TESTIMONY OF
JAMES SZOSTEK
ON BEHALF OF
THE AMERICAN COUNCIL OF LIFE INSURERS
BEFORE THE
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
U.S. DEPARTMENT OF LABOR

HEARING ON
REASONABLE CONTRACTS OR ARRANGEMENTS UNDER
SECTION 408(b)(2)

Monday, March 31, 2008

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Good morning. My name is James Szostek. I am the Director of Pension Policy for the American Council of Life Insurers.

ACLI very much appreciates the Department's work in addressing issues regarding plan services and fees. The Department's fee disclosure initiatives reflect an enormous amount of hard work and thought. ACLI strongly supports the Department's work, and we share the Department's desire to enhance transparency in plan service arrangements.

The manner in which services are provided to ERISA plans has changed significantly over the years. ACLI agrees that it is appropriate to revisit Section 408(b)(2) to ensure that its regulatory requirements are reflective of those changes. We are also mindful that service arrangements are likely to continue to change in the future. Plan fiduciaries and plan service providers need a clear and concise regulatory framework that sets forth principles for disclosure. These principles should be readily understood and easily applied in the context of today's employee benefit plan designs and those of the future. To these ends, we welcome the opportunity to present testimony to the Department.

Our comment letter details a number of suggestions for improving the regulation. My comments today focus on a few of these suggestions – namely the need to separately address the different types of plans, the unique considerations related to the multi-state regulatory system for insurance contracts, and the importance of providing for a smooth transition to the new rules.

<u>Role of Insurers in ERISA Plans</u>
ACLI represents three hundred seventy three (373) member companies. ACLI member companies account for ninety-three (93) percent of the life insurance industry's total assets in the United States.

ACLI member companies began issuing group annuity contracts to employer sponsored retirement plans as far back as the early 1920's. Today, group annuity and other forms of insurance contracts are used to fund and service a wide range of ERISA-covered plans, including defined contribution plans such as 401(k) and 403(b) plans. Insurance contracts hold a significant portion of all tax qualified retirement plan assets.

In addition to retirement plans, ACLI member companies issue insurance contracts to guarantee payments from and provide support services to health plans, life insurance arrangements, long-term care programs and disability insurance plans.

As employers, ACLI member companies also sponsor ERISA plans for their own employees.

Scope of the Regulations

As drafted, the proposed regulations would apply broadly to individual account plans, defined benefit pension plans, and health and welfare plans. We recognize the public policy need to provide rules under section 408(b)(2) that apply to all employee benefit plans. However, we urge the Department to reserve on the issuance of any final rules applicable to defined benefit plans and health and welfare arrangements and instead consider first individual account retirement plans such as 401(k) plans.

Individual account plans have been the focus of the public policy discussion for some time. Since the same level of discussion and analysis simply has not yet been undertaken with regard to other types of employee benefits plans, our member companies have many new questions about the application of the proposed regulations to these other employee benefit plans. These questions concern the application of the principles and technical requirements in the proposed regulations to insurance contracts issued in connection with these plans, plans which have different purposes and different fee structures than individual account retirement plans.

We believe the Department, employers and plan service providers need sufficient opportunity to focus on the unique characteristics of these plans and arrangements. Rather than delay guidance for such effort, we believe that the employee benefits community would be best served if the Department proceeded first with guidance exclusively on individual account retirement plans.

Multi-State Regulatory System for Insurance Contracts

ACLI member companies are also concerned that the final regulations may require changes to the terms of insurance contracts. As you know, the insurance industry is state regulated, and insurers have to obtain approval of their contracts from each state's insurance department. This approval is typically necessary on a state-by state basis and it is not unheard of for the approval process for a single state to take up to a year. It is critical that the final regulations clarify that the disclosure rules may be satisfied without a need for changes to be made to insurance contracts.

More broadly, we urge the Department to reconsider the requirement in the proposed regulations that a "contract" between a service provider and plan fiduciary itself include a provision requiring the service provider to make the required disclosures. As issuers of insurance contracts, ACLI members have significant concerns with the use of the term "contract." Again, any changes in approved contracts must be resubmitted and re-approved by state regulators at significant cost to both our member companies and the various states themselves.

In lieu of the contractual requirement, we urge that final rules allow required disclosures to be made in the form of a notice to the plan sponsor or appropriate fiduciary. Compliance should be determined on the basis of whether the requisite disclosures were actually made. ACLI members need the flexibility to satisfy the disclosure requirements without making modifications to the terms of the underlying

state approved insurance contract. Any other rule would impose an unnecessary burden on insurers and slow implementation.

Transition to New Rules

One of the most important issues for ACLI member companies is the proposed effective date of 90 days after publication of final regulations.

Service providers and plan fiduciaries need sufficient time to ensure that they fully understand and are capable to implement the new regulatory regime. An appropriate transition period is important as even an inadvertent violation of these rules would result in a prohibited transaction. We recommend that the final regulations be effective no earlier than one year following publication of final rules.

We suggest this time frame given our member companies' knowledge, both as plan sponsors and as service providers, of the practicalities involved. Ensuring that all agreements and processes conform to the specifics in new regulations will take time. Service providers and plan fiduciaries will wait for the final regulations before making changes to existing disclosures, modifying current processes and procedures, gathering new data elements, refining existing data or investing in system changes. Of course these activities can only be undertaken after they have had an opportunity to fully understand the final regulations and determine an appropriate approach for implementation.

We note that if the Department does not adopt our comment that the disclosure obligation be provided in the form of notice disclosure, ACLI member companies would need significantly more time to conform to the final rules.

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We very much appreciate this opportunity to present our views on the need to separately address the different types of plans, the unique considerations related to the multi-state regulatory system for insurance contracts, and the importance of providing for a smooth transition to the new rules.

I would be happy to answer any questions.