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August 27, 2010

Submitted electronically via the Federal Rulemaking portal @ www.regulations.gov

Attention: 408(b)(2) Interim Final Rule
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Sir or Madam:

Subject: Comments on Interim Final Rule on Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure (RIN 1210–AB08)

Hewitt welcomes the opportunity to submit our comments relating to the interim final rule on reasonable contracts or arrangements under Section 408(b)(2) of the Employee Retirement Income Security Act (ERISA) published in the *Federal Register* on July 16, 2010.

Who We Are

Hewitt Associates is a global human resources outsourcing and consulting company providing services to major employers in more than 30 countries. We employ 23,000 associates worldwide. Headquartered in Lincolnshire, Illinois, we serve more than 2,000 U.S. employers from offices in 30 states. As one of the world's premier human resources services companies, Hewitt Associates is the largest independent provider of administration services for retirement plans, serving more than 11 million plan participants.

Hewitt has long advocated for greater fee transparency to facilitate better understanding of service arrangements by plan fiduciaries. As noted in our earlier comments, understanding plan costs is fundamental to the basic duties of a fiduciary. Such understanding is necessary to ensure service provider fees constitute reasonable compensation and thus, fall within the prohibited transaction exemption under Section 408(b)(2) of ERISA. Understanding plan costs is also necessary for a fiduciary to act prudently, and solely in the interest of plan participants and beneficiaries when selecting a service provider, as required by Section 404(a) of ERISA.

Hewitt congratulates the Department of Labor (DOL) on the issuance of the interim final rules. These regulations represent a major step toward enabling plan fiduciaries to evaluate the services and fees of plan service providers. Hewitt commends the DOL on many improvements from the proposed rules. We also request clarification of, enhancements, and additions to the rules for your consideration.

1. Recordkeepers and Brokers Should Not Be Liable for the Accuracy of Fee Information of Unaffiliated Designated Investment Alternatives

Section 2550.408b-2(c)(1)(iv)(G) of the final rules requires providers of recordkeeping and brokerage services (hereinafter referred to as recordkeepers) that provide services to participant-directed individual account plans to disclose specified fee information relating to the designated investment alternatives (investment options) that are made available to plan participants through the recordkeeper's service

platform. This requirement applies regardless of whether the investment options are proprietary products of the recordkeeper or its affiliates. The DOL acknowledges in the preamble to the regulations that recordkeepers may be intermediaries that do not necessarily have a direct relationship with the investment provider. The DOL concludes, nevertheless, that recordkeepers are in the best position to provide plan fiduciaries with the information required to evaluate investment option fees. Hewitt agrees that recordkeepers often have access to information relating to all of a plan's investment options. However, if the recordkeeper is not either directly involved with the determination of the investment option fees or affiliated with the investment provider, the recordkeeper should not be liable for the accuracy of any investment option fee information.

Section 2550.408b-2(c)(1)(iv)(G)(2) of the rules provides recordkeepers with a very limited liability exemption for investment option fee disclosure if recordkeepers meet their disclosure obligation by providing regulated information prepared by an unaffiliated investment provider, as long as the recordkeeper has no knowledge that the information is inaccurate or incomplete. There is no exemption if investment option disclosure information is not regulated. Many investment options that serve as the core of many plan investment portfolios, such as collective trusts and insurance products, do not distribute fee information regulated by a government entity. Consequently, the exemption does not apply. We are concerned that these rules might be interpreted to discourage the use of investment options that do not have regulated disclosure material. Such an interpretation would be detrimental to participant retirement savings. Therefore, when fee information does not come from an affiliated investment provider, we suggest the following:

- The DOL should revise the rules to clarify that recordkeepers are not liable for the accuracy of fund fee information made available or provided to them by an unaffiliated party. This should be the rule regardless of whether the investment options or the disclosure materials are subject to state or federal regulation.

- The liability exemption should be extended to apply when fee information made available by investment providers or other responsible parties is consolidated into a more user-friendly summary format, rather than passed directly to the plan sponsor in its original format, as long as the information in the summary is consistent with the information provided by the investment provider or other responsible party. The advantages of making recordkeepers responsible for disclosure are weakened if recordkeepers are discouraged from consolidating fee information for the easy review of the responsible plan fiduciary.

