PENSION
consultants inc.

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Submitted Electronically Via E-mail (e-ORI@dol.gov)

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

RE: Proposed 408(b)(2) Regulation

Pension Consultants, Inc. assists retirement plan fiduciaries with the selection, evaluation and monitoring of service providers furnishing banking, custodial, investment advisory, investment management, recordkeeping, securities or third party administration services. We support the Department's efforts in addressing the importance of plan fiduciaries receiving the information necessary to assess the reasonableness of compensation and fees paid for services from their service providers.

Our firm recognizes plan fiduciaries are not receiving enough information from their service providers to make informed decisions about the costs and the services provided. We believe the additional disclosures, as outlined by the proposed regulation, will provide information to assist plan fiduciaries in their process of evaluating whether or not a service provider's fees are reasonable. This regulation will bring sweeping changes to the retirement plan services industry. Following our review of the proposed regulation, we have identified several areas in which we are requesting additional information or further clarification.

Our first area of concern is within the listing of services provided by service providers in paragraph (c)(1)(i)(B)[1]. This extensive list includes broad areas of services common in the industry. We are concerned there is not recognition of the different types or levels of services that can be provided within those broad areas. For example, a retirement plan sponsor may set up a checking account at a local bank for purposes of making 401(k) plan distributions. Providing an account seems to be a minor service, so to require a bank to comply with the

[1] §2550.408b-2(c)(1)(i)(B)

disclosure rules would be onerous in this instance. Additionally, is it the Department's intention that the services provided by a sub-advisor, hired by a mutual fund, be included within the description of investment management services?

We request clarification whether there are types and levels of services that could be provided under the broader services listed that would not require compliance with the disclosure rules.

Service providers will be determining where they fall within the categories described in paragraph (c)(1)(i)[2]. Specific definitions and/or examples of these categories and the services they provide would be beneficial in making that determination.

Contrary to the Department's assumption[3], we find that many contracts do not come up for extension or renewal. One such plan we advised last year has maintained the same service provider since the late 1980s and their service contract has neither come up for extension nor renewal. We recommend existing service providers, with a contract or arrangement that is not up for extension or renewal, be required to comply with the same disclosure rules described in paragraph (c)(1)(iii)[4] within a reasonable time period.

We have specific concerns regarding the proposed regulation under paragraph (c)(1)(iii)[5], which does not prescribe the manner in which disclosures should be provided to the plan fiduciary, nor does it set any limitations on the number of documents used to provide such disclosures. Based on our experience, plan fiduciaries find it challenging to thoroughly read and understand information contained in a prospectus, recordkeeping service agreement, etc. Without specific disclosure guidelines, the plan fiduciary could become inundated with many different documents. To support plan fiduciaries in their efforts to understand and utilize this information, we believe, when disclosure information is provided in multiple documents, there should be a single reference source that directs the plan fiduciary to the respective documents provided and explains the required disclosures contained therein. We agree with the Department the disclosure information should not be duplicated.

In paragraph (c)(1)(iii)(A)[6], the service provider is required to disclose all services to be provided to the plan. This requirement is very broad and the term "service" is open to interpretation. It is unclear as to what is considered a unique service for purposes of this disclosure. We request further clarification of the definition of service.

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[2] §2550.408b-2(c)(1)(i)
[3] "It is assumed that contracts or arrangements are either entered into or renewed once in each of the first three years after the regulation would become effective." 72 FR 71003-1
[4] §2550.408b-2(c)(1)(iii)
[5] §2550.408b-2(c)(1)(iii)
[6] §2550.408b-2(c)(1)(iii)(A)

There is a discrepancy in the language between the proposed regulation in paragraph (c)(1)(iii)(A)(2)[7] and the preamble[8] on the manner in which compensation or fees may be expressed when disclosed to the plan fiduciary. The proposed regulation states a service provider "may" express the compensation or fees in terms of a monetary amount, formula, percentage of the plan's assets, or per capita charge. The preamble to the proposed regulation gives insight that the Department expects the service provider to disclose compensation or fees in terms of a "specific monetary amount" and, if the service provider cannot provide a specific monetary amount, then the service provider may disclose compensation or fees by using a formula, a percentage of the plan's assets, or a per capita charge. We believe the Department should indicate in the final regulation whether a formula, percentage or per capita charge may only be used if the service provider cannot disclose a specific monetary amount or it may be used at the service provider's discretion.

Finally, we have a concern regarding securities or other investment brokerage services that are not provided to the plan as described in paragraph (c)(1)(i)(B)[9], but are provided directly to plan participants. Some of the individuals providing these services are licensed as a registered representative with the Financial Industry Regulatory Authority (FINRA) and earn commissions from the sale of investments. They do not provide investment advisory services. Our concern specifically relates to a registered representative that is employed by or affiliated with a plan service provider, but is not necessarily compensated directly or indirectly from plan assets.

These registered representatives often work with 401(k) and 403(b) plans providing participant education and other "value added" services. Many of these registered representatives may meet individually with plan participants providing additional financial services that are not related to the retirement plan, a practice commonly referred to as "cross-selling". Some registered representatives may actually have an office at the plan sponsor's place of business. It is our experience in certain situations, fees charged to the plan by the plan's service provider may be lower if the related registered representative is permitted to cross-sell, or the registered representative may commit to provide more services to the plan at no additional fee, if they are permitted to cross-sell.

We are concerned the practice of cross-selling may not be required to be disclosed as a service in paragraph (c)(1)(iii)(A)[10]. It is unclear, to the extent cross-selling can affect pricing or services to the plan, whether this practice is required to be addressed as a conflict of

[7] §2550.408b-2(c)(1)(iii)(A)(2)
[8] 72 FR 70990-3
[9] §2550.408b-2(c)(1)(i)(B)
[10] §2550.408b-2(c)(1)(iii)(A)

interest in paragraph (c)(1)(iii)(D)[11]. We believe the Department should specifically address this type of practice in its final regulations.

In order for fiduciaries to realize the greatest benefits from this regulation, we believe there must be greater advocacy for plan fiduciaries to use the information in a meaningful manner. While this regulation will provide more information, plan fiduciaries must continue to evaluate and monitor service providers using many factors, not simply fees. We are concerned this regulation may have the unintended consequences of leading a plan fiduciary to choose lower cost over value.

We appreciate the opportunity to provide these comments and would be happy to provide additional input or clarification.

Sincerely,

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[11] §2550.408b-2(c)(1)(iii)(D)