



August 30, 2010

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

Re: Interim Final Rule Reasonable Contract or Arrangement Under Section 408(b)(2)

Ladies and Gentlemen:

On behalf of the Securities Industry and Financial Markets Association (“SIFMA”)¹, I am pleased to submit comments on the interim final regulations regarding reasonable contract or arrangement under the Employee Retirement Income Security Act of 1974 (“ERISA”). The regulation will redefine what constitutes a “reasonable contract or arrangement” for purposes of the statutory exemption in Section 408(b)(2) of ERISA from certain prohibited transaction provisions of the statute. SIFMA is pleased that the Department of Labor (“Department”) has provided this opportunity for comments on the regulations prior to their final release. SIFMA supports enhancing disclosure to plan fiduciaries and is committed to ensuring that the disclosure requirements are useful and understandable to plan sponsors and plan fiduciaries. We believe the interim final rule represents a more balanced approach to fee disclosure and appreciate the clarifications that the Department made in response to the comments on the proposed regulation.

As the Department finalizes the regulation, however, SIFMA is requesting that the final rule provide for greater flexibility and coordination with other disclosure regimes that the Department of Labor and other federal and state agencies oversee. In addition, SIFMA believes

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

that it is very important for the Department to provide a longer window of time to comply with the regulation, as explained in more detail below.

1. Effective Date

Under the interim final regulation, covered service providers will be required to comply with the requirements one year after date of publication, which is July 16, 2011. While this effective date is an improvement from the original effective date of 90 days, it is still not adequate time for covered service providers to comply. It will be impossible, especially in light of the elimination of the bundled services rule, for service providers to revise existing and prospective disclosure material, create information and tracking systems and deliver the disclosure in a timely fashion.

SIFMA appreciates the extensive evaluation the Department has provided in assessing the costs of compliance with the regulation. However, it appears that the Department may still be underestimating the amount and complexity of disclosure that will be required under the regulation and the number of plans that will receive the disclosure in determining an appropriate effective date. For example, the Department estimates that two thirds of the plans will receive disclosure which totals eight pages. The basis for the eight page estimate is not stated. However, providing the necessary documentation is likely to exceed eight pages for a larger number of plans than the Department has estimated. The reach of the interim final rule extends to every plan, broader even than the reach of the Form 5500 changes. There are hundreds of thousands of small plans that will need to receive updated disclosure material and this disclosure will exceed the estimated eight pages as SIFMA currently interprets the regulation. The Department has also not estimated accurately the time needed to prepare the disclosure or the likelihood that the effective date is likely to coincide with the implementation of new disclosure rules for participants which are scheduled to be released in 2010, in accordance with the Department's regulatory plan.

Finally, in other disclosure initiatives by the Department, such as the Form 5500, plan sponsors and their service providers were given nearly a 14 month period and a "best efforts" standard for compliance the first year the new disclosure requirements were effective. When Congress enacted ERISA, it provided a transition period of two and a half years to bring service contracts into compliance with the Act (see Section 414(c)(4)). We believe that the scope of necessary changes required by the proposed rule is at least as extensive, if not more extensive, then when Section 408(b)(2) was enacted. Accordingly, we ask for an effective date one year after the final participant disclosure regulations are issued in final form, with a best efforts standard for the first reporting year.

2. Disclosure of indirect compensation when investments are unknown or compensation has not been received.

The interim final rule requires the disclosure of indirect compensation at the time a contract is entered into (or for existing contracts, on the effective date). For many plans, the form and amount of indirect compensation will be impossible to determine in advance of the

relationship as these are dependent upon the services and investments the plan fiduciary or plan participant selects over time. Specific information regarding the payors and amounts, or estimates of the fees actually received by or paid to a recordkeeper, broker, consultant, such as 12b-1 fees and soft dollars are virtually never known at the time a contract is entered into, and are surely never known prior to that date.

To ensure that the disclosure is useful to the plan fiduciary, the initial disclosure material provided to the plan fiduciary should include a statement describing the types of compensation and provide an estimated dollar amount in ranges or other relevant formula. This type of disclosure will of course be supplemented with the disclosures required under the securities laws, including transaction confirmations, prospectuses, etc. In addition, upon request of the plan fiduciary, more information should be provided for specified investments.² Finally, the Department should clarify that that this information may be provided on the service provider's website or other electronic means.

Without this type of clarification, plan fiduciaries will likely receive an avalanche of disclosure material. This will place new burdens on plan sponsors and will likely impact their continued interest in sponsoring plans. Since there are almost unlimited investment products available in a brokerage account, and the fees vary from investment to investment, the interim final rule would apparently require the service provider to disclose to the client compensation that the service provider "reasonably expects to receive" by making available a "phone book" disclosure listing all of the fees by product. That disclosure could easily be dozens, and more likely hundreds, of pages long, especially when the service provider would be required to provide mutual fund fee information. This type of "data dump" will not be useful for prospective plan clients. In fact, clients will ignore it, or worse, complain about the volume of regulatory-related mailings they receive from the service provider. Further, as new products are added or removed on a regular basis, and since it is also possible that fees may change on existing products, the "phone book" would potentially have to be updated in real time because new plan accounts are opened on a daily basis. This type of real time updating would be impossible to accomplish especially in light of the need to include mutual fund fee information.

