

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



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Via email at e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
Attn: 408(b)(2) Interim Final Rule
US Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

RE: Interim Final Regulation on 408(b)(2)

Dear Sir or Madam:

The Financial Services Roundtable (“Roundtable¹”) submits this letter in response to the Department of Labor’s (“DOL”) proposed interim rule to implement Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (“ERISA”). The Roundtable supports the DOL’s intent to enhance disclosures for plan sponsors and ensure that these disclosures are clear and concise. The Roundtable believes that the preservation and expansion of the current workplace based retirement system can best ensure Americans’ retirement security. The recent economic downturn has underscored the urgency to ensure that more Americans plan and save for retirement.

The new interim regulation tasks service providers with providing substantial amounts of information in order to help plan fiduciaries make more informed decisions about plan services, the cost of services, and potential conflicts of interest. However, the Roundtable is concerned about the unintended consequences that may occur due to the broad application of the proposal. Our concerns are outlined below.

Application of the Rule

The interim rule applies to covered service providers who reasonable expect to receive \$1000 or more of direct or indirect compensation for providing covered services. The \$1000 limit applies even if the services or compensation will be received by an affiliate or subcontractor. The Roundtable supports DOL’s decision to include a minimum dollar amount that must be met before the rule is triggered. However, we *recommend* that the \$1000 threshold be increased to \$5000. The \$1000 threshold is too low and will increase compliance costs – in

¹ The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$74.7 trillion in managed assets, \$1.1 trillion in revenue, and 2.3 million jobs.

some cases, costs to comply could exceed \$1000. Increasing the dollar limit will more readily serve one of DOL's underlying purposes of not regulating *de-minimis* transactions.

Overly Broad Service Provider Definition

Next, the Roundtable *recommends* that the DOL clarify the definition of a "service provider." Currently, the proposed regulation divides the term "service provider" into three categories: 1) Fiduciaries and Investment Advisers; 2) Recordkeepers and Brokers; 3) Other Service Providers Receiving Indirect Compensation. This new definition of fiduciary is expansive and may include additional service providers that are not fiduciaries to the plan.

The Roundtable believes that these categories are too broad and would essentially take into account all parties associated with a plan, including outside vendors that do not have any interaction with the plan but only indirectly receive compensation. This definition of a "service provider" is unintentionally expansive in that it would require reporting of relationships in which a service provider does not have direct knowledge, such as sub-advisory relationships where a manager of a fund provides information to a sub-advisor.

We are concerned that the proposal is an effort to impose a uniform duty of care on the industry and that imposing fiduciary liability on indirect persons imposes additional expensive burdens on financial firms. This would lead to significant unintended consequences, such as limiting investor options and increasing the cost of services for plan providers and eventually plan participants.

Recordkeeping Services

According to the new interim rule, plan service providers that provide a variety of services will be required to separately disclose the cost of recordkeeping services. The recordkeeper must provide a description of the direct and indirect compensation the service provider (and affiliates and subcontractors) expect to receive for their services. If there is no explicit fee, a reasonable and good faith estimate of the cost to the plan must be provided. Moreover, the rule allows a service provider that does not specifically price recordkeeping services to make a good faith estimate.

The Roundtable *recommends* that "recordkeeping" services provisions be clarified to take into account these various business models and exclude services provided within the ordinary course of business. For example, the actual division of labor for recordkeeping could vary among different arrangements, but in a typical arrangement the vendor would provide recordkeeping, internet and voice response functionality, backroom trading functions, and participant statements. In such an arrangement, the third party administrator ("TPA") would typically provide compliance and plan design services. The TPA may also perform routine administrative functions such as the handling of withdrawals and suspense payments, since plans usually authorize the TPA to execute a broad range of transactions. One additional feature of these arrangements is that the vendor commonly compensates the TPA for services provided, and the TPA may also bill for services rendered or have these charges deducted from plan assets.

Some business models, such as the one described above, do not fit neatly under the interim rule. In an effort to comply with the regulations, disclosure by several service providers may lead to double reporting, confusion among plan sponsors, and inadvertent non-compliance by some service providers. Additionally, the Roundtable is concerned that the interim rule, as drafted, may have the unintended consequence of increasing costs to plan sponsors and, ultimately plan participants. In short, trying to assign a specific fee or estimate will result in a cost being added to a service that may not have had a specific cost – especially for fully integrated plans. Therefore, the Roundtable *recommends* that DOL revise this provision to take into account various business models and exclude services provided within the ordinary course of business.

