



Walter Welsh

Executive Vice President, Taxes & Retirement Security

(202) 624-2157 t (202) 572-4795 f

walterwelsh@acli.com

James Szostek

Director, Pensions

(202) 624-2378 t (202) 572-4739 f

jimszostek@acli.com

Filed Electronically

February 11, 2008

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 N.W.
Washington, D.C. 20210

Ladies and Gentlemen:

On behalf of the American Council of Life Insurers (“ACLI”), we are writing to comment on regulations proposed under Section 408(b)(2) of the Employee Retirement Income Security Act (“ERISA”), which were published at 72 Fed. Reg. 70988 (December 13, 2007) (“Proposed Regulations”). The Proposed Regulations set forth new requirements for determining the reasonableness of compensation paid for services to employee benefit plans under ERISA. Failure to conform to the rules in the Proposed Regulations would result in a prohibited transaction.

The Proposed Regulations are of particular significance to the three hundred seventy three (373) member companies of ACLI. ACLI member companies account for ninety-three (93) percent of the life insurance industry's total assets in the United States. 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. 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. As noted in the preamble to the Proposed Regulations, the manner in which services are provided to retirement plans has

changed significantly over the years. ACLI agrees that it is appropriate to revisit Section 408(b)(2) to ensure that the regulatory requirements are reflective of those changes. We are mindful that services arrangements are likely to continue to change in the future as different plan designs are adopted by employers and as technologies advance and provide new efficiencies. Both plan fiduciaries and service providers need 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. We welcome the opportunity to work with the Department in this effort.

In our comments below, we suggest a number of specific changes and clarifications to the Proposed Regulations and we raise questions where our members are unsure how to interpret the requirements for disclosure. In some areas, we are not yet in the position to provide specific comments because we have more fundamental questions about the definitions employed by the Department and the intended scope and breadth of various rules. We would welcome the opportunity to speak with the Department and supplement our comments as the Department considers these questions and we gain a better understanding of the Department's intent.¹

Our comments focus primarily on the impact of the Proposed Regulations on defined contribution retirement plans, rather than traditional pension plans or welfare benefit plans. We recognize the public policy need to provide rules under Section 408(b)(2) that apply to all employee benefit plans. We urge the Department, however, to reserve on final rules applicable to defined benefit plans and health and welfare arrangements. The Department should consider first the defined contribution plan issues under Section 408(b)(2). Plan sponsors, service providers and professionals in the defined contribution plan industry have been part of a public discussion regarding the subject for some time. This has not been the case with regard to other types of employee benefits plans that may be subject to Section 408(b)(2). Our member companies are raising many questions about how the Proposed Regulations would be applied to other types of employee benefit plans and, in particular, how the principles and technical requirements in the Proposed Regulations would apply to insurance contracts that are issued in connection with welfare benefit plans, which have different purposes and different fee structures than defined contribution retirement plans. We need more time to gather meaningful information in order to comment on these issues. We believe the Department also will need the opportunity to focus on the unique characteristics of these plans and arrangements, which the stated time frame for finalizing the Proposed Regulations does not provide. In short, we urge the Department to proceed with three separate projects -- the first being the finalization of the Proposed Regulations with respect to

¹ We note that the standards in the Proposed Regulations are, in many ways, inextricably tied to the revised 5500 annual reporting rules that the Department also recently published. While our comments in this letter are specifically focused on the Proposed Regulations, many of the questions we raise or clarifications we suggest also relate to the 5500 reporting obligations to the extent that the same or similar definitions are also incorporated under those rules.

defined contribution retirement plans and the second and third being the development of rules applicable to defined benefit pension and health and welfare arrangements subject to Section 408(b)(2).

Our detailed comments are set forth below.

1. Only Parties Providing Services to the Plan Should be Required to Disclose.

The Proposed Regulation's disclosure obligations include (i) any provider who contracts with a plan fiduciary to provide services to the plan and (ii) any provider of specific enumerated services, which are banking, consulting, custodial, insurance, investment advisory (plan or participants), investment management, recordkeeping, securities or other investment brokerage, or third party administration. The final rules should confirm that where such services are not provided "to the plan," such services are not subject to Section 408(b)(2). Investment management services, for example, are specifically enumerated in category (ii). Such services may be provided "to the plan" where a plan hires an investment manager to manage the plan's assets. The Department should confirm, however, that investment management services that are not provided "to the plan" are not subject to Section 408(b)(2) if those services are provided to an investment fund in which the plan is invested. The underlying investments of a mutual fund held in a variable annuity contract or the assets of an insurance company that issues a guaranteed benefit policy are not plan assets under ERISA. In those and similar cases, the investment advisor to the fund or under such contract is not providing investment services to the plan and we request that the Department clarify the Proposed Regulations accordingly.²

2. The Obligation to Disclose Indirect Compensation Should Be Eliminated and Subcontractor Compensation Should Be Governed by the "Bundled Services" Rules.

