THE BANK OF NEW YORK MELLON

February 11, 2008

Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

Attention: 408(b)(2) Amendment

Dear Mr. Doyle:

BNY Mellon would like to take the opportunity afforded by the Department of Labor to comment on the proposed amendment to Regulation §2550.408b-2(c) published in the Federal Register on December 13, 2007.

The Bank of New York Mellon Corporation is a bank holding company established on July 1, 2007, as a result of the merger of The Bank of New York Company, Inc. and Mellon Financial Corporation. Its primary subsidiary banks are The Bank of New York, a New York chartered bank; Mellon Bank, N.A., a nationally chartered bank; and Mellon Trust of New England, National Association, also a nationally chartered bank. The Bank of New York Mellon Corporation has over 40,000 employees world-wide and more than $20 trillion of assets under management, administration and custody. Through its banks, service companies, and more than a dozen investment management subsidiaries, it provides a multitude of services to employee benefit plans, including trust, custody, investment management, performance measurement, and benefit payment services. Trust, custody and related services alone provide over 50% of the Corporation's revenue and a substantial portion of that revenue is attributable to services provided to employee benefit plans. In this letter The Bank of New York Mellon Corporation and its subsidiaries are referred to as BNY Mellon.

In order for a service contract or arrangement to be considered reasonable under ERISA §408(b)(2), service providers must comply with the current regulations in §2550.408b-2, which provide that: 1) The services must be appropriate and helpful to the plan; 2) the arrangement must be terminable by the plan without penalty on reasonably short notice under the circumstances; and 3) compensation received by the service provider must be reasonable.

The proposed regulation adds the following requirements for specified service providers: 1) All service contracts (and arrangements) must be in writing and contain certain provisions; 2) the service provider must disclose in writing information regarding compensation received, fiduciary status, participation in or acquisition of an interest in any plan transaction, potential conflicts of interest, and its policies and procedures; 3) the service provider must disclose material changes within 30 days; and 4) the service provider must disclose compensation information requested for Form 5500 and other required plan reporting.

We understand the Department's need to assure that, in engaging service providers, plan fiduciaries receive all information reasonably necessary to determine the reasonableness of service contracts and arrangements, including the compensation received by service providers, and consider relevant conflicts of interest. We are however, very concerned with some aspects of the proposal. Those concerns are detailed below.

Effective Date

The effective date of the regulations is 90 days after the publication of the final regulations. Given the breadth of the proposed regulations, it will be extremely difficult for service providers to be ready to comply with the regulations in such a short time period. Gathering information on indirect compensation and conflicts of interest, developing a way to determine compensation and conflicts by plan, creating systems to capture and extract the information, and drafting and executing contracts, if there is no grandfathering, will take countless months. We request an effective date of twelve months from the date of the issuance of the final regulations. Assuming that the final regulation is published before December 31, 2008, this date would still be in advance of the time when service providers need to provide information for the 2009 Form 5500.

Contract Provisions-Need to Amend Contracts

We request that existing contracts be deemed in compliance with the regulation if proper written disclosures are provided to the plan fiduciary. We have no issue with the requirement that the arrangement be in writing nor with the inclusion of the specified provisions in the contract. Our concern is that the current wording results in services provided under existing contracts potentially not qualifying for the §408(b)(2) exemption and, consequently, until the service contracts are amended, the service arrangements will constitute prohibited transactions under §406(a)(1) unless they qualify under another exemption.

Proposed §2550.408b-2(c)(1)(i) states that "[n]o contract or arrangement to provide services to an employee benefit plan, nor any extension or renewal of such contract or arrangement, by...[a] service provider...is reasonable...unless the requirements...[of this regulation]...are satisfied." The requirements necessitate the inclusion of certain provisions in the service contract. The vast majority of service providers use a written contract with the plan sponsor or named fiduciary. If, as of the effective date of the amended regulation, existing contracts must contain the specified provisions, all existing contracts will need to be amended within ninety days from the date the final regulation is issued. Service providers currently have in place thousands of completely adequate and serviceable agreements which will not meet the specific contractual requirements of the proposed regulations. BNY Mellon provides trustee services alone to an estimated 1900 plans. Amending existing contracts will be a tremendous undertaking, with little potential benefit to the plans. Amendment can rarely be done unilaterally by a service provider. When amendments to contracts are required, clients frequently want to change other contract provisions and lengthy negotiations can ensue. Ninety days will be grossly insufficient to accomplish the task. A concerning but realistic scenario is that the majority of service contracts will not be amended to comply with the new regulation within ninety days, and, that, consequently, the service arrangements will not meet the requirements of §408(b)(2), and that prohibited transactions will then result.

