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

**Attention: 408(b)(2) Interim Final Rule (RIN 1210-AB08)**

Greetings:

On behalf of the American Council of Life Insurers (“ACLI”), we are writing to comment on the interim final rule promulgated under Section 408(b)(2) of the Employee Retirement Income Security Act (“ERISA”), which was published at 75 Fed. Reg. 41600 (July 16, 2010) (“Interim Final Rule” or “Rule”). The Interim Final Rule set forth new requirements for determining the reasonableness of compensation paid for services to employee benefit plans under ERISA. Failure to conform to the Rule would result in a prohibited transaction.

The American Council of Life Insurers represents more than 300 legal reserve life insurer and fraternal benefit society member companies operating in the United States. These member companies represent over 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including both defined benefit pension and 401(k) arrangements, and to individuals through individual retirement

arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

ACLI appreciates the Department's significant work in addressing issues related to plan services and fees. The Interim Final Rule includes significant changes from the proposed rule, many of which address concerns we raised in our letter dated February 11, 2008. ACLI agrees that it is important that plan fiduciaries and service providers have a clear and concise regulatory framework that sets forth principles for disclosure that are readily understood and applied in the context of today's employee benefit plan designs and those of the future.

In our comments below, we seek a number of specific changes and clarifications to the Interim Final Rule and we raise questions on issues on which our members are unsure how to interpret the requirements for disclosure. We would welcome the opportunity to speak with the Department and supplement our comments as the Department considers these questions.

### ***1. Consideration of a Summary Disclosure Statement***

In the preamble to the Interim Final Rule, the Department discussed requiring a summary disclosure statement, "for example limited to one or two pages, that would include key information intended to provide an overview for the responsible plan fiduciary of the information required to be disclosed. The summary also would be required to include a roadmap for the plan fiduciary describing where to find the more detailed elements of the disclosures required by the regulations." The Department asked for comments regarding the likely cost and burden to covered service providers, the anticipated benefits to responsible plan fiduciaries, whether due to time savings, cost savings or other factors, and how to most effectively construct the requirement for a summary disclosure statement to ensure both its feasibility and its usefulness in helping the Department achieve its objectives.

The background portion of the Rule states that specific information is being required to assist the fiduciary in assessing the reasonableness of compensation paid for services and potential conflicts of interest. Today insurers who act as service providers give information to plan sponsors in a document or documents which may consist of a number of pages. These documents provide important information about the services, and cost, fees or compensation. Such documents can be modified to address specific aspects of disclosure of compensation prescribed by the Rule.

While a short summary may be beneficial, we think it would be better if the Department did not require such a summary. In order to make a reasonable assessment of a service arrangement, it may be best to obtain information in documents which provide a complete description of compensation as well as the services and other benefits offered with the arrangement. In order to make clear that the specific elements of compensation have been disclosed, a table of contents, reference table or "road map" may be a more effective and efficient means of ensuring disclosure of the key elements covered by the Rule and permitting a proper assessment of the service arrangement. Given the variety of

products and services offered to covered plans, we request that such rule not prescribe a single specific format nor include a page limit. Providers should be given reasonable flexibility to provide the required information in a manner and format that conforms to their particular products and services.

## **2. Examples to Improve Understanding**

The Interim Final Rule includes a number of defined terms as well as undefined terms in its description of compensation to be disclosed. We believe that additional clarification of the Rule would best serve plan fiduciaries and the service provider community. We suggest that a series of illustrative examples on service arrangements that include all or various elements of compensation described in the Rule would be helpful in this regard, in particular with respect to §2550.408b-2(c)(1)(iv)(c)(3) of the Rule.

## **3. Clarify Application of Rule to Subadvisors to Insurance Company Separate Accounts**

The Rule at Sec. 2550.408b-2(c)(1) requires “covered service providers” to make certain disclosures to a responsible plan fiduciary of a “covered plan.” We seek clarification on the application of this rule to payments made by an insurance company to a sub-contractor or an affiliate that acts as an investment sub-adviser in connection with insurance company separate accounts in which the plan has a direct equity investment, as described in the example provided below. We believe that the exclusion that the Department provided in the regulation for sub-contractors and affiliates (2550.408b-2(c)(1)(iii)(D)(1)) should apply provided that (1) the sub-adviser is paid from the insurer’s own assets and under a contract with the insurer and not with the covered plan and (2) the insurer remains liable for the management of assets of the separate account, engages for itself the sub-adviser to manage assets of the separate account, and does not represent to the covered plan that the sub-adviser has any contract or arrangement with the covered plan. The following example illustrates areas on which we are seeking clarification.

