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February 19, 2008

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Mr. Robert J. Doyle
Director
Office of Regulations & Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: 1210-ZA13; Proposed Class Exemption for Plan Fiduciaries When Plan Service Arrangements Fail to Comply with ERISA Section 408(b)(2); 73 Federal Register 70893; December 13, 2007

Dear Mr. Doyle:

The American Bankers Association (ABA) appreciates this opportunity to provide comments to the Department of Labor (Department) regarding proposed regulations that would redefine what constitutes a “reasonable contract or arrangement” for purposes of the statutory exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act (ERISA).

The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation’s banking industry and strengthen America’s economy and communities. Its members – the majority of which are banks with less than \$12 million in assets – represent over 95 percent of the industry’s \$12.7 trillion in assets and employ over 2 million men and women. Many of these institutions provide trust or custody services for institutional clients, including employee benefit plans covered by ERISA, as well as services to individuals holding retirement assets in individual retirement accounts (IRAs). As of year-end 2006, banks and savings associations held more than \$19 trillion in fiduciary assets for both personal and institutional customers in 19 million accounts.¹ Of those assets, \$7.8 trillion are held in defined benefit and defined contribution accounts.² As a result, the Department’s proposed regulation is of great importance to the banking industry.

The proposed regulations would add new provisions to 29 C.F.R. §2550.408b-2(c) that would require that in order for a contract between an employee benefit plan and

¹ FDIC Call Report Data, December 2006

² FDIC Call Report Data, December 2006

a service provider to be considered reasonable, the service provider must disclose all direct and indirect compensation it will receive for providing services to the plan, as well as any conflicts of interest that may arise in connection with providing these services. Specifically, the new provisions would require that the service provider disclose all compensation or fees to be received, as well as the manner of receiving those fees. Compensation or fees include money or any other item of monetary value, such as gifts, awards and trips that are received directly from the plan or plan sponsor or indirectly by the service provider or its affiliate. These new provisions would create a new standard for determining what constitutes reasonable compensation for services.³

This proposal is just one of several fee disclosure projects the Department has undertaken to ensure that plan sponsors and plan participants have more information about payments made to and received by various service providers in connection with the services provided to a specific plan. For example, the Department has revised the Form 5500, the annual report that plan sponsors file, in order to increase information disclosed to the public and the government.⁴ The proposal at issue here relates to service provider disclosure to the plan sponsor. As we understand it, the next step the Department will be undertaking will involve disclosures made directly to plan participants for those plans that permit participant-directed investments.

We commend the efforts of the Department to try to strike the right balance between disclosure that a plan sponsor needs to make an informed decision and disclosure that merely encompasses extraneous information.

In connection with this proposal, we would like to raise the following points:

- A. The scope of the proposal is too broad and may potentially interfere with other exemptions;
- B. The open-ended interpretations of “service provider” and “agent” potentially expands the proposal too far;
- C. The proposal calls for too many unnecessary disclosures; and
- D. The various effective dates do not allow sufficient time for affected parties to become compliant.

The Scope of the Proposal is Too Broad

The ABA is concerned about the impact this proposal could have on prohibited transaction exemptions (PTEs) previously granted statutorily under ERISA or by class or individually by the Department. We respectfully seek Department affirmation that all previously granted prohibited transaction exemptions – class, individual and statutory – remain in effect and are available as alternatives to ERISA Section 408(b)(2) and its implementing regulations.

In the preamble, the Department invited comments on the extent to which the application of the disclosure requirements contained in the proposed regulation will affect, or may be affected by, other ERISA statutory exemptions that relate to plan service arrangements. Service providers currently provide numerous services to plans in reliance upon statutory, class or individual

³ Department of Labor Regulations Sec. 2550.408(b)-2 regarding what constitutes a reasonable contract has historically focused on the plan not being locked into a contract that the parties could not exit. This proposal adds provisions that are outside the scope of the current regulations.