Existing written contracts should be grandfathered until such time as they are amended for some other reason. The desired disclosure can still occur without the need to execute a new contract. Existing written contracts should be deemed in compliance with the regulation provided that, by the effective date, the service provider discloses in writing the information contained in subsection (c)(1)(iii)-(iv) and agrees to disclose the information in (v) when requested (except that the representation with respect to the information being provided before the signing of the contract would not be included). Any amendment, as well as any extension or renewal, to an existing contract would require complete compliance with the regulation. This approach fulfills the purpose of the regulation of giving plan fiduciaries the information necessary to understand how service providers are compensated and whether they have material relationships or arrangements which may adversely affect their performance without placing an undue burden on plan sponsors and service providers to amend and execute countless new agreements.

If the Department believes that the protection of participants and beneficiaries requires that a time limit be put on the grandfathered status of existing contracts, we recommend three years.

Disclosures

Definition of Service Provider-Mutual Fund Service Providers

The definition of a service provider should not include those who provide services to mutual funds. On page 70990 of the Federal Register, the Department states that "...persons or entities that provide investment management, recordkeeping, participant communication and other services to the plan as a result of an investment of plan assets will be treated as providing services to the plan." When applied to mutual funds, this statement is problematic. A plan may invest plan assets in a mutual fund but, once those assets become assets of the mutual fund, the assets of the plan are the mutual fund shares, not the underlying assets of the mutual fund. Consequently, service providers to mutual funds, including but not limited to investment managers, custodians and brokers, are not parties in interest to plans and ERISA §406(a) is inapplicable. Since there is no prohibited transaction, there is no need for the §408(b)(2) exemption. It is then puzzling how the proposed regulation could apply to service providers to mutual funds. Further, investors in mutual funds are adequately protected by the rules and regulations of the Securities and Exchange Commission so that additional disclosures are unnecessary. The Department should review its position and affirm that service providers to mutual funds are not covered by the proposed regulation.

Compensation-Definition of Affiliate

The word "agent" in the definition of "affiliate" should be deleted because its inclusion will result in reporting of irrelevant information. We can think of only one situation, i.e., where the agent's compensation is charged to the plan, when a plan fiduciary would find information regarding an agent's compensation important in determining the reasonableness of a service contract or arrangement.

There are two sources of compensation for an agent of a service provider. First, there are amounts paid to the agent directly by the service provider. The amount that the agent, usually a subcontractor or vendor of the service provider, receives is irrelevant to the plan fiduciary when the service provider, not the plan, pays the agent's fee. Having information about the fee that the service provider pays the vendor in this instance will be confusing to the plan fiduciary in assessing the reasonableness of the contract since this amount is not part of what the plan pays for the services. However, when the service provider passes through to the plan the fees charged to it by the agent, the amount charged to the plan should be disclosed because it is part of what the plan pays for the contracted services. The plan fiduciary needs this information to be able to compare the services and compensation of two service providers, one which charges a fee directly to the plan for the services and one which passes through as an expense the charges of the agent.

Second, there are amounts paid directly to the agent by the plan. This compensation arises when the agent contracts directly with the plan fiduciary for services outside of the service provider's contract. This compensation would be reportable by the agent in its role as service provider to the plan. There is no need for the compensation to be reported a second time by the service provider. We note that any amounts that the service provider may receive back from an agent would be included in the required reporting of indirect compensation so inclusion of the term "agent" is not needed to catch revenue sharing and like arrangements.

Instead of including the term "agent" in the definition of "affiliate," the Department should add a provision to the regulation that requires that all amounts charged for services provided under the service contract or arrangement, whether those amounts are compensation to the service provider or pass through expenses, must be disclosed, if not as compensation, then in a separate category.

In the preamble to the proposed regulation on page 70990, the Department states that "...disclosure of any direct or indirect compensation that otherwise is required under the proposal cannot be avoided merely because such compensation is paid to an employee or agent of the service provider or an affiliate, rather than directly to such service provider or affiliate." This statement in the preamble suggests that the Department has particular situations in mind, presumably in addition to the pass through charge example discussed above, that it believes will permit service providers to manipulate how services are provided in order to avoid the requirements of the regulations. Without knowing what those situations of concern are, it is not possible to suggest a specific alternative to the use of "agent." We have to believe, however, that there are reasonable, workable alternatives that do not stretch the scope of these required disclosures beyond logically useful information. We ask that the word "agent" be deleted from the definition of "affiliate" and that a more reasonable alternative be developed to address the Department's legitimate concerns.

