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August 30, 2010

Via Email: *e-ORI@dol.gov*

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

Re: Comment on Interim Final Rule under section 408(b)(2)
Attention: 408(b)(2) Interim Final Rule.

Ladies and Gentlemen:

Wells Fargo ("WF") appreciates this opportunity to comment on the interim final regulation under section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) published on July 16, 2010, which requires that certain service providers to employee pension benefit plans disclose information to assist plan fiduciaries in assessing the reasonableness of contracts or arrangements. WF includes Wells Fargo Retirement, a division of Wells Fargo Bank, N.A., a leading provider of retirement solutions to businesses, institutions and individuals throughout the United States.

Wells Fargo Retirement ("WFR") is among the top ten national leaders in providing total retirement management, investments and trust and custody solutions tailored to over 8,000 institutional retirement plans. Since 1952, WFR has serviced the entire scope of institutional retirement clients - from single-participant 401(k) plans to complex billion-dollar defined contribution plans for America's Fortune 500 companies. WFR has been on the forefront of offering comprehensive and effective disclosure of service provider fee information to plan sponsors. As a service provider to thousands of retirement plans, WF is well positioned to determine the impact the regulations would have on service providers and the plan fiduciaries evaluating those services.

WF commends the Department of Labor (the "Department") for providing guidance to facilitate the free flow of information between service providers and plan fiduciaries. WF strongly supports transparency in plan services arrangements, as we believe it critical that plan fiduciaries have the opportunity to evaluate the reasonableness of the compensation being paid to various service providers. We hope the regulations can strike an appropriate balance between providing plan fiduciaries with useful and pertinent disclosure while avoiding unnecessary increases in costs – costs which may be borne by plan participants and beneficiaries.

WF believes that the interim final regulation will be helpful in providing much needed guidance around fee transparency, and feels the following comments will help the Department further clarify and improve the regulation.

Application of Monetary Limits: Definitions

The interim final regulation sets the monetary limit for covered service provider at $1,000 or more in compensation reasonably expected, direct or indirect, *in connection with the services* described in the regulation. Similarly, the definition of compensation excludes non-monetary compensation of $250 or less, in the aggregate, *during the term of the contract or arrangement*. The Department should clarify (and WF believes) that these limits are annual (e.g. any 12 month period, the plan's billing period, calendar year or any other designated 12 month period). This would align this regulation with certain Schedule C provisions. It would also eliminate the difficulty of applying the regulation to "evergreen" contracts and other agreements that continue until either party terminates them. Additionally, the portion of the definition of compensation that excludes non-monetary compensation of $250 or less should further be clarified to also have a similar "reasonably expected" criteria as applied to the covered service provider definition; it is unrealistic to expect a service provider to disclose unexpected non-monetary compensation, such as a gift, prior to its receipt. While service providers typically have policies encompassing such items, since the repercussion under the regulation could be a prohibited transaction, further clarification of such items would be useful.

Affiliate or Subcontractor Limitation

WF supports the Department's limitation on the definition of a "covered service provider" as it relates to the performance of services as an affiliate or subcontractor. Limiting the disclosures to the plan fiduciary and the service provider with the primary relationship with the fiduciary would avoid burdening additional parties with disclosures to an entity with which they may have no direct relationship, and which may be duplicative, confusing and potentially cause reconciliation difficulties.

Description of Services and Status

While we agree with the Department in requiring covered service providers to describe the services being provided, we request that the final regulation include model language that can be used as an industry standard.

Many service providers provide similar services and have similar roles with respect to a plan. Model disclosures for services should be possible in cases of bundled providers where the service provider accepts contributions, invests them pursuant to participant direction, and processes requested distributions. A check-the-box format could also work whereby the service provider checks boxes for the services that it will be providing, and "other" boxes can be used for services that were not listed. Without model language it will be more challenging for a plan fiduciary to evaluate the reasonableness of the compensation paid to a service provider. Model language may also assist fiduciaries in comparing services across providers.

Compensation Paid between Related Parties

The interim regulation requires that compensation paid between related parties be disclosed in certain situations, including when charged directly against the covered plan's investments and reflected in the net value of the investments. The Department gives the example of 12b-1 fees. While 12b-1 fees, shareholder services fees, sub-transfer agency fees, and other similar amounts can easily be disclosed, some service providers still use internal cost accounting adjustments to allocate other revenue between related parties for bookkeeping considerations between the related parties; actual hard dollars are not always transferred between the parties in these cases but are handled by bookkeeping adjustments. For example, related parties may reallocate revenue (separate and apart from the fees listed in this paragraph above) from the mutual fund investment advisor to the entity providing recordkeeping and/or trustee

services to the plan. Such allocations are often done for bookkeeping considerations between the parties and have no impact on the actual expense incurred by the plan or plan participants. We request that the Department specifically exclude arrangements where compensation paid between related parties is merely an allocation via internal accounting adjustments and there is no additional impact to participant/plan expense since actual dollars are not exchanged. This exclusion would make this disclosure requirement consistent with the new disclosure requirements under Schedule C.

