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

Re: ERISA Section 408(b)(2) Interim Final Rule - Comments

Ladies and Gentlemen:

This comment letter responds to the interim final regulation (the "Rule") published under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") by the U.S. Department of Labor (the "Department") in the Federal Register on July 16, 2010. These comments are submitted on behalf of the group of financial service companies for which FMR LLC is the parent corporation (collectively, "Fidelity"). Fidelity companies provide investment management, recordkeeping, brokerage, consulting and directed trustee and custodial services to thousands of retirement plans covering millions of participants.

The Department had published a proposed form of the Rule, which is structured as an amendment to the long-standing regulation under ERISA Section 408(b)(2), in the Federal Register on December 13, 2007. We appreciate the Department's efforts to address many of the concerns expressed by service provider and plan sponsor representatives regarding the 2007 proposal. We have supported the Department's efforts to establish a more consistent disclosure framework for plan sponsors and other hiring fiduciaries.

After extensive review of the Rule, however, we believe that several issues still need to be addressed. Formal amendments to the Rule, which would undergo a lengthy regulatory review process, will require a further delay in the effective date (see (1) below). In addition, the Department should try to provide less formal clarification on some issues in an expedited fashion.

(1) Effective Date

Although we supported an effective date at least one year after publication of the Rule to allow service providers sufficient time to prepare for compliance, the Rule effective date, as written, does not resolve two serious problems.

First, the Rule would require service providers to provide the disclosures required by the Rule to existing plan clients before the effective date. For providers with a substantial client base, this will require the disclosure process to start well in advance of the Rule effective date. Considering the need for new disclosure procedures, systems changes, staff training, and client discussions, even good faith efforts to comply with the new rules for existing clients may not be finished by July 16, 2011. We ask the Department to extend the deadline for disclosure to existing clients under the new 408(b)(2) regime to December 31, 2011.

Second, the issuance of the Rule on an "interim" basis acknowledges that the Department may make additional changes in the Rule. It is extremely unlikely that service providers would be able to incorporate any such changes in their disclosure materials by the Rule effective date. Any Rule changes imposing new obligations should only take effect one year after they are published in the Federal Register.

(2) Record Keeper Responsibilities

Rule Section 2550.408b-2(c)(1)(iv)(G)(2) states that a record keeper maintaining designated investment options for the plan must provide "a description of the annual operating expenses (e.g., expense ratio) if the return is not fixed" for each designated investment option. Paragraph (c)(1)(iv)(G)(3) states that the required disclosures must also include a description of "any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees)" for each such designated investment option.

Fidelity maintains a wide range of investment options on its record keeping platform for various types of individual account plans subject to Title I of ERISA. In order to better understand the extent of our disclosure obligations with respect to these options, some clarifications would be extremely helpful on the following points.

(a) Stable Value Products

Although a number of stable value investment options are structured as group trust or separate account investment options for which an expense ratio is determined, some are structured as a single product group annuity contract. This is particularly the case for 403(b) plans maintained by tax-exempt organizations because of Internal Revenue Code limitations on the permissible funding vehicles for such plans.

These annuity products typically provide a fixed rate for a specified period of time, but the rate is changed by the insurer on a periodic basis (monthly, quarterly or annually). In some cases, the rate resets are completely index-based, so that fees or expenses are not particularly relevant to plan sponsor decision-making. In the case of most product offerings, however, the insurer has a fair amount of latitude under the contract in determining the periodic

interest rate resets. Some insurers include a fee assumption in their rate calculation so that the gross interest rate is reduced by that fee to produce a net crediting rate, but that does not address the impact of fees on periodic interest rate resets. Some contracts are silent on fees altogether.

It may be argued that the initial investment decision need not focus on fees and expenses because the rate is already set. However, subsequent changes in rate would generally be determined by a number of factors including fee or expense charges, but such information may not be disclosed by the issuer. We ask that the Department issue guidance confirming whether the fixed return exception would apply in such cases, and what sort of disclosure would be relevant for plan fiduciaries selecting such products.

