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By Electronic Mail to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Plan Fiduciary Class Exemption for Section 408(b)(2) Amendment
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Proposed Class Exemption for Fiduciaries When Plan Service Providers Fail to Comply with ERISA Section 408(b)(2)

Ladies and Gentlemen:

Groom Law Group, Chtd. represents a number of financial institutions and administrative services providers that offer insurance investment products and/or plan services, including investment, recordkeeping, plan administrative services, consulting and advisory services to employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). This letter represents the comments of a group (the "Groom Comment Group" or "Group") of these companies[1] on the proposed Class Exemption for Fiduciaries When Plan Service Providers Fail to Comply with ERISA Section 408(b)(2) (the "Proposed Class Exemption" or "Proposal") published by the Department of Labor (the "Department") on December 13, 2007. 72 Fed. Reg. 70893 (Dec. 13, 2007). We appreciate this opportunity to file comments on behalf of the Group.

The Group provides products and services to thousands of plans throughout the United States, involving many billions of dollars in plan assets. Group members are extremely knowledgeable about the services provided to plans and the very significant effects that the Department's Proposal will have on the employee benefits community, including plan fiduciaries, plan participants, and plan service providers. We would be happy to meet with the Department to discuss the concerns of the Group in greater detail.

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[1] Not all of the companies in the Group provide all of the services or products described above. One or more members are limited to providing non-discretionary administrative services, including recordkeeping services.

Executive Summary

The Group is committed to open communications between service providers and fiduciaries and other plan customers. Group member companies are committed to providing information to plan fiduciaries to enable them to fulfill their fiduciary duties and reporting requirements under ERISA. The Group is also submitting comments to the Department regarding the proposed regulation interpreting what constitutes a reasonable contract or arrangement under ERISA section 408(b)(2) (the "Proposed Regulation") 72 Fed. Reg. at 70896. As reflected in our comments on the Proposed Regulation, the Group is concerned that the Department's approach will not result in greater value for plans and their participants because it will greatly increase the costs of compliance and will overwhelm plan fiduciaries with extraneous information, rather than empowering plan fiduciaries to safeguard plan resources.[2] To that end, the Group submits the following comments about the Proposed Class Exemption:

- The scope of the Proposed Class Exemption should be expanded to provide greater certainty for plan fiduciaries and to cover plan service providers in certain circumstances.

- The Department should clarify that a fiduciary's belief that an arrangement meets or would meet the requirements of section 408(b) and the Department's Proposed Regulation, will not fail to be "reasonable" merely because it would have been possible to for the fiduciary to have discovered the service provider's failure to disclose, so long as the fiduciary takes reasonable steps to review and understand the information provided to it by the service provider.

- The Department should confirm that a service provider will not have "failed to comply" with a plan fiduciary's request for information for purposes of the Proposed Class Exemption merely because, despite good faith efforts, the service provider is unable to complete a response within 90 days of the request.

- Similarly, plan fiduciaries should not have to expend excessive resources to notify the Department of every failure of every plan service provider of every condition of the Proposed Regulation; the Department should modify the Proposed Class Exemption to only require plan fiduciaries to notify the Department in specific instances.

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[2] The Group also suggests that the level of disclosure required in the Proposed Regulation would overwhelm many small plan fiduciaries and that the Department should consider an abbreviated set of requirements for small plans.

- Finally, fiduciaries may not be able to make the required notifications to the Department within the 30-day period provided. The Department should extend this period to 90 days.

Comments

I. The relief provided by the Proposed Class Exemption should be expanded.

The Proposed Class Exemption provides that, if certain conditions are met, the "restrictions of section 406(a)(1)(C) of ERISA shall not apply to a plan fiduciary" who causes a plan to enter into a contract or arrangement for the provision of services to the plan, notwithstanding the service provider's failure to meet certain disclosure requirements provided in the Department's Proposed Regulation. 72 Fed. Reg. at 70896. It appears that the Department is proposing that, where the exemption is available, the section of ERISA that prohibits a plan fiduciary from "causing" a plan to engage in a services transaction with a party in interest does not apply to the plan fiduciary, but that the services transaction itself remains a prohibited and not exempt. Put another way, the prohibited transaction still occurs, but the fiduciary has not caused it. The protections provided to plan fiduciaries under the Proposed Class Exemption are unclear and are not comprehensive. In addition, there are circumstances under which plan service providers should be covered by the Proposed Class Exemption. Below, we identify ways in which the scope of the Proposed Class Exemption should be expanded.

