American Bankers Association

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By electronic delivery

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Mr. Robert J. Doyle
Director
Office of Regulations & Interpretation
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: 408(b)(2) Interim Final Rule, 75 Federal Register 41600 (July 16, 2010)

Dear Mr. Doyle:

The American Bankers Association appreciates the opportunity to provide comments to the Department of Labor (Department) on the interim final rule, regarding disclosure requirements of service providers to employee pension benefit plans. These disclosures are established as part of a statutory exemption from the prohibited transactions provisions of the Employee Retirement Income Security Act (ERISA). The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. Many of these institutions are plan service providers, providing trust or custody services for institutional clients, including employee benefit plans covered by ERISA. As of year-end 2009, banks held $7.5 trillion in defined benefit and defined contribution accounts.[1]

Under ERISA, a service provider generally is prohibited from providing goods or services to a plan that is deemed to be a party-in-interest. However, under section 408(b)(2), certain service arrangements are exempt if the contract or arrangement between the plan and the party-in-interest is reasonable, the services are necessary for the establishment or operation of the plan, and no more than reasonable compensation is paid by the plan for the services. This interim final rule establishes a new requirement applicable to certain plans that, in order for the services to be considered reasonable, the covered service provider must disclose certain additional information to the plan fiduciary.

We commend the Department for modifying its earlier proposal, changes that ABA supported in our comments on the proposal. In response to the Department's 2007 proposal, ABA noted that the conflicts of interest provision was too broad, requiring too much unnecessary disclosure. The 2007 proposal would have required the service provider to disclose whether the service provider or an affiliate had any material financial, referral, or other relationship with any entity that could

[1]FDIC Quarterly Banking Profile, Table VIII-A (December 2009).

create a conflict of interest for the service provider in providing services under the contract, along with a requirement that the service provider identify on a plan-by-plan basis all of the service providers for each plan client, and then determine whether they "could" pose a conflict of interest. This inventory and analysis would have been extremely burdensome to create. We appreciate the Department's recognition that plan fiduciaries will be in a better position to assess potential conflicts of interest and the reasonableness of the contract through full disclosure of the circumstances under which the service provider will be receiving compensation from parties other than the plan.

We also appreciate the Department's decision not to require that the disclosure language be included in the body of the contract or arrangement between plan fiduciaries and plan service providers. Such a requirement would have necessitated a massive rewriting of contracts. The interim final rule requirement, focusing on the substance of the disclosure, and not the delivery method, is a much welcomed improvement.

We do, however, raise several other issues for the Department's consideration.

DISCUSSION

Ensure greater consistency between Form 5500, Schedule C and 408(b)(2)Reporting

The Department should strive to create as much consistency as possible between the disclosures required under the Form 5500 annual reporting regime and those required under statutory exemptions from the ERISA prohibited transaction provisions. In November 2007, the Department revised the Form 5500, the annual report that plan sponsors file, in order to increase information disclosed to the public and the government.[2] As the Department notes in Footnote 2 of this interim final rule, the changes to 408(b)(2) reporting are intended to complement the Form 5500 Schedule C changes. We would encourage the Department to make consistency and avoiding duplication a high priority to ease compliance with these reporting requirements.
One such example involves response times to requests for certain information. Paragraph (c)(1)(vi) of the interim final rule requires a service provider to respond to a request for information from the plan fiduciary or administrator within 30 days of receipt. This requirement conflicts with the response time periods outlined under section 103(a)(2) with respect to Form 5500 annual reporting and certification and recent guidance provided by the Department regarding Schedule C of the Form 5500.[3] We request that the interim final rule specifically reaffirm and state that service providers have 120 days after the beginning of the year to respond to requests for Form 5500 annual reports and its accompanying schedules.

[2] 72 Fed. Reg. 64710 (November 16, 2007)
[3] Department of Labor, Employee Benefits Security Administration, Supplemental FAQs About The 2009 Schedule C, Q17, available at http://www.dol.gov/ebsa/faqs/faq-sch-C-supplement.html

Clarify Compensation Provisions

The interim final rule requires service providers to make the requisite disclosures once the service provider reasonably expects to receive $1,000 or more in direct or indirect compensation. We request clarification that the compensation threshold trigger is determined on a calendar year, not over the life of a multi-year contract.

Additionally, the interim final rule in section (c)(1)(viii)(B) requires disclosure of any non-monetary amounts received above a threshold amount of $250. It is difficult to know in advance whether non-monetary compensation, such as gifts, awards or trips might be provided or received during the course of the contract. While this information can properly be disclosed retrospectively on the Form 5500, it is nearly impossible to disclose this information in advance as this rule would require.

Finally, the Department should make clear that disclosure of estimated compensation may be expressed in terms of ranges, e.g., a range of basis points.

Clarify that Exemptions Already Relied Upon Are Still Good Law

The Department should clarify that a service provider relying upon the disclosure requirements of a previously issued PTE, particularly those that require client consent, does not need to disclose additionally in the manner provided under this rule. For example, PTE 2006-16 permits bank service providers to engage in securities lending transactions with plan assets and to receive compensation so long as the bank obtains client consent at the inception of the arrangement and discloses the formula by which the bank is compensated for securities lending. Since the amount of compensation earned by the bank depends on the volume of securities lending and the amount earned on cash collateral, the compensation to be earned by the bank is not known at the time the client engages the bank to provide securities lending services. PTE 2006-16 describes the manner in which disclosure must be provided. The manner of disclosure laid out in the PTE should be considered appropriate disclosure for purposes of this rule.

Retain Flexibility for Disclosure Format

The Department requested input on whether the Department should prescribe a format for the disclosure. We would recommend that the Department not dictate a particular format for disclosure but instead allow the disclosure to be flexible. This flexibility is important because of the different variations in the marketplace among service providers, as well as to allow for the different preferences among plan sponsors.

In this connection, we recommend that service providers should be permitted to use affiliate disclosure materials to satisfy the disclosure obligations under the rule. As the issuer of the investment option, the affiliate is frequently in the best position to develop the disclosures needed to understand the particular investment, e.g., a hedge fund or real estate private equity fund.

Conclusion

In conclusion, we appreciate the opportunity to provide our comments to the Department. Given the short 30-day comment period provided for the interim final rule, we anticipate that many of our members may not have had the opportunity to consider fully all of the issues raised. In addition, we believe additional issues will arise as plan service providers begin to implement the final interim rule in advance of the June 2011 compliance date. We would urge the Department to establish a process to respond to frequently asked questions in a timely manner, perhaps through a Frequently Asked Questions document that is updated often.

If you have any questions on the foregoing, please contact the undersigned.

Sincerely,

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Center for Securities, Trust & Investment