The Proposed Regulations require disclosure of "indirect" compensation for enumerated services, which are accounting, actuarial, appraisal, auditing, legal or valuation. The Proposed Regulations also state that any service provider that "bundles" plan services through the use of affiliates or subcontractors must disclose the identity of any other affiliates, subcontractors, and vendors that will provide services to the plan, including those that receive "indirect compensation." ACLI members read the Proposed Regulations as treating virtually all service providers to plans as being engaged in "bundled" arrangements. We believe that this is the result under the Proposed Regulations because of the common contractual arrangements with subcontractors and the use of affiliates to provide services to plans. If "indirect" compensation is received by a party, it must be received because of a contractual arrangement with another party that is providing services to the plan and, therefore, is a bundled services arrangement. The final regulations should confirm that the

² The Department may be concerned that investment management fees be disclosed when an affiliate of the investment manager is providing other services to the plan, such as recordkeeping. We discuss such disclosure in connection with the rules for bundled services below.

requirement to report “indirect” compensation is satisfied if the party “offering” the bundled services identifies those subcontractors that would receive “indirect” compensation.

3. Disclosure of Indirect Compensation Should Be Limited to Avoid Disclosure of Parties Whose Services are Remote to the Plan.

Read literally, the Proposed Regulations could be read as treating virtually any party that provides services to a plan service provider as a party that is receiving “indirect” compensation. Such a broad rule would result in massive and unhelpful disclosures to plan fiduciaries and we urge that the final rules define “indirect” compensation more specifically to eliminate any potential disclosure obligation with respect to parties whose services are remote to the plan, and therefore not relevant to a plan fiduciaries’ determination of the reasonableness of fees. We urge that the Department require disclosure of a subcontractor’s fees only where the subcontractor’s fees are charged to plan assets or are dependent on the value of plan assets.

As an example of the potential disclosure of “remote” services arrangements, ALCI member companies have questioned how to analyze the common situation in which a recordkeeper engages outside counsel to represent the recordkeeper and advise the recordkeeper – not the plan fiduciary—on various issues, such as compliance with tax-qualification rules, tax reporting questions, etc. While the law firm’s advice may be utilized by the recordkeeper in the course of the recordkeeper’s provision of services to a single plan or to many plans, neither the law firm nor the recordkeeper should have an obligation to disclose in advance to a plan sponsor that a law firm might be engaged and the manner in which the law firm would charge the recordkeeper for its services. Similar examples exist with respect to accounting, actuarial and other services.

Some have suggested that a vendor does not receive indirect compensation if the vendor would not have been compensated “but for” the plan. We believe that a “but for” test is too broad, however, because it would treat as indirect compensation the fees that, for example, a recordkeeper might pay to a law firm or consultant to help develop nondiscrimination testing methodologies or to advise on IRS voluntary correction programs, etc. In those cases, the vendor would not have been engaged “but for” the recordkeeper’s contractual relationship to provide services to employee benefits plans. Yet, in those cases, the vendors’ services are remote with respect to any particular plan and we do not see the value in requiring advance disclosure of such services in the context of Section 408(b)(2) requirements. We urge that the Department adopt a principle in the final regulations that unless fees to a subcontractor are allocated to plan assets or dependent upon the value of plan assets, the fees paid from one service provider to another vendor are not “indirect compensation” and are not subject to disclosure.

Under our suggested modification of the rules, a plan fiduciary would be required to receive significant information in a bundled services arrangement about parties whose services are directly related to the plan and affect plan assets. For example, if an investment manager is affiliated with a party providing other services to the plan, such as recordkeeping, the investment manager's fees, which are "reflected in the net value of the investment" of the plan, would be disclosed to the extent that such fees are shared among affiliates in order to provide services to the plan. Any "12b-1" or similar payments received by a party providing services to the plan would be disclosed because the Proposed Regulations specifically require disclosure where any party providing services to the plan receives "transaction" or "plan asset" based payments.