In order to avoid financial disintermediation, an insurer would generally limit the plan sponsor's ability to withdraw funds (even at the time of a rate reset) over some specified period of time without a financial penalty or charge. A critical question for Department guidance is whether the plan sponsor or other responsible fiduciary must be informed by the record keeper of any such limitations on the plan sponsor or other fiduciary's authority to change to another product if the fiduciary concludes that the new rate is noncompetitive.

(b) Annuity Products

We note that the Department and the U.S. Treasury Department are jointly conducting an extensive review of the availability of lifetime income products and services for participants in individual account plans. Although we have not witnessed substantial adoption of annuity products to date, the responses to the agencies suggest that this will be an area of growth in the future. The Rule discussion does not provide much explanation of a record keeper's responsibilities for such products serviced on its platform.

For example, the reference to "mortality charges" in the Rule seems somewhat surprising because that appears to constitute a charge for insurance rather than for services. The reference to "expense fees" could cover a range of possibilities, but further guidance is necessary. Particularly in the case of newer minimum benefit products coming to market, it would be helpful for the Department to provide additional details regarding a record keeper's responsibilities for fee disclosure.

Finally, as in the case of plan asset vehicles discussed immediately below, the record keeper should be entitled to rely on the disclosure materials or fee information provided by the insurer, regardless of the regulatory framework. Absent an alternative information source, the record keeper disclosures will be totally dependant on what it receives from the insurer.

(c) Plan Asset Vehicles

The Rule excuses the fiduciary manager of an investment option holding plan assets from its obligation to disclose the option's expense ratio if the plan record keeper has already satisfied that obligation. However, the Rule does not explicitly address the record keeper's obligation if the fiduciary manager does not provide the record keeper with the fee information. Although the communication of mutual fund fees is fairly standardized and readily available, that is not the case for non'40 Act investment options. The Department should confirm that the record keeper is not responsible for the failure to disclose absent the receipt of fee information from the manager, regardless of whether the fiduciary manager fulfills its disclosure obligation to the hiring fiduciary.

In addition, the record keeper should be entitled to rely on the disclosure materials furnished by an institutional investment manager in all cases, regardless of the governing regulatory framework. The Rule only provides relief for the use of disclosure materials provided by an unaffiliated issuer that are regulated by a state or federal agency. Absent information from the manager, however, the record keeper has no other recourse.

(d) Third Party Information Sources

The Rule provides that the record keeper may use disclosure materials of the issuer of the designated investment option to meet its obligations under Paragraph (c)(1)(iv)(G). For registered products such as mutual funds, many record keepers receive data including fee information from third party vendors who gather this information from multiple issuers (and their disclosure documents), consolidate and provide and update the data through electronic feeds. In most instances, the record keeper and the fund company have agreed that the third party data will be used by the record keeper for a variety of purposes including plan sponsor and participant disclosures. This method is less costly and more efficient than using prospectuses and other fund reports for disclosure and will assist in the Rule's requirements to provide updates as information changes.

Given the established disclosure structure, it would be extremely helpful if the Department would confirm that a record keeper would meet its obligations under this section by utilizing data provided by a third party vendor as long as the provider was not aware that the data was incomplete or inaccurate. We think that plan fiduciaries will appreciate the more efficient delivery of information using such a centralized approach to disclosure.

(e) Code Section 403(b) Frozen Accounts

In Field Assistance Bulletin 2009-02, the Department concluded that certain 403(b) accounts frozen to new contributions prior to January 1, 2009, need not be treated as part

of a plan subject to Title I of ERISA for purposes of Form 5500 annual reporting. The Department recognized the plan sponsor's inability to obtain the necessary information for such accounts in many cases and potential difficulties faced by record keepers in identifying all participant contracts or accounts to be included as plan assets under ERISA. For the same reasons, we request that the Department issue guidance confirming that such accounts would not be subject to the new 408(b)(2) disclosure regime.

(3) Brokerage Windows/Accounts

The Rule appropriately excludes the investment options that may be purchased in a plan's brokerage window or account from the Rule requirement that the broker-dealer or record keeper disclose the expense ratio for all designated investment options maintained on its platform. However, the broker-dealer servicing the brokerage window will apparently be required to disclose any indirect compensation received in return for its services. The biggest challenge is how to satisfy this requirement without inundating the plan sponsor or hiring fiduciary with too much information given the large variety of potential investments, and the reality that only a small number of these investments would actually be purchased by participants for their plan account.