With respect to the reporting of affiliate compensation, the Department should clarify that the compensation of an affiliate of a service provider does not have to be reported to the plan fiduciary twice, once as compensation of the service provider's affiliate and again by the affiliate as its own direct compensation. For example, a custodian and an affiliated investment manager both provide services to a plan, the custodian under a custody agreement with the plan fiduciary and the investment manager under a separate investment management agreement. The custodian will report its own compensation to the plan fiduciary under the proposed regulation and the investment manager will report its own compensation to the plan fiduciary. However, the custodian should not have to report the affiliated investment manager's compensation as part of its compensation reporting obligation and the investment manager should not have to report the affiliated custodian's compensation as part of its compensation reporting obligation. If they both report the other's compensation as well as their own, there is double reporting and confusion results. Plan fiduciaries may conclude that each service provider is paid what the two together receive. The plan fiduciary will be able to understand that the two entities are related by disclosure, as we recommend below, by both service providers of the names of their parents, subsidiaries and affiliates.

Compensation-Tracking by Plan

Plan level tracking of most of the information that needs to be disclosed is not currently done. Many service contracts cover multiple plans, particularly in the master trust context. Fees, other than those that are calculated as a percentage of assets or charged by participant, are often determined on a total trust level, not by plan. In addition, many contracts between service providers and third parties that may generate indirect compensation are omnibus contracts, covering multiple clients, including ERISA and non-ERISA clients. Substantial time will be necessary to determine how the compensation and conflict of interest information will need to be allocated at the plan level when services are provided at the commingled trust level or compensation generated across a large client base. We request detailed guidance from the Department on how to determine and report information on compensation, direct, indirect and affiliate, and on conflicts of interest by plan. We submit that general guidance, such as using any reasonable allocation method, is insufficient when failure to allocate appropriately will result in a prohibited transaction.

Scope of Conflict of Interest Disclosure

Subsections (B) through (F) of paragraph (c)(1)(iii) of §2550.408b-2 set forth the disclosures necessary with respect to conflicts of interest. Subsections (B) and (D) are troubling because 1) (B) exposes service providers to unnecessary liability and 2) the potential scope of subsection (D), when taken together with other required disclosures, goes well beyond what a plan fiduciary needs to assess a service provider's objectivity and imposes a tremendous burden on large service providers in ferreting out relationships that have only a theoretical potential of creating conflicts of interest.

Identification as a Fiduciary

Proposed §2550.408b-2(c)(1)(iii)(B) should be removed. Subsection (B) requires a service provider to state whether any of its services will be provided as a fiduciary either under ERISA §3(21) or under the Investment Advisors Act of 1940. A service provider is rarely able to make a singular declaration of this nature. Liability under ERISA has traditionally related to the actions of a fiduciary, not to its title. As the Department has stated on many occasions, including in a footnote on page 70991 in the preamble to the proposed regulation, the determination of whether a person is a fiduciary under §3(21) is based on its actions, not on what it does or does not call itself, and, therefore, the statement should not be binding. Many service providers may exercise control or management over some aspect of the plan and, therefore, may be fiduciaries with respect to those limited actions. However, there may be other services provided that are not fiduciary in nature. For example, a service provider may perform multiple services, some fiduciary in nature (e.g., trustee services) and some non-fiduciary in nature (e.g., benefit disbursements) under a single contract. Inappropriately, a plan fiduciary or a court may, without proper analysis, accept as conclusive for broad purposes and with broad applicability a service provider's statement that it is a fiduciary.

In the event that subsection (B) remains in the final regulation, please clarify how this requirement is to be applied to a service provider that provides a range of services, some of which are fiduciary in nature and some of which are non-fiduciary.

