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Office of Regulations and Interpretations
Employee Benefits Security Administration
ATTN: 408(b)(2) Amendment Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Compensation Disclosure to Employee Plan Fiduciaries

Ladies and Gentlemen:

This comment letter responds to the proposed regulation ("Proposal") published by the Department of Labor (the "Department") under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") in the Federal Register on December 13, 2007. These comments are submitted on behalf of the group of financial service companies for which FMR LLC is the parent corporation (collectively, "Fidelity"). Fidelity companies provide investment management, recordkeeping, benefit disbursement, communications and directed trustee and custodial services to thousands of retirement and welfare plans covering millions of participants.

With the increasingly important role that workplace benefit plans play in securing retirement, health and other benefits for millions of Americans, it is critical that plan sponsors and other hiring plan fiduciaries have the information they need to make responsible decisions in hiring service providers for their plans. However, current disclosure practices vary among providers, and plan sponsors and their consultants may request information in various formats. This imposes significant burdens on service providers and, more importantly, results in disclosures that make it difficult for plan sponsors to make comparisons between different providers. Accordingly, we support the effort to develop a more consistent disclosure framework for plan sponsors just as we have recommended a more structured approach to participant disclosure in our July 24, 2007 comment letter responding to the Department's Request for Information ("RFI") on participant disclosure.

However, there are aspects of the Proposal that we believe do not clearly define the responsibility of service providers, particularly in the context of bundled arrangements. This is critical because prior guidance issued by the Department with respect to fee disclosure has focused on the obligation of the plan sponsor or other responsible fiduciary to obtain the necessary information to make informed decisions in hiring plan service providers, including determinations regarding the reasonableness of compensation. The Proposal would revise the

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regulation issued under Section 408(b)(2) in a manner that substantially shifts the burden of compliance with the statutory exemption to the service provider to disclose the compensation received for its services. Failure to satisfy the new legal requirements could subject the service provider to excise taxes and other potential legal liabilities. Accordingly, if this structure is followed, it is important to allocate disclosure responsibilities specifically to those parties receiving compensation under the arrangement. Although recordkeepers are often viewed as the focal point for service provider relationships, most plans in fact involve a variety of service providers who provide services to the plan independent of the recordkeeper.

Many of our comments below address the basic principles behind the Proposal, and we recognize that some of our comments may in fact run counter to the recognized need for a consistent fee disclosure framework. We would like to work with the Department to achieve that consistent framework but must do so in a way that recognizes the complexity of the service delivery model for plans.

(1) "Service Provider" Status for Investment Managers

Investment managers are potentially treated as "service providers" in two of the three categories of service providers that would be required to agree by contract to provide fee and conflict disclosures under the Proposal. The first category includes persons who provide services as fiduciaries, either under ERISA or under the Investment Advisers Act of 1940, pursuant to the contract or arrangement. The second category includes persons who provide investment management services to the plan pursuant to the contract or arrangement. The Proposal preamble further states that "compensation or fees" includes payments in connection with services provided to plan "or the financial products in which plan assets are invested." This statement implies that such investment managers are potentially parties in interest as a result of providing services to the plan.

This aspect of the Proposal appears to implement a provision in the final regulation for annual plan reporting (the Form 5500 series) issued last November requiring that Schedule "C" include fees paid to investment company advisers resulting from plan investment positions in the investment company (often called a "mutual fund"). The annual reporting regulation preamble states that such investment management services would be treated as service provider compensation "for purposes of Schedule C reporting." The regulation preamble also acknowledges that the Department has broad authority in this area in terms of information to be reported by the plan administrator. While the reporting of fees paid to persons providing services to a mutual fund by a plan administrator may be within the broad authority of the

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Department, we do not believe that it should necessarily have any bearing on plan "service provider" status for purposes of the prohibited transaction rules.

ERISA Section 3(14) states in part that the definition of a "party in interest" includes "a person providing services to such plan." However, ERISA Section 3(21)(B) specifically provides that neither a registered investment company, nor its investment adviser or principal underwriter shall be deemed to be fiduciaries or parties in interest with respect to a plan solely by reason of the plan's investment in securities issued by the investment company. This is consistent with the provisions of ERISA Section 401(b)(1) which state that the assets of a plan that invests in the securities issued by an investment company shall be deemed to include such securities but not the assets of the investment company.

