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Northern Trust

February 11, 2008

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

Attn: 408(b)(2) Amendment

Dear Mr. Doyle:

Northern Trust Corporation ("Northern Trust") appreciates this opportunity to comment on the proposed regulations that would redefine what constitutes a "reasonable contract or arrangement" for purpose of the statutory exemption under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (the "Act"). Northern Trust is a leading provider of investment management, asset and fund administration, fiduciary and banking solutions for corporations, institutions and affluent individuals worldwide. As of December 31, 2007, Northern Trust had assets under custody of US$4.1 trillion, and assets under investment management of US$757.2 billion.

The proposed regulation would establish additional disclosure requirements that would have to be met in order for contracts or arrangements with certain types of service providers to be considered "reasonable" and therefore eligible for prohibited transaction relief under section 408(b)(2) of the Act.

While we are supportive of the Department's goals of achieving greater fee transparency and improving conflict of interest disclosures, we have some concerns about the manner in which the proposal seeks to further those goals. We also feel that there are several aspects of the proposed regulation that need to be clarified. Our questions and comments follow.

1) Manner in Which Disclosures Are Presented to Responsible Plan Fiduciaries

Section B(1)(b) of the preamble to the proposed regulation says that service providers are to be given considerable flexibility in the manner in which required disclosures are made. Disclosures must be in writing, but can be provided in separate documents from separate sources and may be provided in electronic format, as long as the

documents, collectively, contain all elements of required disclosure. Prospectuses and Form ADVs are cited as specific examples of permissible forms of disclosure documentation. We strongly endorse the Department's view that service providers should be afforded such flexibility in satisfying their required disclosure obligations under the regulation.

2) Application of 29 CFR 2550.408b-2(c) to Service Provider Who Are Not Parties in Interest

Section (c)(1)(i)(A) of the proposed regulation includes fiduciaries under the Investment Advisers Act of 1940 as a separate category of covered service providers. The authority of this regulation derives from Section 408(b)(2) of the Act, which provides a statutory exemption from the prohibited transaction provisions of Section 406(a) of the Act for "contracting or making reasonable arrangement *with a party in interest* for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor". The term "party in interest" is defined in section 3(14) of the Act. Inasmuch as that definition does not include fiduciaries under the Investment Advisers Act of 1940, we question the basis or authority for including such persons as a separate category of service providers covered by the regulation. We therefore respectfully request that the Department delete the reference to such persons from section (C)(1)(i)(A).

More broadly, and consistent with the foregoing, we ask that the Department provide clarification in the final regulation that the term "service provider" does not include any person who is not a "party in interest" within the meaning of section 3(14) of the Act. Thus, for example, investment advisers to mutual funds would not be "service providers" under the regulation to the extent provided under section 3(21)(B) of the Act.

3) Interaction of 408(b)(2) of the Act and 29 CFR 2550.408b-2 with Other Prohibited Transaction Exemptions

Section B(1)(i) of the preamble to the proposed regulation invites 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 may relate to plan service arrangements. We believe that this is a key issue worthy of considerable discussion and, further, that the discussion should extend not only to other ERISA statutory exemptions, but also to the interaction of 408(b)(2) and the proposed regulation with existing class and individual administrative exemptions.

In addition to the 408(b)(2) exemption there are a number of other statutory exemptions that permit various types of transactions between plans and service providers, including an exemption for ancillary bank services (which is often used to cover sweep, overdraft and other services and is found at section 408(b)(6) of the

Act); for bank deposits bearing a reasonable rate of interest (section 408(b)(4)); and for transactions between plans and bank common and collective trust funds or insurance company pooled investment funds (section 408(b)(8)). The Department has also adopted a variety of prohibited transaction class exemptions over the years that cover any transaction which could violate section 406(a) of the Act, including the so-called "QPAM" exemption (PTE 84-14), the bank collective trust exemption (PTE 91-38), the insurance company pooled separate account exemption (PTE 90-1), and the insurance company general account exemption (PTE 95-60). In addition there are various specific exemptions for particular types of services such as PTE 75-1, Part I for brokerage services, and PTE 2006-16 for securities lending services (the latter having incorporated many of the provisions of PTE 82-63 which exempted certain compensation arrangements). Finally, the Department has granted hundreds of individual exemptions that cover specific services and transactions of the applicants.