First, we ask the Department to confirm that by relieving the plan fiduciary of the restrictions of section 406(a)(1)(C), the Department intends that the plan fiduciary will not be deemed to have engaged in a prohibited transaction and therefore will not have breached its fiduciary duties under ERISA section 404 solely by reason of having caused the plan to engage in the services transaction. We also ask the Department to further clarify that, for purposes of ERISA's civil enforcement provisions including sections 502(a)(3) and 502(a)(5), to the extent the conditions of the Proposed Class Exemption are met, the services transaction will not constitute an "act or practice which violates" ERISA. Without these clarifications, plan fiduciaries cannot be certain that the exemption fully protects them. Without assurance of full protection, plan fiduciaries are less likely to identify failures to provide information by service providers.

In addition, we ask the Department to expand the scope of the Proposed Class Exemption to address ERISA section 406(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a direct or indirect transfer of plan assets to a party in interest. Because a fiduciary's causing a plan to pay for services received from a party in interest likely involves a "transfer" of plan assets to the party in interest, the Proposed Class Exemption should be expanded to provide relief for any such transfer occurring in connection with a services transaction that is covered under the Proposed Class Exemption (including with respect to payments for service that occur after a plan fiduciary has decided, in accordance with the requirements of the exemption, to

continue a service provider's engagement despite a failure to provide information).

Finally, we ask the Department to expand the Proposed Class Exemption to provide relief for plan service providers who are required to provide disclosures with respect to services offered in a "bundled arrangement." Specifically, under the Proposed Regulation a single plan service provider may be responsible for making disclosures on behalf of its affiliates, subcontractors and any other party offering services under a bundled arrangement. The Group is concerned that in many instances, plan service providers that will be responsible for making disclosures will have very limited access to information from other parties participating in the bundle. The Group requests that the Department extend the protections of the Proposed Class Exemption to service providers who have used reasonable efforts to obtain information from bundle participants but have not been able to obtain such information. In this case, the service provider's position is similar to that of the plan fiduciary seeking information. Therefore, the service provider should have the same protections as the plan fiduciary under the Proposed Class Exemption.[3]

II. The Department should make clear that a fiduciary's belief that a services arrangement met the requirements of 29 C.F.R. § 2550.408b-2(c)(1) at the time the contract or arrangement was entered into, extended or renewed, will not fail to be "reasonable" merely because it would have been possible to for the fiduciary to discover the service provider's failure to disclose at the time of contract (or renewal or extension) provided the fiduciary takes reasonable steps to review and understand the information provided to it by the service provider.

To qualify for the Proposed Class Exemption's protection, the fiduciary must have "reasonably" believed, based on "all of the information available" at the time the contract was entered into, that the contract met the requirements of the Proposed Regulation, and did not

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[3] Included in the Group's comments on the Proposed Regulation is a request that the Department clarify the standard under which plan service providers are required to act when disclosing information to plan fiduciaries for purposes of meeting the requirements under ERISA section 408(b)(2). Specifically, we request that the final regulations under section 408(b)(2) state that an arrangement for services will not fail to be reasonable provided that a service provider makes reasonable efforts to comply with the disclosure requirements and when it becomes aware of a deficiency in its disclosure, uses reasonable efforts to correct such a deficiency. We strongly urge the Department to adopt this standard. If the Department provides this type of guidance in connection with the Proposed Regulation, the Department may not need to expand the scope of the Proposed Class Exemption to provide relief for service providers who have acted in good faith and used reasonable efforts to comply with the Proposed Regulation, but who have not been able to do so.

know, or have reason to know, that the service provider failed or would fail to comply with the disclosure requirements. 72 Fed. Reg. at 70896.

