

National Coordinating Committee for
Multiemployer Plans (NCCMP)
815 16th Street, NW
Washington, DC 20006

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Submitted Electronically Via
Regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attention: 408(b)(2) Regulations

Dear Friends:

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to provide these comments in response to the request for public comments on the Proposed Regulations issued on December 13, 2007, concerning the meaning of a “reasonable” contract or arrangement under §408(b)(2) of ERISA.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer defined benefit pension plans for retirement, and the approximately twenty-six million workers, retirees and their dependents who receive health and other benefits from multiemployer plans. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a non-partisan, nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including (among others) in the building and construction, retail food, trucking and service and entertainment industries.

General Observations

The Proposed Amendment would redefine the meaning of a “reasonable contract or arrangement”. To be a “reasonable contract or arrangement” as defined, contracts between employee benefit plans and certain service providers must include provisions requiring disclosure of certain information that may be relevant to a fiduciaries’ assessment of the provider’s compensation. In addition, such disclosure must actually be made before the contract is entered into. A contract that is not “reasonable” under the proposed regulation would not

qualify for the relief from the prohibited transaction exemption under section 408(b)(2) of ERISA, with the result that the plan fiduciaries would have engaged in a prohibited transaction in violation of section 406(a)(1)(C) of ERISA, and the service provider would be subject to excise taxes as a disqualified person under the Internal Revenue Code.

We commend the Department for the positions it has taken in this proposed regulation which we believe will assist plan fiduciaries in their dealings with service providers. In particular, the requirements in these regulations will provide added leverage for fiduciaries of small plans to demand and obtain information concerning compensation and conflicts of interest from service providers.

Our Comments on the Proposed Regulations

NCCMP believes the proposed amendment requires the following clarifications:

1. The proposed regulation should require service providers to provide a table or summary of disclosures if the disclosure is provided in multiple documents to insure compliance and assist plan fiduciaries in monitoring compliance. The proposed regulation does not specify the manner in which service providers must make disclosures to the responsible fiduciary. The Department explains, in the preamble, that the proposed amendment was drafted this way to avoid duplicate disclosures.

Consistent with this approach, we urge the Department to amend the proposed regulation to require service providers to provide an additional piece of information that would not require duplicate disclosures or substantially increase the burden of disclosure. The proposed regulation already requires that the disclosures be made in writing. It also permits service providers to make disclosures in multiple documents, by a combination of electronic and paper documents and by incorporating documents by reference. It would not unduly increase the burden on service providers to require them to provide a table or summary of disclosures which would either provide the disclosures themselves, or summarize where the disclosures may be found. This requirement would still avoid duplicate disclosures, and it provides additional clarity to ensure that the service provider has satisfied the requirements of the regulation. This also reduces duplication of effort between the service provider, who is likely to have summarized these disclosures in its own due diligence process, and the responsible fiduciary, who would likely repeat the service provider's efforts in meeting his own fiduciary obligations to verify that all required disclosures have been made.

A contractual relationship often involves substantial documents. The proposed regulations would enable a service provider to provide a thick stack of paper and advise the Plan fiduciary that it contained all of the required disclosures. A requirement that the service provider must also include a summary stating where each required disclosure can be found would assist both the service provider and the fiduciary to comply with the requirements without undue burden to either. As noted above, the service provider must review some form of checklist to make certain that it has met its disclosure obligation. Requiring that this checklist be provided to the Plan fiduciary would enhance overall compliance with the requirements of the regulation.

2. The proposed amendment should clarify the application of the regulations to existing agreements. The application of the proposed regulation to existing contracts that fall within the scope of the proposed amendment is not clear. A number of references indicate that the regulation will apply when, after the regulation becomes final, a contract is entered into, extended or renewed. It is not unusual for contracts to remain in effect, unchanged, without renewal or extension for many years. If the proposed regulation does not apply to existing contracts, this results in a large gap in the protections and aid to fiduciaries to obtain disclosure afforded by the regulations. However, if the proposed regulations do apply to existing contracts, the 90 day time frame for compliance after the issuance of final regulations is inadequate. A plan of any size may have 100 or more service provider agreements in effect and more than 90 days may be required to obtain disclosures and contract supplements for existing agreements.

We suggest the Department clarify whether the regulations apply to existing arrangements, **especially to those which are open-ended or which have a long-term duration.** If so, for such agreements that are not scheduled to expire within a date certain period (perhaps twelve or twenty-four months), we recommend that the regulations provide an additional period of time for plan fiduciaries to obtain the required disclosures and enter into the contract supplement required by the regulations.

We appreciate the care and attention that the Department is giving to these regulations which we believe will aid plan fiduciaries to obtain information needed to evaluation contractual arrangements with service providers. The NCCMP requests that the Department provide the clarifications discussed above in the final amendment. We will be happy to discuss these comments with you further or provide additional information you may need as you finalize this regulation and request the opportunity to testify should the Department believe further public commentary would be desirable..

Sincerely,

Randy G. DeFrehn
Executive Director