Similarly, the requirement to advise clients of changes in the existing disclosure within a 60-day deadline will likely be logistically impossible to implement. We urge the Department to retain the materiality standard for this purpose. Or, alternatively, the Department could adopt a rule which permitted updates to be provided semi-annually or annually.

SIFMA supports the rule in Section (c)(1)(v)(A) which permits a recordkeeper or broker to provide investment information required in section (c)(1)(iv)(G) as soon as practicable after the date the investment alternative is designated by the responsible plan fiduciary. We believe that

² This is also a concern in the disclosure of non-monetary compensation. The receipt of incidental non-monetary compensation is unknowable and unpredictable in advance, and moreover, is disclosed through the Schedule C. Different rules for section 408(b)(2), the Form 5500 Schedule C, and the Department's nonenforcement policy for gifts and entertainment increase confusion and lead to needlessly complex compliance systems.

this rule should apply as well to (c)(1)(iv)(C) and (F), where compensation such as soft dollars is not known at the time the contract is entered into.

For investment managers, the provision of the ADV or other information provided to clients at the time the contract is entered into gives the plan fiduciary sufficient information about the receipt of indirect compensation such as soft dollar services or incidental gifts and entertainment. SIFMA urges the Department to specifically permit the ADV (or other similar regulatory disclosure) to satisfy the 408(b)(2) requirements.

3. Affiliate Compensation

The interim final regulation seems to require that a fiduciary disclose its own fees as well as the fees it causes an affiliate to receive. SIFMA notes that the Department has provided exemptive relief, such as in PTE 86-128, the underwriting exemptions (PTE 2000-25), PTE 77-4 and PTE 2006-16, all of which have their own significant and comprehensive reporting and disclosure rules. Would the 408(b)(2) requirement impact the disclosure requirements under these individual and class exemptions? Just as in the situation noted above, the manager does not know how often it will use its affiliate to trade as agent, or buy in an underwriting or lend securities. A plan asset fiduciary affiliated with a custodian may have the same obligations that are unknowable in advance, with respect to ticket charges, assets under custody charges, overdraft charges or the like. We think these charges, both in the custody context and in these other contexts, are well disclosed by the custodian in its disclosure to the plan fiduciary and should be specifically excluded in the final rule.

4. Investment Vehicle Disclosure

The interim final rule does not provide a broker or recordkeeper with a safe harbor for disclosure regarding investments that are related to the broker or recordkeeper or where the disclosure is not regulated by a state or federal regulator. SIFMA is concerned that by limiting the ability of recordkeepers and brokers to utilize regulated disclosure material, these service providers will be forced to create unique disclosure for these investment vehicles. This would be a tremendous waste of resources and could lead to incorrect or contradictory disclosure material. We urge the Department not to require service providers other than the issuer of investment vehicles to craft disclosure related to the investment vehicle. The issuers are the parties subject to the securities law anti-fraud rules; it places an unprecedented legal burden and cost on brokers and recordkeepers to create such disclosure when they are not the issuers of the investment vehicle. Indeed, by contract, the issuer of the vehicle may prohibit the broker or recordkeeper from drafting descriptions of the vehicle without the issuer's express consent. This requirement should be on the party on which it legally belongs: the sponsor or issuer of investment vehicles sold to plans.

5. Summary document

In the accompanying preamble of the interim final rule, the Department has asked for comment on specific questions, including whether the final regulation should require the covered

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service provider to include a summary document or “road map” to assist the plan sponsor and plan fiduciaries track the disclosure of compensation. SIFMA has worked with the Department in the past to consider whether a summary format could be created which is both short and flexible enough to cover the different types of investment vehicles in which plans invest and the different types of compensation that the investment vehicle sponsor and its subcontractors and affiliates might receive. We urge the Department to conduct further review of this type of “one size fits all” requirement. By delaying any such requirement, the Department will provide necessary time for the retirement plan service providers to formulate disclosure materials and for plan fiduciaries to have the opportunity to review and digest them. After that process takes place, the types and utility of any summary disclosure in a required format can be assessed more meaningfully.

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Thank you for the opportunity to comment on the interim final rules relating to plan fiduciary disclosure. Please contact the undersigned at (202) 962-7300 if you need additional information about our submission.

Sincerely,

A handwritten signature in cursive script that reads "Liz Varley". The signature is fluid and elegant, with the first and last names clearly legible.

Liz Varley

cc: Phyllis Borzi
Michael Davis
Robert Doyle