Reporting of Potential Conflict of Interest Relationships

On page 70991 of the Federal Register, the Department raises its concern that the plan fiduciary be able to assess "the objectivity of a service provider's decisions or recommendations." We agree with the Department that this concern should be addressed. However, we believe that modest revisions to subsection (D) will provide sufficiently valuable information for plan fiduciaries without extending the scope of the subsection beyond that necessary to address the Department's concern. First, we recommend that each service provider should disclose the names of its parent, all of its subsidiaries and all of its affiliates (affiliate being defined as any person directly or indirectly controlling, controlled by, or under common control with the service provider), provided that updates are required to be furnished no more often than annually if there is a material change. This time frame corresponds with our proposal below with respect to timing of notices for material changes in the section entitled "Periodic Notice for Material Changes" on page 8. This disclosure will alert plan fiduciaries to corporate relationships of which they may not be aware. Second, we propose that only those service providers who exercise discretion on behalf of the plan, such as trustees and investment managers, or recommend a course of action with respect to use of other service providers or investments, such as consultants and investment advisors, should be required to disclose relevant material relationships and arrangements. These are the service providers whose private interests and relationships require consideration because they make "decisions or recommendations." Further, only those material relationships and arrangements that have the potential to affect such service providers' decisions or recommendations should need to be reported. Other service providers should not have to disclose information under (D) except the names of their own parent, subsidiaries and affiliates. Reporting of indirect compensation by these non-fiduciary service providers should give the plan fiduciary any needed information with respect to material benefits that the provider receives from third parties, including its own vendors, related to services provided pursuant to the contract.. Third, because of the difficulty in applying the concept of a "conflict of interest" to a non-fiduciary service provider,[1] we recommend that the language in (D) be changed from disclosure of conflicts of interest to disclosure of a service provider's "material relationships or arrangements with a third party that a reasonable plan fiduciary would consider significant in assessing the service provider's ability to properly perform the services under the contract or arrangement." Fourth, because it is not possible to know what conflicts may arise in the future due to frequent company mergers and a plan's change in investments and service providers, it should be made clear, notwithstanding the Department's inclusion of the qualifying language "to the best of the service provider's knowledge," that disclosure of conflicts is to be based upon the facts and circumstances existing and known to the service provider at the time of disclosure. It is inappropriate to require a service provider to disclose mergers or purchases under consideration. Likewise, it is unreasonable to expect a service provider to predict what entities may be parties in interest to the plan in the future. Further, only conflicts known to the service provider should be required to be reported. A service provider must be able to rely upon information provided to it by the plan fiduciary with respect to the plan's current parties in interest. It is not uncommon for a plan fiduciary not to be able to identify all of the parties in interest to the plan. Service providers should not be held responsible for omissions of the plan fiduciary that result in inadequate disclosure of conflicts of interest.

With the information indicated above, the information on indirect compensation, and the other information that is required to be disclosed under the proposed regulation, the plan fiduciary should have all information necessary to determine "a service provider's material relationships or arrangements with a third party that a reasonable plan fiduciary would consider significant in assessing the service provider's ability to properly perform the services under the contract or arrangement" and the reasonableness of the contract.

Policies and Procedures

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[1] Black's Law Dictionary (Seventh edition) defines a conflict of interest as "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." The term relates to those in a special position of trust, not to those providing ordinary services. ERISA §406(b) contains one set of prohibited transactions for fiduciaries and a separate set in ERISA §406(a) for parties in interest, including service providers. The definition and the structure of §406 of ERISA suggest that the disclosures required by subsection (c)(1)(iii)(D) are out of sync with both what a conflict of interest is and ERISA's differentiation between applicable standards of conduct for fiduciaries and for service providers.

Subsection (c)(1)(iii)(F) requires a service provider to disclose the existence of any of its policies and procedures designed to address conflicts of interest and explain how they prevent such conflicts and adverse effects on the provision of its services. BNY Mellon has a well-established policy against disclosure of our procedures. We are more than willing to share policies that we have with respect to conflicts. However, procedures are constantly being reviewed and refined and we do not view as a matter for the client's consideration whether we get to the end result in three steps or five and what those steps may be. Therefore, we object to the requirement that we provide explanations of our procedures. Further, the purpose stated on page 70993 of the preamble is to educate plan fiduciaries on how service providers address potential conflicts of interest. We do not believe that a service provider has or should have any duty to educate plan fiduciaries with respect to something about which the plan fiduciary, like any fiduciary, should already be knowledgeable in order to be able to fulfill its own fiduciary duties. Subsection (F) should be deleted or, if deletion is not acceptable, disclosure related to procedures should be eliminated.

Periodic Notice for Material Changes

Proposed §2550.408(b)-2(c)(1)(iv) requires a contract or arrangement to include a provision requiring a service provider to disclose to the responsible fiduciary any material change in the information required to be reported to the responsible fiduciary within 30 days after the service provider acquires knowledge of the material change. We agree that the plan fiduciary should be provided updated information upon which to determine whether to continue the services of the service provider. However, we recommend an annual update of the information instead of notice each time there is a material change because 1) the frequency of the thirty day notices is likely to cause confusion for plan fiduciaries and 2) the meaning of "acquires knowledge" will present problems for large multi-faceted service providers.