The notion that a mutual fund investment adviser is a plan service provider for purposes of the prohibited transaction rules would also be a significant departure from earlier guidance from the Department. A good example of Department thinking is provided in PTCE 77-9, which provides exemption relief for certain transactions, including the following: "The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, and investment company or an investment company principal underwriter, when such investment company, principal underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of; (1) the sponsorship of a master or prototype plan; or (2) the provision of non-discretionary trust services to the plan; or (3) both (1) and (2)." The quoted language implicitly accepts the principle that mutual fund investment adviser status does not equal plan service provider status. The class exemption preamble also distinguishes mutual fund adviser status from a situation in which the person is an investment adviser to the plan directly. A similar implication is provided in Advisory Opinion 2003-09A (dated, June 25, 2003).

We recommend that the Department confirm that mutual find advisers are not treated as plan service providers for purposes of ERISA Section 408(b)(2). The treatment of mutual fund fees received by an affiliate in a "bundled" service provider offering is discussed below.

(2) Bundled Provider Disclosure

The Proposal describes a bundled service provider as one who offers an array of services that are priced as a package rather than as a separate fee for each service. In the case of a bundled arrangement, only the provider of the bundle must make the required disclosures.

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However, it is not clear from the Proposal exactly which services are in the "bundle". The preamble states that the bundled service provider must provide information about services in the bundle "regardless of who provides them". Proposed Section 2.550.408(b)-2(c)(1)(A)(3) also states that the service provider must disclose the aggregate compensation received by the provider, any affiliates or subcontractors, "or any other party in connection with the bundle of services." However, in many situations, a plan receives a bundle of services from one provider but purchases services from other providers that are outside the bundle. We believe that the bundle should include only those services that the bundled provider has committed to provide to the plan, either directly, through affiliates or through subcontractors. Other services should not be considered part of the bundle.

There are many conceptual as well as practical problems with a requirement that a bundled provider disclose the compensation received by unrelated firms for services that are not the responsibility of the bundled provider. Where the plan purchases an investment or insurance product in conjunction with a bundled offering, the bundled provider may have no knowledge of the fees payable to underlying service providers to the product. The industry is accustomed to thinking about bundled relationships in the context of 401(k) plans and it appears many have assumed that all investment products that are on the recordkeeping platform are part of the "bundle". We question that notion.

When Fidelity is the bundled provider for a plan, it commits to provide 401(k) recordkeeping services with respect to investments in both Fidelity and non-Fidelity funds. With respect to Fidelity funds, it also provides investment management and other services for those funds. However, Fidelity does not provide investment management services for non-Fidelity funds and those services should not be considered part of Fidelity's bundled service offering. Even with respect to Fidelity funds, those funds are not affiliates of Fidelity and retain unaffiliated providers for some of the services necessary for the operation of the fund, including custody services, legal and accounting services and brokerage. As with outside funds, none of these services should be included in the "bundle" that Fidelity offers to its customers. We recommend that the Department confirm that a recordkeeper would not have to disclose the revenue received by the manager of an unrelated mutual fund included in the plan investment lineup (or fees received by others for providing service to that mutual fund).

The concept that a recordkeeper has fee disclosure obligations with respect to all investment options is particularly problematic in the context of brokerage accounts in 401(k) plans where participants may choose among thousands of mutual funds (as well as individual securities). In the case of plans that offer brokerage options, typically the broker/dealer would

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have separately negotiated selling or service agreements or arrangements with a large number of unaffiliated mutual fund providers. Each of these separate arrangements may cover a variety of classes of mutual funds within a particular fund family, each of which may have a discrete pricing structure that may involve either sales loads, transaction fees, and/or service fees. While information about the fees associated with each of these investments is available to both plan sponsors and participants, it is unrealistic to expect that a recordkeeper can aggregate or summarize this information in any meaningful way.

We would also like to question the notion that the recordkeeper is presumptively the provider of the "bundle". In the case of 401(k) plans, it is often the recordkeeper that is responsible for integrating the products and services necessary for operation of the plan so it may at first seem logical that it should have responsibility for being the single point of contact for fee disclosure. But in the context of other types of plans, that assumption seems flawed. For example, the recordkeeper for a health and welfare plan typically has responsibility for eligibility and enrollment processing but may have no responsibility with respect to the actual delivery of benefits to participants. It would be problematic if the Proposal contemplates that recordkeepers for health and welfare plans have responsibility for assembling information about compensation payable to unrelated providers for the actual delivery of benefits since the recordkeeper often has an extremely limited role in that capacity.

Our concerns regarding responsibility for the disclosure of fees received by unrelated parties is based in large part on its appropriateness in the context of a statutory exemption for the service provider's contract with the plan. If the Department is determined to pursue this course notwithstanding, the Department must clearly address the service provider's limited responsibility to provide the prospectus or other fee document received from the unrelated party, and should have no responsibility or legal exposure for problems arising from such disclosure.