In the case of mutual funds made available in a brokerage plan account and in the case of plans that offer brokerage options, typically the broker/dealer would have separately negotiated selling or service agreements or contractual arrangements with each unaffiliated mutual fund provider. Each of these separate arrangements typically covers a variety of classes of mutual funds within a particular fund family, each of which may have a discrete pricing structure that may involve sales loads, transaction fees, and/or service fees.

It is important for the Department and plan fiduciaries to realize that this compensation is used to support the brokerage platform, which is a considerably expensive undertaking given the various regulatory requirements and the intricacies of recordkeeping and transacting such a variety of investment vehicles. For many record keepers, an affiliate or third party platform separate from that which is used to record keep the plan's designated investment options is utilized to offer brokerage.

We certainly agree that the hiring fiduciary should be informed of the existence of indirect compensation and the potential range of the applicable payment levels. However, it would be both unproductive and confusing to the hiring fiduciary to require the broker-dealer to disclose, and the hiring fiduciary to review each of thousands of individual formulae (many of which are the same) for all the funds in question. With respect to our broker-dealer platform, for example, this would require the production of more than 13,000 separate data points.

In an effort to achieve meaningful disclosure, we respectfully request that the Department confirm that the provider of brokerage services may satisfy the Rule by describing by category and providing ranges of the indirect compensation that it (or its affiliates) may receive for a given mutual fund or a given class or category of mutual funds. We would also direct the plan fiduciary to the fund prospectus, or other available document for specific details on a particular investment, or make available additional fee details upon request.

Finally, a similar approach should apply if a plan is provided with access to a platform offering a "mutual fund window" that gives plan participants the opportunity to invest in an expanded universe of mutual funds. As an example, prior to the broad use of a brokerage platform for such purposes, small business plans on our retail shareholder platform were provided access to all available Fidelity funds. That approach is still maintained for long-time "legacy clients" and currently provides access to more than 250 Fidelity funds.

Such an expanded offering should not, by itself, be considered the provision of recordkeeping services under Rule Section 2550.408b-2(c)(I)(iii)(3)(B). That is, the resulting universe of funds should not be considered to be designated investment alternatives under the Rule. Rather the investments available under that window should be treated the same as a brokerage window under the Rule, as the window is intended to allow a participant access to investments beyond that which might be specifically designated or monitored by the plan fiduciary.

(4) Summary Disclosure Statement

In the regulatory preamble, the Department has invited comments on the consideration of a "summary" disclosure statement that would provide the hiring fiduciary with an overview and a roadmap of where any more detailed disclosures may be found (75 FR 41607). Some plan sponsors might find such a summary useful, depending in part on the range of services and fees involved, and we expect to assist plan sponsors in understanding the fee disclosures to be provided. However, we are extremely concerned with the potential impact of such an addition to the Rule because it could greatly complicate and increase the cost of compliance efforts already underway.

We appreciate that the Rule retains the approach in the 2007 proposal regarding flexibility in format of disclosures. The Rule's requirements will impose significant development efforts and therefore costs to service providers, especially record keepers who have additional responsibilities under the Rule to report fees related to options which they record keep. A requirement to include all disclosures in one document or other required format would substantially increase those costs. Further, if the record keeper uses disclosure materials of the issuer to meet its requirements for designated investment options, it would be impossible to comply with a one document requirement.

Also, given the large variety of both service provider models and compensation structures, such a summary statement requirement will have to allow for considerable flexibility, particularly considering the spectrum of plan sizes that will be covered. Presumably, the summary statement for a very small business plan would potentially be much different than that provided for a large corporate employer's plan.

We ask that the Department confirm that (1) any summary disclosure statement requirement would not take effect for a year following its publication in the Federal Register, and (2) it would not require a specific format or wording. It is our experience that plan sponsors and other fiduciary decision makers expect service providers to give them a fee disclosure framework for their decision-making in any event. A service provider that has already provided the necessary framework in its disclosures should not be required to add a standardized disclosure summary in the event that such a requirement is added to the Rule.