*Example* : XYZ Insurance Company provides recordkeeping services in conjunction with a group annuity contract to Plan A. XYZ is a covered service provider. The XYZ group annuity contract includes separate account J and separate account K which invest in equities, bonds, cash and cash equivalents. Separate account J is managed by an employee of XYZ who is paid an annual salary by XYZ. Separate account K is managed by XYZ but XYZ engages investment management firm L to manage assets of the separate account and thereby assist XYZ in meeting XYZ’s obligations to Plan A. L may or may not be an “affiliate” of XYZ. Plan A is neither a party to the contract between XYZ and L nor has any contract or arrangement with L. XYZ charges an annualized charge of 0.75% against the separate accounts and discloses this charge to Plan A. XYZ pays compensation to L, from XYZ’s own assets, to manage separate account K. L’s compensation may be either a fixed amount or may be determined as a percentage of the separate account assets.

XYZ acknowledges fiduciary status as manager of separate account K, describes its duties as limited to managing assets of separate account K and remains liable to Plan A for management of assets of the separate account. XYZ acknowledges using investment sub-advisers, but does not represent to Plan A that L will enter into any contract or arrangement with Plan A.

We ask the Department to confirm that, provided that the foregoing conditions are satisfied, the sub-adviser is not a “covered service provider” to a “covered plan.”

The Rule at §2550.408b-2(c)(1)(iv)(c)(3) requires the disclosure of compensation that will be paid among the covered service provider, an affiliate or a subcontractor. We seek clarification on the application of this rule to payments made to sub-advisor L above. From the example, ACLI understands that the 0.75% charge against the separate accounts, direct compensation received by insurance company XYZ, is to be disclosed to the plan fiduciary. This should provide the fiduciary with sufficient information to consider the reasonableness of the arrangement. Please confirm that payments made directly by insurance company XYZ to sub-advisor L to assist in managing a separate account are not payments “charged directly against the covered plan’s investment” under this rule.

#### ***4. Third Party Investment Disclosure***

Under the Interim Final Rule, a covered service provider who provides recordkeeping or brokerage services is responsible for providing investment disclosures to the plan (as described in paragraph (c)(1)(iv)(G)). In some cases, a plan fiduciary may request that a certain investment option that is not part of the recordkeeper’s offering be included in the plan. The recordkeeper may be willing to provide services to the plan with respect to such investment but the investment would not actually be a part of the service provider’s platform. In this situation, it is often the plan fiduciary that is in the best position to obtain information regarding the fees related to the investment. In the case of such investment, we request that the Department provide relief to the recordkeeper from this rule.

Paragraph (c)(1)(iv)(G)(2) provides relief if certain criteria are met, one of which is that the disclosure material is “regulated by a State or federal agency.” Some insurance products are registered with the SEC, i.e., a product prospectus must be filed with the SEC prior to a sale. Other insurance products are subject only to state insurance department rules that address the content and delivery of disclosures. While insurance contracts are subject to prior state insurance department review, the disclosure materials may not be. Such disclosure materials may be reviewed by state insurance departments from time to time. Please clarify that the phrase “regulated by a State or federal agency” means that the entity offering the investment is so regulated and that there is no requirement that disclosures have been reviewed by a State or federal agency before use.

## **5. Clarification of Recordkeeping Definition**

Insurers provide a variety of products and services to employee benefit plans. Annuities and other insurance contracts are often used as a plan investment with unaffiliated parties providing recordkeeping and other plan administration services directly to the plan. Paragraph (c)(1)(viii)(D) of the Interim Final Rule defines recordkeeping services as “services related to plan administration”, etc. This paragraph should explicitly state that merely providing an insurance contract (where the insurer does not maintain records of individual participant accounts) does not constitute the provision of recordkeeping services. The insurance company would of course keep a record of its relationship with its customer (i.e., the plan or the plan’s trustee or custodian).