⁴ 72 Fed. Reg. 64710 (November 16, 2007)

exemptions that provide relief from the prohibited transaction rules of ERISA. We see no basis for the Department to require compliance with this regulation for prohibited transaction relief where a service provider satisfies previously articulated conditions of another statutory, class, or individual exemption.

Since the passage of ERISA in 1974, hundreds of class and individual exemptions have been granted. Each of these exemptions includes a variety of conditions, including, among other things, disclosure and cost limitations intended to address potential conflicts due to a relationship between a service provider and a party in interest. Thus, the exemption granted explicitly relieved the service provider from being deemed to be engaging in a prohibited transaction with a party in interest on the condition that the service provider follow the terms of the exemption.

In addition, the Department has subsequently issued further exemptions, advisory opinions, and field assistance bulletins adding additional requirements to, and/or further interpreting, previously articulated prohibited transaction exemptions. Service providers have become comfortable with the current regulatory regime in place for seeking prohibited transaction exemption relief.

For example, in PTE 91-38 the Department amended PTE 80-51 to permit a bank collective fund to engage in transactions with parties in interest to a plan that invested in the collective fund so long as the plan's participation in the fund did not exceed a specified percentage of total collective fund assets.⁵ After issuing this PTE, the Department later issued further related guidance. This guidance included clarifying that Individual Retirement Accounts are similar to employee benefit plans and come within the exemption,⁶ that a registered investment adviser can serve as manager of the collective funds,⁷ and that a transaction can occur between one bank's collective trust fund and an affiliated collective trust fund.⁸

The Department has always advocated “reasonable” fees, and the industry has taken this pronouncement seriously. Each time the Department has issued a new PTE it has properly weighed the potential conflicts in activities among providers, fiduciaries, and plans. As a result, we would encourage the Department to affirm that if a party has properly relied on another exemption – statutory, class or individual – as to a particular service, then it would not also need to comply with ERISA Section 408(b)(2) and its implementing regulations.

The Service Provider and Agent Categories are Too Broad

The proposal references multiple terms that either have not been defined under ERISA, or require additional clarification. The terms “agent”, “compensation or fees”, and “service provider” appear throughout the Department’s proposal. An expansive reading of these terms could lead to excessive and unnecessary disclosures that could very well distract plan sponsors from making an informed decision regarding service providers and the reasonableness of their fees.

1. The term “agent” should be defined to exclude subcontractors or vendors to the service providers who are acting in the ordinary course of business.

⁵ Department of Labor PTE 1991-38

⁶ Department of Labor PTE 2002-13

⁷ Department of Labor Advisory Opinion 96-15A (Aug. 7, 1996)

⁸ 57 Fed. Reg. 7801(March 4, 1992); 58 Fed Reg. 89890 (Feb. 18, 1993); 61 Fed. Reg. 21501 (May 10, 1996)

The proposal defines an affiliate to a service provider as “any person directly or indirectly controlling, controlled by, or under common control with the service provider, or any officer, director, agent, or employee of, or partner with, the service provider.”⁹ It is unclear how the term “agent” is to be defined. In our view, the term agent should not include a subcontractor, subadvisor or vendor hired by the service provider in the ordinary course of business. Such persons are not providing services to the plan by virtue of being a subcontractor, subcustodian or vendor. Rather, they are providing services to the bank that contracts with them.

2. The definition of a “service provider” should be limited to the agency relationship the service provider has with the plan.

The proposal broadly defines “service provider” to include an expansive list of providers of various services. Specifically, the Department’s proposal creates two categories of service providers. The first category includes those who provide banking, consulting, custodial, insurance, investment advisory, investment management, recordkeeping, securities or other brokerage, or third party administration directly to the plan pursuant to the contract.¹⁰ The second category encompasses those who receive indirect compensation or fees in providing accounting, actuarial, appraisal, auditing, legal or valuation services that may be incidental to the plan.¹¹ As we understand the proposal, it would go so far as to include disclosure in the following instance: a service provider pays for legal services for its own purposes regarding keeping stock in the collective fund where a particular company might be in litigation. While the law firm has been paid directly, the compensation appears to be considered “indirect” compensation to the plan because there is a connection to the service provider’s collective fund.