4. Final Rules Should Clarify that Current Law Rules Apply With Respect to "Float" and Similar Sources of Compensation.

The Proposed Regulations require service providers to disclose situations in which the service provider may affect its own compensation and specifically cite as an example compensation related to "float." Typically, service providers have limited control of "float" because the service provider does not control when checks are presented or when assets are deposited. ACLI member companies have questions as to whether the Proposed Regulations are intended to change or otherwise affect the existing rules related to "float" under Field Assistance Bulletin 2002-3 (November 18, 2002). We urge the Department to confirm that the standards set forth in the Field Assistance Bulletin continue in effect and conform that no substantive changes are intended by the Proposed Regulations.

5. Final Rules Should Require Only Disclosure to Plan Fiduciaries and Eliminate "Contract" Requirements.

We urge that the Department clarify in final regulations that there is no requirement for an insurance contract issued to a plan fiduciary to include any necessary disclosures under Section 408(b)(2), provided that the plan fiduciary receives those disclosures through a notice. More broadly, we urge the Department to reconsider the requirement in the Proposed Regulations that a "contract" between a service provider and plan fiduciary itself require the disclosure of all fees and services under Section 408(b)(2). We do not understand the rationale for this rule given that actual compliance with Section 408(b)(2) would be a condition for avoiding a prohibited transaction and potential breach of fiduciary duty. Finally, in lieu of the contractual requirements, we urge that final rules allow disclosures to be made in the form of a notice to the plan sponsor or appropriate fiduciary and that compliance be determined on the basis of whether such disclosures were actually made.

The use of the term "contract" raises significant concerns for ACLI member companies because they issue insurance contracts that are subject to state-law regulations and approval by state insurance commissioners. Any changes in those

approved contracts must be resubmitted and re-approved by state regulators. Providing the disclosures contemplated under the Proposed Regulations in the insurance contract itself would be exceedingly difficult (and potentially impossible under some state insurance laws). ACLI members need the flexibility to provide a document – other than the underlying insurance contract issued to the plan – that conforms to the Proposed Regulations’ disclosure requirements. Any other interpretation would impose extraordinary burdens. Seeking new state approvals of contracts is typically a lengthy and costly process. In addition, state law typically would not allow a contract to be issued “before the arrangement was entered into” as required by the Proposed Regulations. State regulators could impose their own interpretation of the Section 408(b)(2) requirements.

ACLI member companies believe that disclosures to plan fiduciaries may satisfy the standards in the Proposed Regulations through documentation that supplements the information in an insurance contract. Today, it is typical for insurance companies to enter into a separate services agreement with plan fiduciaries for recordkeeping services and similar services. We anticipate that such services agreements as well as other disclosures for the underlying investments in the insurance company’s separate account (e.g., a mutual fund prospectus) would cumulatively satisfy the disclosure rules in the Proposed Regulations.

6. Final Rules Should Clarify When an Arrangement is an “Investment-Only” Contract.

The preamble to the Proposed Regulations notes that a contract for the investment of plan assets, including “the purchase of insurance,” is not itself a contract for services. While we believe that this rule is logical and one that the Department should continue in the final regulations, ACLI members need additional guidance as to when services that are inherent to the fulfillment of the contract’s obligations rise to the level of services to the plan for purposes of 408(b)(2). For example, a plan may have engaged a third-party recordkeeper for the plan but may engage an insurance company to provide a particular investment option. The investment option itself will require internal recordkeeping of deposits, asset values, and withdrawals. The insurance company may provide communication materials for plan participants explaining the investment option and may provide services to the extent that distributions from the plan investment option are made to the plan participants. We do not believe that these services, which are related only to the investment option and payment of benefits, should rise to the level of plan services that fall within the scope of Section 408(b)(2), and we request that the final regulations confirm such view.

7. Final Rules Should Confirm that Disclosure of a Crediting Rate in a Fixed Contract and a Description of Services is Sufficient.

The Proposed Regulations provide that a description of fees in a services contract or arrangement need not be a dollar amount but may include a formula for determining such fee, provided that the formula provides the plan fiduciary with adequate information necessary to judge the reasonableness of the fee. We agree with the approach in the Proposed Regulations and we urge the Department to continue this provision in final rules.

ACLI members have questions, however, as to how the Proposed Regulations' requirements apply where recordkeeping or other plan services are provided in connection with a contract that provides a fixed rate of return. Often, in such contracts, there are no fees for services that are incidental to the guaranteed benefit. The insurance company is committed to providing a guaranteed rate of return. A description of the services and the guaranteed crediting rate provide sufficient information for the plan fiduciary to evaluate the contract. We welcome an opportunity to further discuss this comment with the Department.