In an effort to achieve meaningful disclosure, we would respectfully request that the final regulation allow service providers to describe by category, the revenue that it (or its affiliates receive) for a given category or class of mutual fund or individual security, directing the plan fiduciary to the fund prospectus, brokerage fee schedule or other available document for specific details on a particular investment choice. In addition, it would be appreciated if the final regulation provided for the ability of service providers to report brokerage related fees by providing a fee schedule, that is, the anticipated revenue per listed transaction or the methodology for calculating asset Service providers based fees), if a fee schedule for the plan is

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available, in lieu of simply an aggregate amount of fees. Such reporting would provide more useful information.

(3) Indirect Compensation Payable to Other Providers

The third category subject to the Proposal includes persons who provide accounting, actuarial, appraisal, auditing, legal, or valuation services to the plan AND receive indirect compensation or fees in return. The Proposal preamble states that "indirect compensation includes fees that service providers receive from parties other than the plan, the plan sponsor, or the service provider." The preamble states that "these providers perform some of the most important and potentially influential services to plans and, to the extent these services to plans and, to the extent these service providers receive indirect compensation…similar conflict of interest concerns would be raised."

We would appreciate clarification regarding how indirect may be the compensation in such cases that still triggers a disclosure obligation. This category of service provider apparently does not have to satisfy the regulation if paid by the plan or plan sponsor. We note that the definition of "indirect compensation" differs in that regard from the definition provided in the annual plan reporting regulations. It would be helpful if the Department includes some concrete examples in the final regulation that deal with this category of providers.

(4) Related Service Providers

The Proposal refers to obligatory representations set forth in each contract with a plan. Affiliated service providers may have multiple contracts with a plan. For example, if a trust company serves as the trustee for a 401(k) plan under a trust agreement, the responsible plan fiduciary may enter into a separate service agreement with a related entity serving as the plan recordkeeper. We think that it would be helpful for the Department to confirm that even if there must be provider representations in both agreements, then the disclosures could be provided by either of the affiliated providers.

(5) Disclosure of Possible Conflicts

The Proposal would require a service provider to disclose any relationships or interests that may raise conflicts of interest for the service provider in its performance of services for the plan. The concern expressed by the Department in the Proposal preamble refers to

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influences that may be relevant to the plan fiduciary's assessment of the objectivity of a service provider's decisions or recommendations.

We think that it would be helpful for the Department to clarify what relationships would constitute such interests or conflicts, particularly in the case of a non-fiduciary service provider. In the case of a recordkeeper affiliated with a fund manager, for example, the firm as a whole would earn more or less revenue depending on the investment options offered by the plan and the allocation of participant accounts among the options. Unless the recordkeeper (or an affiliate) will provide recommendations with respect to the selection of plan options, however, it would not appear that there is any conflict in the recordkeeper's role.

The subject of potential conflict is hard to describe with certainty. As an example, the Department has already opined that a fiduciary's decision to retain an affiliated service provider whose fees will be paid by the plan sponsor will not involve an adversity of interests as contemplated by Section 406(b)(2) of ERISA Advisory Opinion 91-44A (dated November 14, 1991). It is not clear, however, how such a relationship need be disclosed under the Proposal.

We recommend that the Department narrow the approach taken in the Proposal. Fiduciary conflicts are generally prohibited or else accommodated pursuant to a statutory or administrative exemption under ERISA. A good example is the statutory exemption for the provision of investment advice provided by the Pension Protection Act of 2006. In the case of non-fiduciary services, disclosure of the services provided and the compensation received in turn should provide the necessary information. This information should include a description of any relationship with other parties involved with the plan.

(6) Manner of Disclosure

Although the proposed regulation requires written disclosure, the Proposal preamble to the proposed regulation states that the required disclosures may be provided in electronic format. We recommend that the Department confirm that the fee disclosure may be provided in a manner that takes advantage of current technology. The cost savings will benefit plan sponsors and, ultimately, their plan participants.

In Field Assistance Bulletin 2006-03 ("FAB") issued to provide transitional guidance for participant statements required under PPA, the Department concluded that effective access to a secure website would constitute statement delivery, subject in part to the condition

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that participants be provided with notice of such availability and of their right to request paper documentation instead. With regard to the use of electronic media to deliver such notice, the Department agreed that a plan may rely on either its guidance, at 29 C.F.R. § 2520.104b-1(c), or on the Department of the Treasury and Internal Revenue Service guidance, at 26 C.F.R. § 1.401(a)-21, relating to the use of electronic media to provide certain notices and documents required to be furnished to participants by retirement plans under the Internal Revenue Code. We believe that this approach taken in the FAB should be followed under Section 408(b)(2) of ERISA.