Recordkeeping Services

WF recommends that the Department alter the disclosure required for recordkeeping services and include model language that can be used as an industry standard to assist plan fiduciaries in evaluating recordkeeping services across providers. The regulation would require recordkeepers in certain circumstances to estimate the cost of recordkeeping to the plan. Specifically, the service provider must *explain the methodology and assumptions used* to prepare the estimate and describe in detail the recordkeeping services that will be provided to the covered plan. Although we strongly believe that an estimate and description of such services will be valuable to plan fiduciaries in order to evaluate the reasonableness of the compensation being paid, we suggest that the regulation include model language that can be used as an industry standard, which again would assist fiduciaries in evaluating recordkeeping across providers.

Summary Statement

The Department requested comments on whether the final regulation should require that each service provider provide a summary of the total direct and indirect compensation that the service provider reasonably expects to receive. While summary disclosures can be helpful when used in lieu of full disclosures for certain populations (such as summary prospectuses given when full prospectuses are not needed), giving a summary disclosure in addition to a full disclosure to the same fiduciary will require service providers to provide duplicative information. Given the importance of evaluating the cost of services, WF believes fiduciaries should be reviewing the full disclosures instead of relying on summaries thereof. In addition, such a requirement heightens the risk of information being misstated when it is otherwise already accurately described in the underlying substantive disclosure, since a certain level of human error is always unavoidable. This would give rise to questions of which disclosure should govern, especially concerning since misstatements could be construed as prohibited transactions.

Reliance on Information Provided by Investment Providers

WF agrees with the Department's inclusion of language allowing covered service providers to rely on current disclosure materials of the issuer of the designated investment alternative. However, the language in its current state can be read to require added disclosure where an investment alternative is issued by an affiliate; by stating non-affiliated recordkeepers can rely on an issuer's disclosures, the regulations can be read to imply that affiliated recordkeepers may not rely on similar materials and need to create something additional.

We suggest that the language in the final regulation allow the covered service providers to pass through information that is made available by the issuer of all the plan's designated investment alternatives regardless of affiliation if the disclosures materials are regulated by a state or federal agency. Significant time and effort are put into disclosure materials such as prospectuses and similar disclosure documents for collective funds and similar investments. These documents are composed according to numerous laws and regulations. It is unlikely that a recordkeeper will have more knowledge of the investment options than the entity producing the disclosure document to begin with. The requirement that the

recordkeeper not have actual knowledge that the materials are incomplete or inaccurate should sufficiently cover those unlikely situations where the recordkeeper would have information about investments that the disclosure materials would not discuss.

In addition, since the regulation subsection that requires recordkeepers to provide disclosure of investment materials refers back to subsection (F), which deals only with the investment options holding plan assets, the Department should clarify whether this disclosure obligation applies to all designated investment options or only those which hold plan assets, (e.g., are mutual funds excluded from this requirement?).

Timing of Initial Disclosure

WF would like to request further clarification on the timing requirement for initial disclosure as the interim final regulation only states that information must be disclosed "reasonably in advance of the date the contract or arrangement is entered into, and extended or renewed." There are instances where it may not be clear when the "arrangement is entered into" (e.g. a new service is agreed to and an effective date is established before the written agreement is finalized). One suggestion would be to change the language in the final regulation to state that information must be disclosed "reasonably in advance of the date in which the contract or arrangement is legally binding." By doing so, the regulation would provide a clear cut off point from which a service provider and plan fiduciary can work.

Changes to Investment Alternatives

WF believes the language in the interim final regulation requiring information to be "disclosed as soon as practicable, but not later than the date the investment alternative is designated by the responsible plan fiduciary" needs to be changed. Sometimes a plan fiduciary will select an investment alternative long before the covered service provider has any knowledge of such designation. Requiring the disclosure as soon as practicable, but not later than the date the investment alternative *becomes an investment option in the plan*, may be a more practical solution. By utilizing the date the investment alternative becomes an investment option in the plan, the Department will ensure that the covered service provider is given the appropriate lead time needed to provide the plan fiduciary the correct disclosures needed to make an informative decision.