While we do not fully understand the Department’s creation of two separate categories, we believe that it captures more information than is necessary for a plan sponsor to determine the reasonableness of fees paid to a service provider. In fact, the inclusion of extraneous and unnecessary information concerning service provider payments to third parties could distract plan sponsors from their ultimate goal of determining the reasonableness of the fees they pay to service providers.

For example, a service provider should not have to disclose compensation earned by the service provider or its affiliate for serving as indenture trustee on a bond issuance in which the plan maintains an investment merely because the indenture trustee is affiliated with the service provider. Similarly, an investment manager’s placement of trades on behalf of a plan or a direct filing entity (DFE) through an affiliated broker should not cause the broker to become a service provider to the plan. The regulation should only require the compensation to be disclosed if it arises out of the service provider’s relationship to the plan.

The proposal also raises significant programming difficulties. It would be extremely difficult for a service provider to create a search function that can connect service provider clients to each other. For example, a directed trustee should not have to disclose to the plan sponsor the fact that it or its affiliate provides custodial or transfer agency services to a third party mutual fund in which the plan sponsor or its participants have chosen to invest. Further exacerbating the issue is that plan participants may change investment options frequently. It would be virtually impossible for a

⁹ Proposed 2550.408b-2(c)(1)(iii)(A)(1) in defining “Compensation or fees”

¹⁰ Proposed 2550.408b-2(c)(1)(i)(B)

¹¹ Proposed 2550.408b-2(c)(1)(i)(C)

service provider to know that it or an affiliate is providing services to a particular mutual fund in which plan participants may have chosen, at that particular time, to invest.

Given that Section 408(b)(2) only applies to service providers that are parties in interest to a plan, the Department should narrow the proposal to cover a more limited number of service providers and agents. It is important that only the relevant and appropriate relationships are disclosed to the plan sponsor. Too much information could undermine the plan sponsor's ability to make an appropriate analysis concerning the reasonableness of its service provider fees.

Finally, it is not uncommon for plan sponsors to negotiate for services with separate business lines within a large financial services holding company. For example, a plan may negotiate with a bank for custodial services, but also with an affiliated investment adviser for certain advisory services. Where the plan sponsor has chosen to negotiate separately and in an uncoordinated fashion for services provided, protection from prohibited transaction liability should be provided to those service providers that, despite their good faith efforts, fail to disclose compensation received by an affiliate

3. Service providers to mutual funds should not be considered service providers to the plans.

Service providers to mutual funds, such as transfer agents, custodians and fund accountants, should not be considered "service providers" to the plans. ERISA Section 3(21)(B) clearly states that investments in a mutual fund will not cause an investment company, its investment advisor or its principal underwriter to be deemed to be a fiduciary or a party in interest.

This principle was further interpreted through the Department's Interpretive Bulletin 75-3:

Consistent with this principle, the Department of Labor interprets this section to mean that a person who is connected with an investment company, such as the investment company itself, its investment adviser or its principal underwriter, is not to be deemed to be a fiduciary of or party in interest with respect to a plan solely because the plan has invested in the investment company's shares.¹²

In addition, the Department has made clear that mutual fund assets are not deemed to be "plan assets" by reason of a plan's investment in the fund.¹³

Due to the clear language of ERISA, as well as the Department's interpretation of applicable statutory provisions, service providers to mutual funds should not be considered "service providers" to plans under these proposed regulations.

The Proposal Calls for Too Many Unnecessary Disclosures

The disclosure requirements are more extensive than what would be necessary for a plan fiduciary to determine the reasonableness of the fees being paid. Among the many disclosures required, the proposal calls for disclosure of float, *possible* -- as opposed to *actual* -- "conflicts of interest," and an

¹² 29 C.F.R. § 2509.75-3

¹³ 29 C.F.R. § 2510.3-101(a)(2)

attestation of fiduciary status. These three items are unnecessary for assisting a plan fiduciary to assess the reasonableness of fees.