Each of these statutory, class and individual exemptions contains a set of carefully crafted conditions that the Department has previously determined to be appropriate and sufficient to safeguard the interests of plans and their participants, and which historically have been treated as independent means of obtaining relief from the prohibited transaction restrictions of section 406(a)(1)(C) of the Act. We believe that to the extent a particular service may be provided in reliance upon another statutory, class or individual exemption, there is no need for 408(b)(2) relief and the requirements of the 2550.408b-2(c) need not be met.

To illustrate this point, assume that a service provider ("X") provides securities lending services to an employee benefit plan ("P") pursuant to a securities lending agreement ("Contract A") in reliance upon a prohibited transaction exemption other than 408(b)(2). We believe, and we read the proposed exemption to say, that the requirements of the proposed exemption (including fee, conflict and other disclosures) would not apply to Contract A. Now assume that X enters into a separate contract for custody services to P ("Contract B"), and that X relies on the 408(b)(2) exemption for one or more services rendered under Contract B. We do not believe that X should be required to make any disclosures regarding the services rendered under Contract A in order for Contract B to be deemed "reasonable" under 408(b)(2). Finally, assume that X and P agree to amend Contracts A and B so that the custody and securities lending services are provided under a single contract ("Contract C"). We see no basis for requiring X to make additional disclosure obligations regarding its securities lending services merely because the two contracts have been combined. In our view, X and the responsible plan fiduciary for P should be able to continue to rely upon other exemptions for the securities lending services, previously rendered under Contract A and now rendered under Contract C, without having to make additional disclosures regarding those services under 408(b)(2).

Because the proposed regulation is ambiguous as regards the above fact patterns, we request that the Department clarify the final regulation by confirming that it agrees with our views as set forth above.

4) "Terms of Contract" Requirements

Sections (c)(1)(iii), (iv) and (v) of the proposed regulation provide that the "terms of the contract or arrangement" under which services are provided:

i) shall require the service provider to disclose in writing, to the best of the service provider's knowledge, the information set forth in paragraph (c)(1)(iii);
ii) shall include a representation by the service provider that, before the contract or arrangement was entered into (or extended or renewed), all such information was provided to the responsible plan fiduciary;
iii) shall require that the service provider must disclose to the responsible plan fiduciary any material change to the information required to be disclosed in paragraph (c)(1)(iii) not later than 30 days from the date on which the service provider acquired knowledge of the material change; and
iv) shall require that the service provider must disclose all information related to the contract or arrangement and any compensation or fee received thereunder that is requested by the plan fiduciary or plan administrator in order to comply with the reporting and disclosure requirements of Title I of the Act and the regulations, forms, and schedules issued thereunder.

We are concerned that these provisions as written could be interpreted to require the inclusion of new wording in any contract that is within the scope of the exemption. We request that the Department clarify in the final regulation that the foregoing requirements need not be included in the service provider's written service contract, but can be met by a written undertaking from the service provider to the responsible plan fiduciary, both for new and existing contracts.

If the foregoing requirements could only be satisfied through language in written service contracts, then all existing contracts would have to be amended to be in compliance. This would create an enormous compliance burden, especially for large service providers with thousands of existing service contracts. Because service providers generally do not have the ability to unilaterally amend their contracts, any such compliance effort would include identifying all affected contracts, drafting appropriate amendments, reviewing, explaining and, in many cases negotiating the amendments with clients and their legal counsel, monitoring the receipt of returned amendments, and following up on unreturned amendments. If amendments were required, the proposed 90 day compliance period would be substantially inadequate. In addition, the Department's compliance cost estimates as set forth in E(7)(a) of the preamble would be significantly understated, as those estimates did not take any amendment costs into account.

