.408b-2(c) which states only that a contract or arrangement is not reasonable unless it permits the plan to terminate without penalty on reasonably short notice. The Proposed Regulations add a series of requirements, including interpreting "reasonable arrangement" for the first time. Courts will undoubtedly be presented with the question of whether the Proposed Regulations should be consulted for guidance with respect to service agreements that were signed before the Proposed Regulations were issued.

What will the Department's position be on this question? Did "reasonable arrangement" not effectively exist until the Proposed Regulations were issued? Will existing service contracts need to be amended retroactively to comply with the definition of "reasonable arrangement", or will compliance upon the effective date of the final regulations be sufficient (*i.e.*, will an attempt at good faith compliance be required until the proposed regulations become final?)

Conclusion:

We believe the proposed regulation provides valuable guidance but also raises some questions that we hope the Department will address in the final regulations. The Department's response and/or clarification on matters identified in this letter are greatly appreciated and will enable us to better assist our clients with their fee disclosure responsibilities.

If you have any questions or comments, please contact the undersigned at the telephone number or electronic mail address provided below.

Sincerely,

Eggertsen & Associates, P.C.

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