## **6. 403(b) Contracts Described in Field Assistance Bulletin 2009-02**

For the 2009 plan year, the Department replaced the limited reporting required of sponsors of Title I 403(b) plans with a requirement to file a complete Form 5500. In Field Assistance Bulletin (“FAB”) 2009-02, the Department recognized that it may be difficult for plan administrators to identify all participant contracts and accounts to be included as plan assets. Under the Bulletin, an administrator of a 403(b) plan does not need to treat certain annuity contracts and custodial accounts as part of the employer’s Title I plan or as plan assets for purposes of ERISA’s annual reporting requirements.<sup>1</sup> ACLI appreciates the guidance EBSA provided in the FAB. For these contracts, it is more likely than not that the contract provider has no relationship with an employer or other plan fiduciary. We believe that the Department should extend the guidance provided by the FAB and confirm that, for purposes of the final rule, a contract or account described in the FAB is not itself or a part of a “covered plan.” Consistent with the guidance’s approach to the treatment of these contracts, plan sponsors should not have an obligation to receive disclosures under the Interim Final (or final) Rule and non-receipt of the disclosure should not result in a prohibited transaction or imposition of penalties.

## **7. Timing of Disclosures**

*Existing Arrangements* - Under the Interim Final Rule, initial disclosures must be made for all service arrangements to which the rule applies by July 16, 2011. As the Department recognizes in the Regulatory Impact Analysis, due to the application of the rule to existing business, activities for the 2011 disclosure deadline will require roughly 700% of the work effort needed for 2012 and beyond. ACLI members seek at least two years in which to prepare and provide disclosures for existing arrangements, i.e., arrangements entered into prior to the effective date of the final rule. ACLI members have already provided fee

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<sup>1</sup> Under FAB 2009-02, a contract or custodial account is eligible for this treatment if: “(1) the contract or account was issued to a current or former employee before January 1, 2009; (2) the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the contract or account before January 1, 2009; (3) all of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and (4) the individual owner of the contract is fully vested in the contract or account.”

disclosures to existing arrangements. For many service providers, a year is not sufficient time to determine what, if any, additional disclosures are required and to prepare and distribute new materials specific to each existing arrangement.

*Non-Affiliated Investments* - Under the Interim Final Rule, a covered service provider must disclose a change to the information required as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable. For the disclosure of changes to fees and charges of non-affiliated investments, ACLI seeks to align this requirement with existing activities such as the delivery of quarterly reports and requests that the deadline be extended to the end of the calendar quarter following the calendar quarter in which the change is effective.

*Deadline for Delivery of Information* - While the main focus of the rule is the disclosure of anticipated compensation, the rule also addresses the delivery of information required for the plan to comply with the reporting and disclosure requirements of Title I of ERISA which includes compensation received. A plan has seven (7) months to prepare and deliver its annual report to the Department and may file for an additional 2½ month extension. Under the Interim Final Rule, upon the request of the plan fiduciary, a covered service provider would have 30 days to provide such information. For insurance companies, under rules in place since the late 70s, this information is required to be delivered within 120 days after the end of the plan year.<sup>2</sup>

ACLI members believe that the current 120 day rule provides reasonably sufficient time for its members to prepare reports for covered plans. However, 30 days following a plan year end is not sufficient. We strongly urge the Department to revise the requirement to apply only to disclosure of reasonably expected compensation. If the Department intends to revise the 120 day rule, we urge the Department to undertake separate rule making.

#### **8. Final Rule Should Be Effective No Earlier Than One Year From Publication**

Service providers will need sufficient time to comply with changes made to the Interim Final Rule. Under the current effective date, the adoption of any new requirements would leave service providers with significantly less than a year to develop and implement any changes. We ask that there be a single effective date for the final rule of no less than 12 months following its publication in the Federal Register.

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<sup>2</sup> ERISA §2520.103-5

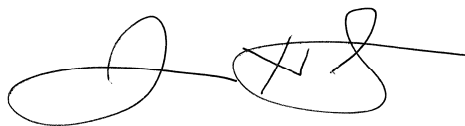
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On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,



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