1. Float disclosure should meet the test of the Department's previously issued guidance.

In 2002, the Department issued extensive guidance, through a Field Assistance Bulletin (FAB)¹⁴, regarding information a plan sponsor fiduciary needed to consider in evaluating the reasonableness of an agreement under which the service provider will be compensated, in part, through "float."¹⁵ The guidance also addressed required service provider disclosures. In the FAB, the Department noted that the variations in float compensation due to changing interest rates as well as the varying lengths of time money may be held by the bank, pending investment or disbursement, made float disclosure with any degree of specificity difficult. As a result, the Department said:

...it is anticipated that any projections by the fiduciary will result in only a rough approximation of the potential float. However, the information on which the approximation is based (e.g., basis for earnings rates and agreement terms relating to maximum periods within which funds will be invested following investment direction, timing of transfers of cash from the plan to the provider's general account following direction to distribute funds, period for mailing checks, extent to which experience shows that distribution checks remain outstanding for unusually long periods of time, etc.) and the approximation itself, will enable a fiduciary both to compare service provider float practices and assess the extent to which float is a significant component of the overall compensation arrangement.

We would encourage the Department to include a reference in the final regulation, clarifying that service providers need not disclose more than what is currently required under the applicable FAB guidance specific to float.

2. The conflicts of interest provision is too broad, requiring too much unnecessary disclosure.

The conflict of interest disclosure requirements require the service provider to disclose whether the service provider (or an affiliate) has any material financial, referral, or other relationship with a money manager, a broker, another client of the service provider, another service provider of the plan, or any other entity that could create a conflict of interest for the service provider in providing services under the contract, and if so, a description of the relationship. In addition, the proposal would require that the service provider identify on a plan-by-plan basis all of the service providers for each plan client, and then determine whether they "could" pose a conflict of interest.

It would be unreasonable, and extremely burdensome, to require service providers to perform a detailed inventory and analysis of all relationships that could potentially give rise to conflicts of interest and then create a customized disclosure for each plan client listing all of these potential

¹⁴ Department of Labor Field Assistance Bulletin 2002-3

¹⁵ "Float" is the earnings that result from the short-term investment of funds held in omnibus accounts on the commercial side of the bank.

conflicts.¹⁶ This concern is especially true for large plans, which may have hundreds of service providers, and large service providers, which provide services to hundreds of plans. The duty to disclose should be limited to actual conflicts, actually known to the service provider.

For example, suppose a bank has an affiliate that underwrites securities. If the bank is serving as a directed trustee and is directed by a named fiduciary or investment manager to buy a security underwritten by the bank's affiliate, that could be deemed a conflict, whether the security is purchased directly from the bank affiliate or from another member of the underwriting syndicate.

This would be an impossible standard to achieve in today's complex financial inter-relationships. Moreover, the proposed disclosure requirement fails to recognize that even if there is an actual conflict of interest between the plan and a party in interest, the party in interest may have a prohibited transaction exemption covering the activity. As such, the service provider is adhering to the disclosure, or other regime, dictated by the Department for such prohibited transaction exemption to apply. As discussed earlier, many of these conflict situations could be covered by various PTEs.

3. Attesting to fiduciary status unnecessary.

Service providers should not be required to state whether they (or an affiliate) will provide any services to the plan as a "fiduciary." Fiduciary status under ERISA calls for a legal determination that is context specific and often unclear.

Under ERISA 3(21)(A), a party is only a fiduciary "to the extent" that it performs the functions set forth in the definition. Accordingly, even as a trustee, one can be performing functions that are ministerial rather than truly "fiduciary." For example, banks serving as directed trustee may provide services, such as recordkeeping and specialized financial investment reporting, that are not fiduciary in nature and could be offered by a commercial party.