8. Final Rules Should Clarify Other Relationship Disclosures.

ACLI members have raised the most questions and concerns, by far, with respect to the Proposed Regulations' requirements that service providers disclose "material financial, referral or other arrangements," as well as actual or potential "conflicts of interest." The Proposed Regulations provide no definitions of these terms. The phraseology, "conflict of interest," has pejorative connotations that are particularly troubling in this context given that the ERISA prohibited transaction rules already preclude service providers from participating in transactions that are generically viewed as conflicts of interest. We cannot readily discern what business relationships the Department might reasonably foresee falling into these categories given that, elsewhere in the Proposed Regulations, there is an obligation to disclose all compensation, including "transaction-based" compensation, compensation that is billed to the plan, compensation that affects the net investment of plan assets, compensation or transactions in which the service provider may affect the level of its own compensation, and compensation from transactions where the service provider participates or has a financial interest. Given the breadth of the proposed disclosure and the existing prohibited transaction rules that govern parties in interest, we believe that the "conflict of interest" and "material relationship" disclosure obligations should be eliminated in final rules.

If the Department has concerns about business relationships that the Department believes are not otherwise covered under the Proposed Regulations and that would provide meaningful information to plan fiduciaries, we would welcome a dialogue with the Department on that topic. These terms, however, in the Proposed Regulations are so vague as to be unenforceable in our view. Given the significant potential penalties for failure to conform with the Section 408(b)(2) rules, service

providers need more clarity as to the kinds of business relationships that should be disclosed and the standards for determining when such relationships arise.

9. Final Rules Should Provide that Service Providers May Rely on Data from Other Parties in Satisfying the Disclosure Obligations.

The Proposed Regulations create obligations for a service provider to disclose all fees that it receives as well as fees that may be received (including indirectly) by subcontractors and other parties (e.g., in a bundled services arrangement.) The service provider that discloses the fees to the plan sponsor needs to be able to rely on the data provided to it by a subcontractor or other party. For example, a recordkeeper may need to rely on data provided to it from outside funds when disclosing compensation formulae. The final regulations should specifically provide that services providers may reasonably rely on data from other service providers.

10. Final Rules Should Be Effective No Earlier than One Year From Publication.

The Proposed Regulations state that final rules would be effective 90 days following their publication. We understand that the Department intends to publish final regulations in 2008, which would require compliance in the first quarter of 2009. We agree that Section 408(b)(2) should be a significant priority for the Department and that issuing final regulations this year should be the goal. Service providers and plan fiduciaries will be well served by having clear guidance as soon as practicable. Notwithstanding, service providers and plan fiduciaries need time to ensure that they fully understand and are ready to implement a new regulatory regime given that, if violated even inadvertently, a prohibited transaction will have been committed. As indicated in our comments above, we believe some parts of the Proposed Regulations require significant changes. For those reasons, we believe that an effective date of at least one year following the publication of final rules is appropriate.

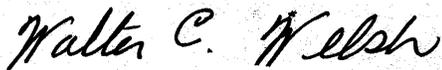
We suggest this time frame given our member companies' knowledge, both as plan sponsors and as service providers, of the practicalities involved. We note that certain types of disclosures being called for in the Proposed Regulations are not "new" to service providers and plan fiduciaries. Today, plan fiduciaries ask for detailed information in negotiating contracts with service providers and service providers are providing such information. Nonetheless, ensuring that all agreements and processes conform to the specifics in new regulations takes time. Service providers and plan fiduciaries will be hesitant to expend resources necessary to conform to the new rules until the final regulations are published and they have the opportunity to fully understand them and determine the best approach for implementation. We believe that the additional time we propose would be adequate for affected parties to make the systems and process changes that are needed, including gathering any new or refined data necessary under the rules such as data needed from third parties (such as subcontractors in bundled arrangements).

We note, however, that if the Department did not adopt our comment that the disclosure obligation be provided in the form of notice disclosure, ACLI member companies would need significantly more time to conform to the final rules. If existing service contracts must be amended, then significant additional time, such as at least 3 years, would be required for re-contracting with all existing plan fiduciaries with whom our members have services relationships. As stated above, we urge the Department to avoid this issue by modifying the final regulations to provide notice disclosure under Section 408(b)(2).

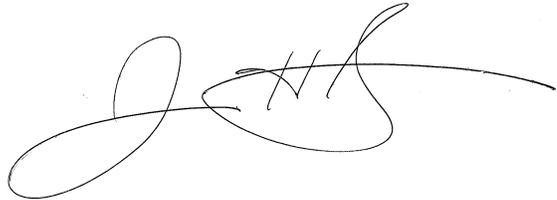
* * * *

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

Sincerely yours,



Walter C. Welsh
Executive Vice President,
Taxes & Retirement Security



James H. Szostek
Director, Pensions