(5) Changes Requiring Disclosure

The proposed regulation would have required that the disclosure of material changes to the fee disclosures already provided to the hiring fiduciary must be furnished within 30 days from the date on which the service provider acquired knowledge of the change [75 FR 41612]. The Rule extends the deadline by 30 days, but it deletes the use of the word "material" – that is, all changes must now be disclosed within 60 days.

First, although it is hard to develop a bright-line test for determining whether a change is material or not, many changes are so inconsequential that they would have no effect on plan fiduciary decision-making. We recommend that the Department retain the "material" threshold for changes requiring notification, so that minor changes don't prompt a technical violation without any real significance.

In addition, we ask that the Department amend the Rule to permit change notifications to be provided on a quarterly basis. Because quarterly reporting regimes are already in use by many plan service providers, this modification would provide timely information to plan fiduciaries while minimizing the disruption and cost in adjusting to the Rule.

(6) Use of Electronic Medium

The Rule is silent on the use of electronic medium, but the Rule notice includes several assumptions about the use of electronic medium in the financial analysis portion of the preamble. The preamble discussion includes the following:

> A substantial part of the cost of the final regulation depends on the means of disclosures between covered service providers and plan fiduciaries. Paper disclosures involve much

> higher costs than electronic disclosures. Thus, as at least one trade group commented, the industry is interested in taking advantage of electronic disclosure, if at all possible. This conclusion seems plausible as most covered service providers are sophisticated entities and by nature of their services are electronically savvy, as are most plan fiduciaries. Unaware of any contrary comments, the Department assumes that about 50 percent of disclosures between service providers and plan fiduciaries are delivered only in electronic format. [75 FR 41621]

The preamble is consistent with the view that the Department doesn't think that an explicit statement in the regulation is necessary. This is similar to the approach followed in the proposed 408(b)(2) regulation published in 2007. The proposal preamble included the following discussion:

> "All of the required disclosures need not be contained in the same document, as long as all of the required information is presented to the responsible plan fiduciary in writing before such fiduciary enters into the contract or arrangement. Written disclosures may be provided in separate documents from separate sources and may be provided in electronic format, as long as these documents, collectively, contain all of the elements of disclosure required by the regulation." [72 FR 70990]

We appreciate the Rule preamble commentary, but we want to comment on one aspect of the use of electronic medium for 408(b)(2) disclosures not specifically mentioned in the preamble.

Fidelity provides disclosure of payments received from fund vendors for designated investment options maintained for plans on its record keeping platform on a secure website for plan sponsors that is updated periodically for changes in the compensation formulas. This process has been followed for a number of years and is documented in the trust or service agreement executed with the plan sponsor. This has worked well for plan sponsors until now and should satisfy the intent of the Rule regarding fee and fee change disclosure.

(7) <u>Other Disclosures</u>

Rule Section 2550.408b-2(c)(1)(vi) provides that a service provider must upon the responsible plan fiduciary's request, provide information related to compensation received in connection with the contract or arrangement that is required for the covered plan to meet its reporting and disclosure requirements under Title I of ERISA. Absent extraordinary circumstances, the covered service provider must disclose this information not later than 30 days following the receipt of a written request. We are concerned that this provision may inadvertently disrupt established practices for disseminating plan information. Further,

depending on the information requested, 30 days may not be sufficient time even though extraordinary circumstances may not be present.

As the Department is likely aware, many service providers produce reporting packages that include compensation information required to complete annual Form 5500 reporting for its clients. This information is distributed to clients sufficiently in advance of reporting deadlines and service providers should not have to accelerate providing such information to the plan fiduciary upon request. We ask that the Department confirm that service providers should not be required to provide requested disclosures within 30 days of request. Rather, the information should be required to be provided by such time as would reasonably enable to the plan fiduciary to meet its reporting obligation. Alternatively, the plan fiduciary and the service provider should be able to mutually agree upon a realistic time frame for providing such information.

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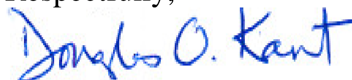
In conclusion, we would be pleased to furnish any additional information that you may deem useful for your deliberations.

Respectfully,



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