5) Brokerage Services

Section (c)(1)(B) of the proposed regulation includes within the scope of covered service providers persons furnishing "investment brokerage services" to a plan. We ask that the Department clarify that a person utilized by a plan service provider (e.g., an investment manager, trustee or custodian) to provide trade execution services is not itself a service provider to a plan within the meaning of the regulation. If the Department were to take a contrary view, then it would appear that broker dealers would be required to enter into written contracts in order to continue providing brokerage services for transactions involving employee benefit plan assets. This would be a radical departure from current practice and would require an enormous, systemic documentation effort requiring tens, or perhaps hundreds, of thousands of contracts. Furthermore, brokers would presumably have to be informed of the identity of each and every plan for which a service provider wished to place trades so that the brokers could make all required disclosures under the regulation relative to each such plan. Such disclosure would presumably include any direct or indirect compensation to be received by the broker and its affiliates from each such plan and any relationships that could create a conflict of interest with each such plan. This would require a fundamental restructuring of the way brokerage relationships are established and maintained because, as was noted by the Department in the preamble to the final Form 5500 regulation, "in many cases the broker will not know the party on whose behalf a brokerage transaction is being executed because the instructions to execute trades are often provided by investment managers who control investment portfolios for multiple ERISA plans, non-ERISA plans, and non-plan clients."

6) Disclosure of Services to be Provided to the Plan

Section (c)(1)(iii)(A) of the proposed regulation requires service providers to disclose "all services to be provided to the plan pursuant to the contract or arrangement and, with respect to each such service, the compensation or fees to be received by the service provider, and the manner of receipt of such compensation or fees". Further clarification is needed regarding the level of detail expected in this regard. For example, employee benefit plan custodians engage in various activities (e.g., safekeeping, trade settlement, income collection, etc.) as part of their standard custody service, and for which they are compensated through their standard custody fee. In our view, a contract or arrangement should not be considered unreasonable merely because a service provider fails to list each and every activity that could arguably be viewed as a separate service.

7) Use of the Term "Agent" in the Definition of "Affiliate"

Section (c)(1)(iii)(A)(1) of the proposed regulation provides that compensation or fees to be disclosed by service providers to responsible plan fiduciaries includes amounts received, or to be received, by the service provider and its affiliates. The term "affiliate" is defined to include any agent of a service provider; the term "agent" is not defined. We ask that the Department either delete the word agent from the

definition of affiliate or provide further clarification regarding its intended meaning. In this regard we would not expect vendors and subcontractors that are used by a service provider in the ordinary course of business to be agents under the regulation. Such persons contract with the service provider rather than with the plan, and in our view should not be viewed as providing services to the plan. Examples of such vendors and subcontractors include pricing and corporate action vendors, proxy vendors, mailing vendors, depositories, clearing agencies, foreign subcustodians, subadvisers and clearing brokers (used by executing brokers).

8) Payments from Plan Sponsors and the Treatment of Gifts, Meals, Etc.

The definition of "compensation or fees" in (c)(1)(iii)(A)(1) of the proposed regulation also includes anything of monetary value (including gifts) received, or to be received, directly from the plan *or plan sponsor* or indirectly from any other source. We question the need for disclosure of payments from plan sponsors, especially since the Form 5500 reporting instructions provide that payments made by the plan sponsor, which are not reimbursed by the plan, are not subject to Schedule C reporting requirements even if the sponsor is paying for services rendered to the plan.

It is also troubling to us that, unlike the Form 5500 reporting requirements, there is no de minimis rule for items of non-monetary compensation of insubstantial value (such as gifts or meals) that a service provider receives from third parties. We believe that the required disclosure of all such items irrespective of value is unworkable and will require substantial compliance effort for no constructive purpose. We urge the Department to include a reasonable de minimis standard in the final rule.