2. Suggestions for Summary Disclosure Statement

Hewitt agrees with the DOL that service providers require flexibility in the form and manner of fee disclosure. However, we also recognize the advantages to plan fiduciaries of having a summary disclosure with the most essential information, as well as an index to more detailed documentation. Hewitt recommends that the focus of a summary disclosure statement be on the direct and indirect compensation of the service provider, including affiliates. The statement should include:

- **Total expected direct compensation** for services pursuant to the contract or arrangement, including either the estimated dollar amount or the formula used to derive direct compensation, and a summary of the services to which such compensation applies.

- **Total expected indirect compensation** relating to services pursuant to the contract or arrangement, including either the estimated dollar amount or the formula used to derive the indirect compensation, a summary of the services to which such compensation applies, and the sources of such compensation.

- **A list of plan investment options and associated fees** if either the service provider's compensation is impacted by the plan investment options or any investment options are mandatory in order to receive the pricing included in the disclosure.

- **Total expected recordkeeping compensation** (if applicable), both direct and indirect, relating to services pursuant to the contract or arrangement, including either the estimated dollar amount or the formula used to derive the recordkeeping compensation, and a summary statement of the services to which such compensation applies.

- **Disclosure of any other potential sources of revenue** associated with servicing the plan, including the information detailed in Section 3 of these comments.

Hewitt agrees with the DOL that it is likely that at least 50% of all service providers will provide their disclosures electronically. To the extent there is additional detail supporting the information above, the index to the summary should include a description of required disclosures and (if such disclosures are not physically attached to the summary) the location or direct link to the more detailed information.

3. Compensation That Must Be Disclosed Should Be Expanded to Include Compensation Earned From Cross-Selling

Section 2550.408b-2(c)(1)(iv)(C) of the rules requires the disclosure of all direct and indirect compensation a service provider expects to receive in connection with the services provided to a covered plan pursuant to a contract or arrangement. This includes the disclosure of compensation received among related parties of a covered service provider for specified transactions or which is charged directly against a plan investment option and reflected in the net value of such option. The DOL notes in the preamble that the requirement to disclose related-party compensation is intended to help the responsible plan fiduciary determine the reasonableness of the compensation and also assess actual or potential conflicts of interest that may impact the services provided.

For similar reasons, Hewitt believes that the definition of compensation is too narrow. Specifically, the cross-selling of retail products to plan participants is a practice that not only raises conflicts of interest and other fiduciary concerns, but also directly impacts service provider compensation. Many service providers market their own retail products by utilizing their employer plan services. Marketing can be done on plan Web sites, in plan mailings, and through a plan's customer service representatives. The revenue generated from retail marketing that leverages a provider's services can be significant. However, in guidance relating to disclosure of indirect compensation on the Schedule C to the Form 5500 Annual Report, the DOL indicated that cross-selling revenue was not compensation for annual reporting purposes.[1] Hewitt does not believe the same position should apply to the disclosure of a service provider's expected compensation before the commencement of a contract or arrangement. Where the services provided to plan participants will be intertwined with the marketing of a service provider's retail products, Hewitt suggests that the rules be revised to require a service provider to disclose:

- Whether it expects to receive compensation from cross-selling;

- The source of such compensation;

- The methods that will be used to promote or sell the products; and

[1] Question and Answer 38 of the FAQs About The 2009 Form 5500 Schedule C.

- Whether a plan fiduciary has the option to exclude retail marketing in conjunction with plan services and any variation in the service provider's fees if marketing is excluded.

This information will allow the plan fiduciary to better assess a provider's total expected compensation related to the services provided to employer plans, judge where there is a conflict of interest, determine whether such compensation is reasonable, and consider whether marketing practices raise other fiduciary concerns, before entering a contract or arrangement.