Our full recommendation is an annual update of the information (provided within twelve months of the prior update) where there has been any material change in the information during the year; provided that no material change has altered or will alter the total fees or the disclosed formula that the plan pays for the services under the contract. The plan fiduciary should receive notice of any material change that affects the total fees or the disclosed formula that the plan pays for the services within thirty days of that change (in the event of the rare contract that permits fee changes without the consent of the fiduciary). With respect to all other material changes, providing the fiduciary with a comprehensive, concise summary of changes once a year will permit the fiduciary to thoughtfully review whether the contract or arrangement continues to be reasonable. Receiving information piecemeal throughout the year is unlikely to result in the fiduciary's understanding the effect of a change in the context of all compensation being received by the service provider under the contract.

An annual update would also resolve our concern with the meaning of "acquires knowledge." Because BNY Mellon, like many other service providers, is a large, complex organization made up of multiple divisions, subsidiaries and affiliates, one part of the organization may not have knowledge of fee or relationship changes in another part of the organization and certainly not within thirty days. Further if "acquires knowledge" is interpreted to mean "institutional knowledge," i.e., if one part of the organization knows all parts are considered to know, large service providers will be in breach of this provision continually. Notice of all material changes when they occur will involve a large amount of time and coordination by large service providers since they will need to continually monitor all changes in the voluminous amount of information that is required to be disclosed and review those changes for materiality. Using an annual update would permit service providers like BNY Mellon to establish a process for gathering the required information on changes and providing it to clients in a simple, understandable format. We encourage the Department to weigh the real benefits to fiduciaries and service providers alike of this recommendation notwithstanding the fact that the timing of the notice is substantially different from the current proposal. It maintains the Department's purpose of keeping plan fiduciaries aware of important changes, it allows fiduciaries a broader view in order to put changes in the context of the overall service contract and it gives service providers time to gather and report the required information.

If the above proposal is unacceptable, a reasonable interpretation of "acquires knowledge" or substitute language is needed.

Relief for a Service Provider's Good Faith Compliance

Through proposed Prohibited Transaction Class Exemption 2008-XX, the Department has provided relief for plan fiduciaries from a prohibited transaction that would result from a service provider's failure to comply with its disclosure obligations under the proposed regulations. Provided that the plan fiduciary has followed a certain course of action prescribed in the PTCE, it would not be considered to have engaged in a prohibited transaction if the requirements of §2550.408b-2(c)(1) have not been met. Similar relief should be available to service providers for good faith compliance with the proposed regulation. The disclosures required under (c)(1) are complex and much information is required to be disclosed, particularly for large service providers with many clients, complex corporate structures and numerous third party vendors. Inadvertent errors or omissions will be hard to avoid even for the most conscientious service provider and interpretations of a new regulation are apt to vary, neither of which situation is addressed by inclusion of the language "to the best of the service provider's knowledge" in the proposed regulation. The Department should provide a means, for the service provider who has made a good faith effort to comply, of avoiding the imposition of the substantial penalties and other potential consequences of a prohibited transaction, perhaps through the Voluntary Fiduciary Correction Program currently available, a Prohibited Transaction Class Exemption, a regulation, or other effective means, where the service provider takes steps to timely correct any error or omission by providing revised disclosures after discovery.

Effect on Other Exemptions

The Department has invited comments on the extent to which the disclosure requirements under the proposed regulations would affect or be affected by other ERISA statutory exemptions that may relate to plan service arrangements. In our view, the proposed regulations should have no direct effect on any statutory, class or individual exemption issued by the Department to which such requirements do not specifically apply, including all past, current and future exemptions. The exemptions fall into two categories.

First, there are exemptions (whether class exemptions or individual exemptions) that the Department has issued which relate to §408(b)(2). At the time that those exemptions were issued, the Department took a critical look at the need for the exemptions and evaluated them based on its findings. It would be unfortunate for the Department to now rewrite those exemptions by retroactively applying the regulations under §408(b)(2) to them.

Second, there are other statutory, class and individual exemptions that are not connected to or dependent upon §408(b)(2). To permit the rules promulgated under §408(b)(2) to have some residual impact or authority with respect to those exemptions would undermine the existing exemption structure and process and add confusion to the interpretation and implementation of existing exemptions.

The Department should confirm that these exemptions are not affected by the proposed regulation.

In the event that the Department determines that some or all of the class or individual exemptions should be affected by the proposed amendment to the regulation, the Department should give the public and the individuals affected an opportunity to fully comment on each exemption. It is important for the Department before taking any action to fully understand the potential far-reaching implications of any revocation, amendment or other Department action with respect to these exemptions on those plan sponsors, fiduciaries and service providers who have come to rely upon them.

We would like to thank the Department for this opportunity to offer our comments on the proposed amendment to Regulation §2550.408b-2(c). If we can provide further clarification on any of our comments, please contact me at 412/234-1508.

Sincerely,

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