9) Conflict of Interest Disclosures

Section (c)(1)(iii)(D) of the proposed regulation requires a service provider to disclose in writing *"to the best of the service provider's knowledge"* whether the service provider (or an affiliate) has any material financial, referral, or other relationship or arrangement with a money manager, broker, other client of the service provider, other service provider to the plan, or any other entity that creates *"or may create"* a conflict of interest for the service provider in performing services pursuant to the contract or arrangement and, if so, a description of such relationship or arrangement. We are concerned about several aspects of this requirement. First, the division or business unit of a service provider that enters into a contract or arrangement with a plan may often be unaware of third party relationships or arrangements entered into by other divisions or business units of the company. This is especially true in the case of large service providers offering a wide array of products and services. In some cases the lack of knowledge is due to "Chinese Walls" or "information barriers" within the company, and in other cases it is due simply to the sheer size and complexity of the business. We do not think that service providers should be required to conduct company-wide conflict checks as a condition of accepting employee benefit plan business, and we urge the Department to clarify in the final regulation that disclosure is only required for material conflicts of interest

known to the division or business unit of a service provider that is entering the contract or arrangement with the plan.

Second, we think 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. Again, this is especially true for large plans and large service providers. We believe that the duty to disclose should be limited to actual known conflicts that a reasonable plan fiduciary would consider significant, and we urge the Department to clarify the final regulation to so provide.

Finally, consistent with some of our earlier comments, we think that the Department should clarify that service providers need not disclose conflicts of interest under 2550.408b-2(c) that have already been "cured" through compliance with the requirements of another statutory or administrative prohibited transaction exemption.

10) Consequences of Failure to Satisfy the Proposed Regulation

In that the proposed amendments to 2550.408b-2(c) apply only to "employee benefit plans" and there are no corresponding proposed amendments to 54.4975-6, we question the basis for the Department's assertion in B(2) of the preamble that a service provider whose contract fails to satisfy the proposed regulation will be subject to excise tax liability under the Code. We ask that the Department clarify its position on this issue in the preamble to the final regulation.

11) Disclosure of Fiduciary Status

Section (c)(1)(iii)(B) of the proposed regulation requires service providers to disclose whether they (or an affiliate) will provide any services to the plan as a fiduciary either within the meaning of section 3(21) of the Act or under the Investment Advisers Act of 1940. We respectfully request that the Department delete this requirement in its entirety. Consistent with the discussion in paragraph 1) above, we believe that references to a person's status under the Investment Advisers Act of 1940 are misplaced in a regulation implementing a prohibited transaction exemption under the Act.

Nor do we feel it is workable or appropriate to require service providers to declare their fiduciary status under ERISA. As the Department has noted on numerous occasions, fiduciary status under ERISA is context specific. A service provider may be a fiduciary as to one service or set of circumstances and not as to others. In the case of various types of investment funds, a person's fiduciary status may hinge upon the level of benefit plan participation in the fund, and such status may change over time if benefit plan participation moves above or below the 25% threshold. Fiduciary status is also often unclear. It is a legal concept that is frequently the subject of fierce dispute in litigation, and the courts have not been uniform in their interpretation of its boundaries. For all these reasons, we feel it would be inadvisable to require service providers to declare their fiduciary status as a condition of satisfying the requirements

of the regulation, and we urge the Department to delete this provision from the final regulation.

12) Disclosure of Information Upon Request

Section (c)(1)(v) of the proposed regulation requires service providers to disclose "*all information related to the contract or arrangement* and any compensation or fees received thereunder that is requested by the responsible plan fiduciary or plan administrator in order to comply with the reporting and disclosure requirements of Title I of the Act and the regulations, forms, and schedules issued thereunder." The words "related to" are ambiguous and capable of a much broader interpretation than we think was intended. We therefore request that the Department clarify that service providers will only be required to provide information under this section that they would otherwise (in the absence of the regulation) be obligated to have or obtain.

Again, we thank you for the opportunity to comment on this important initiative. If you would like to discuss any of the issue raised in this letter, please feel free to contact me.

Sincerely yours,

Dale K. Nichols
Assistant General Counsel