

TESTIMONY

OF

**ASHLEY GILLIHAN
ALSTON & BIRD, LLP
REPRESENTING THE SELF-INSURANCE INSTITUTE OF AMERICA, INC -
(SIIA)**

**PROPOSED Department REGULATION - 29 CFR PART 2550
REGARDING REASONABLE CONTRACT OR ARRANGEMENT UNDER
SECTION 408(b)(2) – FEE DISCLOSURE**

**BEFORE
THE Department OF LABOR**

MARCH 31, 2008; 9 a.m.

Good morning, my name is Ashley Gillihan and I am here on behalf of the Self Insurance Institute of America, Inc. ("SIIA"), to submit comments on the proposed compensation and fee disclosure regulations published in the December 13, 2007 Federal Register (the "Proposed Regulations"). We appreciate the receptiveness of the Department of Labor to receive input from the employer/plan sponsor, benefits administrator and service provider community.

The Self-Insurance Institute of America, Inc. (SIIA) is the only national association dedicated exclusively to protecting and promoting the self-insurance and alternative risk transfer industry. Since its founding in 1981, the association has grown significantly and now includes members from across the nation and several countries around the world. Major membership constituencies include self-insured employers (healthcare and Workers' Compensation), group self-insured Workers' Compensation funds (SIFs), third-party administrators (TPAs), managing general underwriters (MGUs), excess/stop-loss insurance carriers, and a variety of other companies involved in the self-insurance/alternative risk transfer business.

In response to the request for further comment in the Proposed Regulations, we would like to express our desire for additional clarification regarding the application of the rules set forth in the regulations to compensation received by individuals who assist plans and plan sponsors with the placement of insurance (e.g. insurance brokers, agents). In order for plan fiduciaries to make decisions that are in the best interests of participants, it is important that the playing field be level for service

providers of both self-insured and fully-insured benefit plans. An insurance broker or agent to a fully-insured plan will often receive his/her compensation with respect to a plan in the form of commissions from an insurance carrier, which is typically a percentage of the premiums paid by that plan to the insurance carrier (“specific sale” commissions) but may also be based on the volume of overall sales closed by a service provider for a particular insurance carrier (“contingent commissions”).

Historically, disclosure of commissions, regardless of how characterized, has been problematic. For example, contingent commissions were the focus of the Department in Advisory Opinion 2005-02A, in which the Department clarified that the portion of any contingent commissions earned by a broker that are attributable to a plan, must be reported on that plan’s Form 5500, Schedule A. It seems clear that the Department does not intend to include premiums paid to the insurance carrier in the definition of “compensation and fees” otherwise subject to the disclosure rules; however, we do believe it is the intent of the Department to require individuals such as insurance brokers and agents who assist plans and plan sponsors with the purchase of insurance to disclose any and all compensation indirectly received from the insurance carrier or other third party as a result of or related to the purchase of such insurance. Nevertheless, we have concerns that the Proposed Regulations do not effectively convey this intent for the reasons set forth below. Consequently, we respectfully request the Department to consider the attached proposals to the Proposed Regulations that we believe will clarify the intent of the Department and will ensure plan fiduciaries have all of the necessary information without regard to whether the plan is self-insured or fully-insured.

The definition of compensation and fees set forth in the Proposed Regulations is very broad and would seem to encompass any and all compensation received by a service provider with respect to the services it provides for the plan or plan sponsor (or that arise as a result of the service provider's position to the plan). Although broad in scope, the Proposed Regulations do not identify specific types of compensation other than to identify certain types of non-monetary compensation (e.g. gifts, awards). For example, "commissions" are not specifically listed in the definition of compensation and fees. Many service providers will refer to the preamble to assist in making a determination as to whether to disclose certain amounts received by the service provider in accordance with the Proposed Regulations. In the preamble, the Department notes that the "purchase of insurance is not, in and of itself, compensation to a service provider for purposes of these regulations." We fear that such a statement may lead service providers of fully-insured plans, including but not limited to insurance agents and brokers, to erroneously conclude that compensation (e.g. commissions) received by individuals from an insurance carrier or other third party that is related, directly or indirectly, to the purchase of insurance is not subject to the Proposed Regulations. Similarly, we fear that service providers of fully-insured plans may view contingent commissions or other compensation that is based on the total volume of an insurance carrier's contracts sold by service provider as payments made as a result of the service provider's relationship to the insurance carrier—not the plan—and, therefore, they will not be disclosed in accordance with the regulations.

We also have concerns that plan fiduciaries who engage individuals to assist plans and plan sponsors with the review and analysis of various insurance products will be unable to identify any conflicts of interest unless such individuals are required to disclose not only the compensation that they will actually receive with respect to the insurance contract chosen but also the compensation that they would have received if the other insurance products brought to the plan fiduciary by such individual were chosen.

We believe that both issues may be resolved by revising the definition of compensation and fees as set forth in the attached Exhibit.

On behalf of the members of the Self-Insurance Institute of America, I would like to thank you for the opportunity to present our industry's recommendations regarding the proposed fee disclosure regulation. I believe the simple, but important recommendations I have laid forth will significantly increase the effectiveness of the Department's proposal. Thank you for your time and attention.

**EXHIBIT A TO
TESTIMONY**

OF

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Proposed revisions to Prop. Labor Reg. 2550.408b-2(c)(1)(i)(B) and (iii)(A)(1)(revisions in italics):

I. Prop. Labor Reg. 2550.408b-2(c)(1)(i)

(B) A service provider who provides or may provide any one or more of the following services to the plan pursuant to the contract or arrangement: banking, consulting, custodial, insurance, *(including but not limited to services directly or indirectly related to the placement or selection of insurance with the plan or the plan sponsor)*, investment advisor (plan or participants), investment management, recordkeeping, securities or other investment brokerage, or third party administration.

II. Prop. Labor Reg. 2550.408b-2(c)(1)(iii)(A)

“Compensation or fees” include money or any other thing of monetary value (for example, gifts, awards, and trips) received, or to be received, directly from the plan or plan sponsor or indirectly (i.e., from any source other than the plan, the plan sponsor, or the service provider) by the service provider or its affiliate in connection with the services to be provided pursuant to the contract or arrangement or because of the service provider's or affiliate's position with the plan. *Compensation and fees shall also include (i) any money or things of value received by a service provider from an insurance company or other third party, in whole or part, with respect to an insurance contract placed with a particular plan or plan sponsor (e.g. specific-sale or contingent commission) or amounts paid on the total value of all insurance contracts placed by the service provider and (ii) with respect to an service provider engaged by a plan or plan sponsor to assist with the selection of insurance (including but not limited to stop loss insurance), any amounts that the service provider will receive from the insurance carrier or third party as a result of placement of an insurance contract with the plan or plan sponsor, whether such insurance is chosen or not.* An “affiliate” of a service provider is any person directly or indirectly (through one or more intermediaries) 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.