Direct and Indirect Compensation

As described within the rule, compensation includes direct and indirect compensation paid to the plan service provider, or its affiliates or subcontractor. Direct compensation is compensation received directly from the covered plan. Compensation paid by the plan service provider to the plan sponsor is not subject to the interim final rule. Indirect compensation is compensation received from any source other than the covered plan.

The Roundtable agrees with the Department’s view that plan administrators should have a clear understanding of the services they receive from service providers. Again, however, the Roundtable is concerned that the interim rule may increase costs incurred by plan sponsors and plan participants. For instance, it is common for directed trustees and custodians to charge both a basis point fee as well as a per-transaction fee that varies with the type of the transaction. In such instances, the fee will be the per-transaction charge multiplied by the number of transactions (which are directed by a named fiduciary or investment manager). The directed trustee or custodian will not know in advance the number or types of transactions in which it will be directed to engage. As a result, despite the changes provided for in the interim rule, it still may be impractical to estimate the applicable fees in such circumstances. Roundtable *recommends* that DOL revisit this portion of the rule and provide additional clarification and guidance on this issue.

Disclosure Requirements

Under the interim rule, covered plan providers will now need to make the required disclosures even if they are not entering into a new contract, or modifying an existing contract. When the rule was originally proposed it only applied to new contracts entered into after the rule’s effective date. The retroactive effect of this part of the rule places an extraordinarily time consuming administrative burden on the industry. Each contract entered into prior to the interim final rule will have to be reviewed and amended to comply with this new requirement. Accordingly, the Roundtable *recommends* that this regulation only apply to new contracts. In the alternative, the Roundtable *recommends* that the 60-day limit to disclose modifications be extended to 90-days. This additional time will present service providers with much needed

additional time to investigate changes and determine whether or not these changes are material to the current contract.

Finally, the Roundtable *recommends* that the DOL require a representative letter to be sent to plan sponsors that would highlight the specific information set forth in the rule. This letter would accompany the necessary disclosures that are currently sent to plan sponsors.

Responding to Request to Comply with Reporting and Disclosure Requirements

Upon request of the responsible plan fiduciary or plan administrator, the covered service provider must furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements of ERISA. Accordingly, the rule requires that the information must be disclosed no later than 30-days following such a request in writing. The Roundtable *recommends* that the 30-day window be expanded to 90-days. This will give more flexibility to manage requests, especially during periods of unforeseen heavy volume.

Disclosure Errors

The Roundtable appreciates that the interim rule provides that inadvertent disclosure errors and omissions will not result in the service provider's loss of the section 408(b)(2) prohibited transaction exemption. Under the interim rule, no agreement or arrangement will fail to be "reasonable" if there is an error or omission by the service provider in disclosing the required information. To qualify for this relief, the provider must disclose the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30-days from the date on which the provider knew of the error or omission. The Roundtable *recommends* that the DOL maintain this relief provision and extend the 30-day deadline to 90-days due to the administrative oversight and training that will need to occur in order to be compliant with the new regulatory guidance.

Extension of Effective Date

The present proposal requires the final interim regulation to go into effect on July 16, 2011. Accordingly, covered service providers must provide disclosures for existing relationships no later than July 16, 2011. The Roundtable *strongly recommends* that the DOL extend this effective date a minimum of 12 months. The implementation of the interim rule will be a substantial undertaking due to the various procedural changes and training that will need to occur in order to be compliant with the new amendment.

Coordination with other Regulators

The Roundtable encourages the DOL to work with other regulators when finalizing this rule. Currently, a number of regulatory agencies are examining the disclosures used within their respective industries. The Roundtable *recommends* that the regulators work together to

develop a commonality among the disclosure requirements so as not to create any undue burden on the industry to comply.

Conclusion

In summary, the Roundtable supports the DOL's intent to enhance disclosures for plan sponsors. However, the Roundtable is concerned about the unintended consequences of the rule as discussed above and recommends the revisions advanced herein.

Thank you again for the opportunity to share our views with you on this subject. If you have any questions, please feel free to contact me, or Brian Tate at 202-289-4322.

Sincerely,

Richard Whiting
Executive Director and General Counsel