The Department should clarify that a fiduciary will not be precluded from taking advantage of the exemption merely because it would have been possible, with the use of unlimited resources, to discover a failure or likely failure by a service provider. Rather, the Department should make clear that if the plan fiduciary takes reasonable steps to review and understand the information it receives, he or she will not fail the "reasonably believed" or "all available information" conditions of the exemption.

III. The Department should confirm that, for purposes of the Proposed Class Exemption, a service provider will not have "failed to comply" with a fiduciary's request for information merely because the service provider is unable to complete its response to the fiduciary within 90 days of the request.

The Proposed Class Exemption requires that, upon discovering that a service provider has failed to comply with the disclosure requirements of the Proposed Regulation, a plan fiduciary request in writing that the service provider furnish the omitted information. 72 Fed. Reg. at 70896. If the service provider fails to respond within 90 days, the fiduciary must notify the Department of this failure. Id.

A complete response within 90 days may be impossible. In some cases, a plan service provider may not be able to gather information requested within 90 days of the request, despite good faith efforts. If the service provider responds to the request for information, and continues to work with the plan fiduciary to provide appropriate information, it should not be deemed to have failed to comply, and the fiduciary should not be required to notify the Department.

Similarly, the fiduciary and the service provider may disagree about whether complete disclosure has been made. The discussion between the service provider and the fiduciary should not be deemed a "refusal" by the service provider to comply with the request for information, and therefore should not trigger a notice to the Department.

IV. To reduce the burden on plan fiduciaries, and to help the Department focus its resources appropriately, the Department should modify the Proposed Class Exemption to require plan fiduciaries to notify the Department of a service provider's failure to disclose information only in specific instances.

As proposed, the Proposed Class Exemption treats the omission of any piece of the voluminous information required to be disclosed under the Proposed Regulation as a failure that requires the fiduciary to notify the Department. See id. As a matter of conserving the plan's (and the Department's) scarce resources, we suggest the Department amend the Proposed Class Exemption to require notice to the Department only with respect to specific types of disclosure failures by service providers. For instance, the Department could limit the requirement of notice

to the Department for failures by plan service providers who are fiduciaries. The Department could also limit the notice requirement to specific disclosures contained in the Proposed Regulation, for instance to failures to provide fee and compensation information.

V. The Department should extend the amount of time a plan fiduciary has to notify the Department of a service provider's failure to disclose.

To obtain the benefit of the Proposed Class Exemption, a fiduciary must notify the Department of a service provider's failure within 30 days of either the service provider's refusal to comply, or of the expiration of the 90-day period following the fiduciary's written request to the service provider for information. Id. In many cases, the plan fiduciary may need more than 30 days to do so.

In particular, the notice to the Department must include a statement of whether the fiduciary has decided to retain the service provider, despite its failure. Id. Many fiduciary committees do not meet on a monthly basis, and it may be difficult for a fiduciary committee to make a final determination about retention of the provider within this 30-day period. Also, as discussed above, the service provider and the fiduciary may engage in discussions regarding the requested information beyond the 90-day period. Such collaborative efforts to resolve confusion or disputes and ensure the plan receives the necessary information should be encouraged. The 30-day requirement requires the fiduciary unilaterally terminate such discussions.

Thus, we suggest that the Department extend to 90 days the time a plan fiduciary has to provide notice to the Department following a refusal to respond or failure to provide the requested information.

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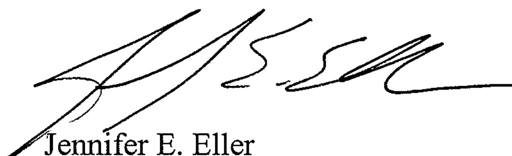
The Group appreciates the opportunity to comment on this important Proposal. We would be happy to meet with the Department to discuss these comments or to provide additional input as you work to finalize the exemption.

Best regards,

Stephen M. Saxon



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