4. Responsible Plan Fiduciaries Should Not Be Obligated to Investigate the Sufficiency of Service Provider Disclosures

Section 2550.408b-2(c)(1)(ix) of the rules provides a necessary prohibited transaction exemption to responsible plan fiduciaries if service provider fee disclosures are incomplete or erroneous. As a condition of the exemption the responsible plan fiduciary must not have knowledge of a service provider disclosure failure. Also, the responsible plan fiduciary must have "reasonably believed" that the service provider disclosed the required information. This provision might be interpreted to obligate the plan fiduciary to independently confirm that the information disclosed meets the requirements, before the fiduciary can reasonably believe that disclosures are complete. Such an interpretation would be inconsistent with other provisions of the regulations that place the obligation for making accurate and complete disclosures on the covered service provider whether or not the plan fiduciary takes action to confirm such information. Therefore, we suggest that the provision be clarified to provide that the prohibited transaction exemption is available unless the plan fiduciary "knows or should have known" that the disclosures are incomplete or inaccurate based upon information in the fiduciary's possession.

5. Suggestion of Annual Disclosure Statement

We suggest that when a service provider's fees are variable based upon plan assets or the number of plan participants, the service provider also should provide prospective annual disclosures to the plan fiduciary consistent with the disclosure provided in the summary disclosure statement, described in Section 2 above. Such annual disclosure would enable the plan fiduciary to determine whether a service provider's fees continue to be reasonable over the duration of a contractual arrangement and to understand the potentially significant impact that changing asset levels, asset allocations, and plan participant counts could have on the fees charged. We recommend that this annual disclosure be in addition to the Schedule C disclosures for the Form 5500, which are provided more than a year after the fees are actually incurred.

6. Brokerage Window Disclosure

Section 2550.408b-2(c)(1)(viii)(C) of the rules specifically excludes brokerage windows (and similar arrangements) from the definition of "designated investment alternative." Accordingly, brokers are not obligated to disclose fee information relating to every investment option offered within a brokerage window. Notwithstanding, brokers are covered service providers with the obligation to disclose direct and indirect income received in connection with their services to client plans. There was some uncertainty regarding the information brokers needed to disclose for purposes of reporting compensation on Schedule C of the 2009 Form 5500 Annual Report. We therefore suggest that to avoid similar confusion, the service provider fee disclosure rules clarify what types of compensation a broker of a brokerage window has to disclose.

We recommend that a broker of a self-directed brokerage window be required to disclose all types of direct compensation expected to be received by the broker (including its affiliates and subcontractors) from the plan or participants. Specifically, brokers should disclose expected compensation for implementation and maintenance of the brokerage window, as well as the schedule of participant transaction fees and commissions paid for access to and trading within the brokerage window. We also suggest that brokers

disclose the general types of indirect compensation that may be received from the various funds offered within the window (e.g., finder's fees, 12b-1 fees) relating to the brokerage window services. However, consistent with the definition of "designated investment alternative" brokers should not have to provide fund-specific indirect compensation information. Considering the large number of funds generally offered in a brokerage window, such disclosure would be a burdensome exercise that would not be useful to plan fiduciaries.

7. Clarification Needed for Covered Service Provider Description

Section 2550.408b-2(c)(iii) requires disclosures related to each "contract" or "arrangement," but it does not specifically address how the rules apply when multiple contracts or arrangements exist with respect to separate service lines offered by the same service provider (or its affiliates). Large companies with several lines of business may provide a number of services to plans under a variety of arrangements, not as bundled packages but as separate services for different needs. Under the rules, only certain services would cause the company to be a covered service provider. In order to avoid an inadvertent prohibited transaction, we request that the DOL clarify that just because a company (or its affiliate) is a covered service provider for certain services it will not be a covered service provider for other services, if such services would not independently cause the provider to be covered under these rules.

8. Effective Date

Hewitt appreciates that the DOL has given service providers one year to take actions necessary to comply with these rules. We are long-time advocates of uniform and comprehensive fee disclosure, and we prefer that plan fiduciaries have the information they require to assess the reasonableness of a contract or arrangement, as well as any potential conflicts of interest as soon as possible. Therefore, we are not requesting an extension of the effective date. We understand, however, that if final rules make significant changes, additional time may be required to enable service providers to comply. We therefore encourage the DOL to provide final rules as soon as possible to avoid a further delay of the effective date.

Closing

In closing, Hewitt once again commends the DOL for its efforts to find the right balance between adequate disclosure and overwhelming information. We agree that these rules should help plan fiduciaries evaluate the reasonableness of fees and underlying services and also to identify potential conflicts of interest.

Thank you for your consideration. Please feel free to contact us with any comments or questions relating to the matters discussed in this letter.

Sincerely,
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