

# GROOM LAW GROUP

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March 20, 2008

**By Electronic Mail to e-ORI@dol.gov**

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: 408(b)(2) Hearing  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Re: Written Request to be Heard and Outline of Proposed Testimony on Proposed Fee Disclosure Rule Under Section 408(b)(2) of ERISA

Ladies and Gentlemen:

In response to the Notice of Public Hearing on Reasonable Contracts or Arrangements Under Section 408(b)(2) – Fee Disclosure, published in the Federal Register on March 11, 2008 (73 Fed. Reg. 13012, Mar. 11, 2008), Groom Law Group, submits this written request to testify at the public hearings to be held on March 31, 2008 and April 1, 2008 on behalf of a group of client companies that provide the following services: actuarial, employee benefits and human capital consulting services to employers and employee benefit plans throughout the United States. Some or all group member companies may also provide or have affiliates who provide investment-related services, including advising plans and plan sponsors on the development of investment policies and assisting in the selection and monitoring of investment managers. We expect the testimony on behalf of the group to take 10 minutes. The testimony will be delivered by Stephen M. Saxon and Judith F. Mazo, Senior Vice-President and Director of Research of The Segal Company. An outline of the topics to be discussed, including the time allotted to each topic, is included below.

## **Outline of Testimony**

- I. Consulting services (such as actuarial, health and welfare, communications, administration and technology or compliance consulting services) that are not related to plan investments and are provided to plans under transparent and fully disclosed fee-for-service or flat rate compensation arrangements should not be subject to the disclosure obligations imposed by the final regulation. (Total: 7 minutes)

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- The proposed regulation identifies three categories of service contracts that will be subject to the new disclosure requirements, including (1) fiduciary contracts, (2) contracts involving certain enumerated services, including "consulting," and (3) contracts with certain service providers receiving indirect compensation. The reference to consulting in the second category is too broad and vague and should not be included as a category of services covered by the final rule.
- The proposed regulation is designed to address the complexity of fees charged to employee benefit plans for certain types of services (primarily investment related) and the potential for conflicts of interest by providers of such services. A relatively narrow class of benefits consultants provides services that are not directly related to the selection of plan investments and use uncomplicated fee-for-service and flat rate arrangements that are nothing like the sophisticated layered arrangements that appear in the investment industry that the proposed regulation is intended to address. As long as plan fiduciaries are apprised of specific services that are to be provided and are aware of the hourly rates or flat fees, these compensation arrangements should not be subject to additional regulation.
- Rather than being included in the second category of enumerated services, these types of consulting services should be included in the third category of service providers. The Department has raised concerns that certain types of plan service providers may have significant influence over plan investment decisions, including the selection of investment products and providers. Adding consulting services (other than those related to plan investments) to the third category of service providers would avoid the unnecessary and potentially confusing disclosure of transparent fee-for-service or flat fee compensation arrangements for non-fiduciary consulting services and would address the DOL's concerns about influential services provided by consultants to plans by requiring consultants to disclose any indirect compensation arrangements.

II. Agreements for non-investment consulting service arrangements with fee-for-service or flat rate compensation arrangements should be excluded from the advance notice of services and disclosure of material change requirements in the proposed regulation. However, if the Department determines that advance notice of material changes is required for non-investment related consulting services like those described above, it must lengthen the time frame for disclosure. (Total: 3 minutes)

- Broad-based benefit consulting arrangements are unique from other service arrangements in that changes to the service agreement are commonly made, often retroactively, to cover supplemental services or unanticipated time and effort. Plans and providers must be given flexibility to revise or supplement the agreement during the term of the contract. It may be difficult for a benefits consultant to provide

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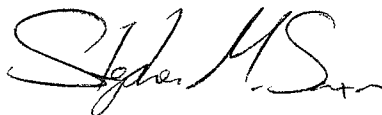
written disclosure of all material changes by the 30-day deadline included in the proposed regulations.

- For example, an actuarial and consulting firm might perform an actuarial valuation for a pension plan for a flat fee. That fee might also cover general consulting on questions that arise during the year. The plan may require supplemental services from the consultant that were not covered by the original arrangement, including compliance and operational reviews, preparation of participant communications, special analyses and reports in connection with mergers, spinoffs, a mass withdrawal, or a plan termination and financial modeling related to legislative and regulatory activities.
- Another example would be a plan that was historically well-funded and was expected to stay well-funded. After a sudden severe market decline, the plan's outlook reversed and the plan sponsor needed to quickly implement benefit restrictions. This would require a thorough review of all funding, actuarial and implementation options, participant communications, employer communications, government filings and the development of a correction program. Implementing benefit restrictions would involve a great deal of unanticipated work for the retirement consultant, and it would be unrealistic and imprudent to delay the project in order to renegotiate an optimal compensation arrangement that would comply with the regulation's 30-day deadline.

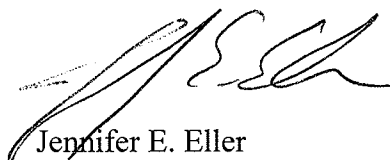
\* \* \* \*

We appreciate the opportunity to testify on the proposed regulations under section 408(b)(2) of ERISA.

Best regards,



Stephen M. Saxon



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