We currently provide plan sponsors with online access to prospectuses for Fidelity mutual funds and with fee disclosure regarding payments received from unrelated fund companies. In both cases, this manner of disclosure is documented in the trust or service agreement with the plan sponsor. In the RFI plan participant disclosure comment letter referenced above, we noted the widespread use of such technology among plan participants in recent years. This is even more the case with plan sponsors, who need to use technology in their businesses.

(7) Effective Date

The Proposal effective date would be ninety (90) days after publication of the final regulation in the Federal Register. The Proposal solicits comments whether the final regulation should specify how far in advance of contract execution the fee disclosures should be provided. The preamble notes that the responsible plan fiduciary must ensure the receipt of current and accurate information from the service provider "sufficiently in advance of entering into the contract or arrangement to allow the fiduciary to prudently consider the information."

Our experience demonstrates that the timing of disclosures will vary greatly from contract to contract. That is, the negotiation of fees may in some cases continue until immediately prior to the date of execution of the contract. Therefore, we concur with the approach taken in the Proposal, not including a specific deadline in the final regulation that would inhibit the flexibility of the contracting parties.

In addition, we strongly believe that the final regulation effective date should be extended to a full year to allow service providers sufficient time to get ready for negotiations. The disclosure obligation must be satisfied before the contract is signed, and some negotiations may take place over a lengthy period. In addition, contrary to statements made in the Proposal

preamble, service providers will need to commit substantial resources to prepare for compliance with the final regulation.

Finally, we would appreciate confirmation that the new disclosure mandate would only apply to contracts entered into (or renegotiated) after the effective date of the final regulation. The Proposal seems to make that point – the new disclosure obligation precedes contract completion. We have heard some expressions of uncertainty on this point, however, and we think that such uncertainty could be quite harmful to existing contractual relationships. We maintain thousands of service contracts with retirement plan sponsors and would be literally unable to amend all these contracts other than in the normal course of contract changes. Also, it would be helpful if the Department would confirm that only a material contract change, one that changes the fee structure in some manner, would require new disclosure. If a provider adds a new feature or service to its offering without changing the fee, a prior disclosure mandate would only delay the rollout of such benefits to the plan.

We also ask that the Department consider an alternative approach that would impose the new fee disclosure requirement on service providers without the need for a specific contract representation. This would have the advantage of allowing for implementation of the new legal framework on a widespread basis without the potentially disruptive impact of the need for wholesale contract revisions. In this case, we would suggest the same full year for implementation so that service providers would be required to provide the new fee disclosures within one year after publication of the final regulation in the Federal Register.

(8). Service Provider Recourse

The Proposal would drastically change the impact of disclosure errors or omissions by service providers in their dealings with plan sponsors and other fiduciaries. Until now, the primary concern is whether a mistake or omission may cause a loss or expense to plan participants or fiduciaries. The new rule would result in the imposition of an excise tax in the event of a disclosure failure regardless of its impact on plan administration.

We note that a related prohibited transaction class exemption proposed by the Department would apply if the responsible plan fiduciary unknowingly enters into a contract with a service provider that does not satisfy the disclosure requirements of the regulation. In order to obtain relief under the proposed exemption, the fiduciary would be required to request the missing information from the service provider. The proposed exemption would provide in

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part that the service provider would be deemed to fail to satisfy its disclosure obligations if it does not provide the information requested by the fiduciary within 90 days.

We are concerned that the services provider does not have satisfactory recourse in cases of a disagreement over what constitutes sufficient disclosure. Alternately, a service provider may inadvertently omit some item in its fee disclosure. Even if the omission is nonmaterial, the Proposal appears to impose a heavy economic sanction (the excise tax) on the service provider. The 90 day notice procedure set forth in the class exemption appears to provide the service provider with the opportunity to correct the error or omission. We recommend that the Department provide clarification of the legal consequences of the 90 day notice.

Alternatively, we have asked in a separate comment letter (dated the same as this one) that the proposed class exemption be revised to deal with these concerns. Finally, absent exemption relief, we ask that the Department establish a procedure that would allow the service provider to request a waiver of excise taxes in appropriate circumstances.

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In conclusion, we would be pleased to respond to any comments or questions regarding the issues discussed above or any other aspect of the Proposal.

Respectfully,

Douglas O. Kant

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