Lastly, as the Department itself notes, fiduciary status is ultimately a question that would be decided by a court. As a result, it is inappropriate for the Department to require a service provider to attest to its fiduciary status. That determination is best left to the judiciary.

The Various Effective Dates Do Not Allow Sufficient Time for Compliance

1. Ninety days is insufficient time for creating the disclosure requested in the proposal.

The proposal calls for an effective date of 90 days after final regulations are issued. That is insufficient time both to create the necessary disclosure and send the information to the appropriate plan fiduciaries.

The information that would be required when these proposed regulations become effective is more extensive than the information captured today. Any changes will require time for bankers to review and understand the final regulation (i.e. who is covered? What relationships are covered?), and then update the systems to track that particular information.

¹⁶ In its Regulatory Impact Analysis, the Department "assumed that many written disclosure statements under the proposal could be made routine and automatic." Given that the conflicts of interest disclosures will require customization for each plan as described above, it will be impossible for them to be made routine and automatic.

In addition, should the Department determine to go forward with its proposal to require extensive conflict of interest disclosures, an entire system would need to be developed to capture the many potential relationships between potentially numerous service providers. Often these relationships are very complex and would require tracking service providers, their affiliates, as well as their affiliates and related parties.

Moreover, if disclosures regarding current service provider arrangements are required, we envision that significant revisions to existing contracts will be required. Clearly, 90 days will be insufficient time to build a disclosure system and obtain the necessary contract amendments.

2. These additional disclosure requirements under 408(b)(2) should not need to be contained in the body of the contract.

Several provisions in the proposed regulations provide that the terms of the contract or arrangement shall require or include lists of indirect and direct compensation, gifts received directly or indirectly, and services received, as described earlier in this letter.¹⁷ The Department should clarify that these requirements can be met by including a suitable written undertaking from the service provider to the responsible plan fiduciary that could be incorporated into the broader written disclosures required by the regulations. The disclosure language should not be required to be included in the body of the contract. Amendments to existing contracts should be avoided at all costs, due to the significant regulatory burdens involved.

3. Timing for notification of material changes is impractical.

The proposed regulations would require service providers to disclose to plan fiduciaries any material changes to the information previously disclosed within 30 days of the service provider's knowledge of the change. This requirement is impractical and unduly burdensome, because it would require service providers to develop and implement tracking systems to monitor continually the disclosures, fees, and relationships potentially giving rise to conflicts of interest, and to create customized updated disclosures as necessary for each plan client. It is our understanding that most service providers inform their clients of any material changes in fees and similar items prior to the effective date of the change. However, other changes, such as conflict of interest that suddenly arises from a new relationship, may be more difficult to disclose in advance. In addition, in large financial institutions with numerous divisions, it may take time before a change made by one department or affiliate is noted by the plan service provider.

Conclusion

We appreciate the opportunity to comment on the proposal. We hope that our suggestions and comments will aid the Department in identifying the disclosure truly necessary for a plan sponsor to make an informed decision and eliminating unnecessary and burdensome service provider disclosure.

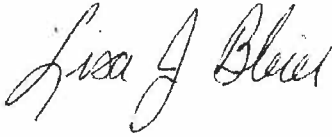
In addition, it is important that the Department affirm that current class and individual exemptions continue to be viable alternatives to compliance with ERISA Section 408(b)(2). Clarification of terms used in the proposal and delay of effective date is needed to ensure that information that is

¹⁷ See proposed 2550.408b-2(c)(1)(iii), (iv) and (v).

unnecessary to an informed plan sponsor decision is not collected and to allow for the sufficient time to implement the necessary systems to comply with the final rules.

Thank you for your time and attention to these issues. Please do not hesitate to contact the undersigned if you have any further questions.

Sincerely,

A handwritten signature in cursive script that reads "Lisa J. Bleier". The signature is written in black ink and is positioned to the left of the typed name.

Lisa J. Bleier