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February 12, 2008

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VIA ELECTRONIC MAIL

Mr. Louis Campagna
Ms. Kristin Zarenko
Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA)
Room N-5669, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: **Reasonable Contract or Arrangement Under Section 408(b)(2) -
Fee Disclosure (RIN 1210-AB08)**

Dear Lou and Kristin:

We appreciate the opportunity to comment on the U.S. Department of Labor's (DOL) proposed regulation to ERISA section 408(b)(2) (the "proposed regulation"). We commend the DOL for its effort to bring better disclosure to plans and fiduciaries. We believe that increased disclosure will result in a better understanding of fees and expenses as well as beneficially impact participants' benefits.

COMMENTS

I. Contract Must Be in Writing

The proposed regulation requires (1) that there be a contract or arrangement between the plan and the service provider and (2) that the contract or arrangement be in writing. While it is not clear from the proposal, we assume that, where there are existing oral arrangements, they will need to be documented as written contracts as of the effective date. And, although not discussed in the proposal, we further assume that, for existing written arrangements, the final regulation will either "grandfather" them or provide for a transition period before requiring a compliant written contract.

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In that regard, we specifically request that the DOL clarify, in the final regulation, the transition rules for both pre-existing oral and written contracts or arrangements. As a practical matter, it will be very difficult, and perhaps impossible, to bring all arrangements with covered service providers into compliance by a specified date – even if it is several months from now, *e.g.*, January 1, 2009.

II. Services Provided Under the Contract

The proposed regulation requires that various disclosures be made in writing before the contract is entered into and before a contract is extended or renewed. The proposed regulation does not specify how the services are to be described. However, in both the preamble (where the DOL explains much of the thinking behind the proposed rules) and the proposed regulation, the DOL generally uses the term “services” broadly. Thus, we believe it would be satisfactory for a service provider to use a broad definition (subject to possible sub-categorization as discussed in our next comment), such as “consulting” or “investment advisory” services. We request that the DOL clarify how broadly a service provider may (or how narrowly it must) describe its services in the final regulation.

Also, the DOL indicates in the preamble that the written contract may incorporate other materials by reference, if they are adequately described and explained. Some registered investment advisers (RIAs) may seek to comply with portions of the disclosure obligation by providing Part II of their Form ADV and incorporating the Form by reference. However, the DOL states in the preamble that it “expects that the service provider will clearly describe these additional materials and explain to the responsible plan fiduciary the information they contain.” We understand from discussions with representatives of the DOL that such an explanation is required as a condition to using separate documents as a “part” of the contract. Thus, RIAs that incorporate information from their ADV or other documents by reference will need to explain the information that is being incorporated by reference. In other words, it is not enough to simply deliver the ADV Part II without further explanation.

We request further clarification in the final regulation or its preamble of the extent of the description and explanation that is required to satisfy that condition. Also, we request clarification about whether that description and explanation must be in the written contract or arrangement, or whether it must at the least be referenced in the written contract or arrangement, or whether it may be entirely separate.

III. Services and Compensation

The proposed regulation requires the disclosure of, for each service, the direct and indirect compensation to be received by the service provider and its affiliates. As discussed above, there is a question about how broad the descriptions of “each service” can be. It is unclear whether, as a practical matter, the requirement may be satisfied by aggregating all services that

are covered by the primary fee under a single description, and then separately describing each service for which additional fees are charged or revenues are received. We request clarification on this issue.

IV. Fiduciary Status

The proposed regulation would require a service provider to disclose whether it or an affiliate will provide any services to the plan as a fiduciary as defined under either ERISA § 3(21) or the '40 Act. The preamble indicates that this disclosure requirement applies to both acknowledged and functional fiduciaries. A person providing investment advice for a fee is a fiduciary under ERISA if he advises regarding the purchase, sale or holding of investments and if the advice is, among other things, individualized, based on the particular needs of the plan or the participants. Under this provision, such an adviser would be required to acknowledge – in writing – that he is an ERISA fiduciary, and the failure to do so would cause the arrangement to be a prohibited transaction.

That is problematic for service providers who do not ordinarily acknowledge that they are fiduciaries—often because they do not believe that the service they are providing is “investment advice” for ERISA purposes—but are later found to be functional fiduciaries, such as some brokers. We request clarification whether a failure to disclose fiduciary status (*e.g.*, for a functional fiduciary) would cause the entire arrangement between the plan and the service provider to be a prohibited transaction. We also request additional guidance on the application of the standard of “to the best of the service provider’s knowledge” as it may apply to this issue.

V. Other Relationships or Arrangements

The proposed regulation requires a service provider to disclose whether it or an affiliate has any material financial, referral or other relationship or arrangement with a money manager, broker or other service provider to the plan that creates or may create a conflict of interest in performing services for the plan. The preamble states that, “If the relationship between the service provider and this third party is one that a reasonable plan fiduciary would consider to be significant in its evaluation of whether an actual or potential conflict of interest exists, then the service provider must disclose the relationship.”

We are assuming that a referral relationship is one where an RIA compensates a third party (with money or items that have monetary value) for referrals, *e.g.*, a finder’s fee. However, we acknowledge that a plausible interpretation would include a “cross-referral” relationship where two service providers refer material amounts of business to each other, even if it is not on a quid pro quo basis, without compensation changing hands. Certainly, the first referral relationship must be disclosed; perhaps the second does also. Because of the potential for materially different interpretations, the DOL should clarify this concept.

VI. Material Changes

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The terms of the contract must require that the service provider disclose any material change (to the information required to be disclosed) to the responsible plan fiduciary not later than 30 days from the date on which the service provider acquires knowledge of the material change. We request that the disclosure period be extended to 60 or 90 days.

The short time period for notifying clients of a material change could be problematic. While the proposed regulation does not explicitly say so, we believe it goes without saying that a service provider would only need to disclose material changes related to its contract or to information that it previously provided to comply with its obligations. That is, we do not believe the proposal intends to create an obligation to oversee the disclosures of other service providers. We request clarification on that latter issue.

VII. Effective Date

The proposal states that the effective date will be 90 days after the final regulation is published in the Federal Register. However, we understand that the DOL is considering an effective date of January 1, 2009, which would coincide with the effective date for changes to reporting service provider compensation on Schedule C to the Form 5500. We believe that at least that much time is needed for the 401(k) industry to make the changes required by the proposed regulation and that a longer transition period should be provided for existing contracts, perhaps as much as an additional year.

Please let us know if you would like us to provide additional examples or clarification. We would be pleased to discuss these issues with you or provide supplemental comments. Please contact us at 310-478-5656 if you would like to discuss this further.

We hope that these comments have been helpful.

Very truly yours,

/s/

C. FREDERICK REISH

/s/

BRUCE L. ASHTON

/s/

DEBRA A. DAVIS