Changes to Disclosure Information

WF agrees with the Department's removal of the materiality standard from the proposed regulations requirement that service providers disclose changes to the information that was previously provided, as such a standard would likely be interpreted differently by service providers. We believe the final regulation needs to address the situation where investment providers have the authority to change their fees at will (e.g. mutual funds' expense ratios can repeatedly).

Without addressing situations such as this, recordkeepers will need to continually monitor the operating expenses of investment providers and update their disclosures as these entities change their fees. Such constant monitoring and mailing may prove to be unnecessary and burdensome, and the cost of such activities may eventually be borne by participants. WF suggests that the regulation use an annual notification process for situations where the service provider itself does not receive the additional fees from any resulting changes.

Reporting and Disclosure Information; timing

WF requests that the final regulation provide more guidance around the interaction between the time line for reporting generally and a request for information. While we support the rule that upon request, a covered service provider must provide the responsible plan fiduciary with any information "required for the covered plan to comply with the reporting and disclosure requirements for Title I of ERISA and the regulations, forms, and schedules issued thereunder," we are struggling with that fact that such a rule may force a service provider to provide information on a much shorter time line merely by allowing the plan fiduciary to make an affirmative request under the interim final regulation. Compiling the information for Form 5500 and other purposes can be a labor intensive process and must be done for all clients. Such information is not necessarily readily available at any given time regardless of whether it is requested.

We suggest that the response date should be reasonably in advance of the due date for complying with the applicable reporting and disclosure requirements. This would strike a balance between ensuring that the requisite information is provided and allowing the service provider the opportunity to develop the information in a timely manner.

Disclosure of Errors

WF agrees with the Department's provision allowing a covered service provider 30 days to provide corrected information if they make an error or omission in disclosing the information required under the interim final regulation.

Compensation Definition

WF agrees with the Department's decision to allow for the use of a description or an estimate of compensation which may be expressed as a monetary amount, formula, percentage of the covered plan's assets, or a per capita charge for each participant or beneficiary or, if the compensation cannot reasonably be expressed in such terms, by any other reasonable method.

Brokerage Window not as Investment Alternative

WF supports the Department's conclusion in the interim final regulation that provides that brokerage windows in individual account plans that permit participant investment control are not considered designated investment options. Not only is this provision parallel to the Schedule C requirements but it is also helpful in that it is clear that a plan's recordkeeper need not pass through disclosure information related to investments purchased through the window.

Effective Date

While WF appreciates that the interim final regulation is effective July 16, 2011, we are concerned that the Department will be not able to address comments made and finalize changes to the interim regulation to give service providers sufficient lead time needed to modify their current recordkeeping and information management systems in order comply with any changes by July 16, 2011. To this end, we suggest that, if any changes are made, the effective date should be extended for an appropriate time period (at least one year) from the date such change was made. In addition, we would like to request that the Department consider a grandfather rule for existing arrangements. While there is no such rule for the interim final regulation, such change may be more applicable in the final regulation given that such a change may require a complete repapering of current client disclosures any will cause much confusion.

Pending Legislation

WF would like to suggest that the final regulation address any interaction with legislation pending before Congress. While we fully support the legislative and regulatory process, we feel that more needs to be done to ensure these systems work in sync. Complying with the updated disclosure regulation will require service providers to make significant changes to their recordkeeping and trust reporting software. It would be a significant burden on service providers if they are required to invest time and money to ensure they are compliant with a regulation only to have another governmental body change everything midstream.

Preemption

We suggest that the final regulation omit the preemption provision of the interim final regulation as we are concerned that this creates the possibility of different state regulations imposing different disclosure regimes. Such a possibility could substantially burden plans and plan service providers, resulting in additional costs eventually borne by participants. To the extent the Department believes that preemption of state law governing plan service relationships should be addressed, we request that such issues be handled through a separate rulemaking process.

Treatment of Welfare Plans

WF greatly appreciates the Department's decision to distinguish the application of the interim final regulation to welfare benefit plans and include a reserved section for future guidance. These types of plan clearly raise distinct issues and we look forward to the opportunity to provide our input on the appropriate disclosure regime for service providers to welfare benefit plans.

Again, we appreciate the opportunity to comment on the interim final regulation. We believe that WF offers an important and unique perspective as national leader in providing total retirement management service, and we look forward to working with you on these important changes.

Sincerely,

John Papadopulos
President
Wells Fargo Retirement