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By Electronic Delivery

U.S. Department of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
200 Constitution Avenue, NW.,
Washington, DC 20210

Attn: 408(b)(2) Amendment

Re: Reasonable Contract or Arrangement – Individual Retirement Accounts

Dear Sir or Madam:

On behalf of the IRA Group, an association of financial institutions that sponsor or provide services to individual retirement accounts and annuities ("IRAs"), we would like to comment on the proposed ERISA section 408(b)(2) regulation (the "Proposed Regulation") and the counterpart services regulation under section 4975(d)(2) of the Internal Revenue Code of 1986, as amended (the "Code"). Our group includes a number of large providers of IRA products and services including brokers, insurance companies, mutual funds and banks.

Our comments herein are limited to the potential interpretation or extension of section 4975(d)(2) to cover IRAs and other "plans" that are subject to the Code but which are *not* "employee benefit plans" subject to Title I of ERISA. Members of the Group may through other channels also comment on the Proposed Regulation as it applies to ERISA plans.

Summary

The Department has proposed only to amend the existing regulations under section 408(b)(2) of ERISA, not the parallel Treasury Regulations under Code section 4975(d)(2), which were issued prior to the transfer of regulatory authority to the Department pursuant to Reorganization Plan No. 4 of 1978. Based on informal conversations with Department staff, we understand that the Department intended to apply the new disclosure requirements only to covered plans as described in ERISA section 401(a) and not to IRAs and other non-ERISA plans covered only by Code section 4975.

However, in the Preamble to the proposed regulations, 72 Fed. Reg. 70897 (Dec. 13, 2007), the Department suggested that the unamended section 4975 regulations may be interpreted in a manner consistent with the amended section 408(b)(2) regulations. In this

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respect, although we do not necessarily agree that new disclosure requirements can be read into the section 4975 regulations absent formal notice-and-comment rulemaking, the Department's Preamble comments create uncertainty with respect to the application of section 4975 to ERISA and non-ERISA plans alike.

Accordingly, we urge the Department to confirm – either as part of its final section 408(b)(2) regulations or via a new formal section 4975 rulemaking procedure – that (1) the existing (unamended) Code section 4975 regulations continue to apply to non-ERISA plans including IRAs, and (2) nothing in the final section 408(b)(2) regulations as applied to ERISA plans is intended to create any implication as to what constitutes a "reasonable" contract or arrangement with respect to the provision of services to a non-ERISA plan.

Discussion

The need for clarification. We recognize that the Proposed Regulation *on its face* does not purport to impose any disclosure obligations on service providers with respect to IRAs, as confirmed by informal statements of Department staff. Nonetheless, the members of the IRA Group are gravely concerned that various ambiguities and uncertainties surrounding the regulation and the regulatory process may have far-reaching and possibly unintended consequences. In particular, we question whether a wholesale upheaval of one of the most critical of all of prohibited transaction exemptions is an appropriate mechanism for addressing what we understand to be perceived deficiencies primarily in certain segments of the 401(k) marketplace. In this respect:

- The Department has not explicitly limited the scope of the Proposed Regulation to covered plans described in ERISA section 401(a). Moreover, the Preamble makes several broad references to Code section 4975,¹ without limiting or qualifying those references to ERISA-"covered" plans. In light of these ambiguities, a court might not be persuaded by informal assurances from Department staff as to the scope of the Proposed Regulations.
- The Department has not articulated any clear rationale for distinguishing between one class or type of plans and another, or between ERISA and non-ERISA plans. For instance, a welfare plan has little in common with a 401(k) plan, yet both are covered. On the other hand, a "brokerage window" under a 401(k) plan is nearly identical in operation to an IRA brokerage account, yet the former would be covered and the latter would not.

¹ See, e.g., 72 Fed. Reg. at 70993 under "Consequences of Failure to Satisfy the Proposed Regulation," stating that: "The service provider, as a 'disqualified person' under the Internal Revenue Code's (Code) prohibited transaction rules, will be subject to the excise taxes that result from the service provider's participation in a prohibited transaction under Code section 4975;" and "The failure to make the required disclosures also would result in a prohibited transaction by the service provider under section 4975(c)(1)(C) of the Internal Revenue Code." *Id.*, at 71003.

- Even if the Proposed Regulation on its face were limited to ERISA plans, as an *interpretation* of what is "reasonable" the Proposed Regulation might be treated by the courts as precedent for reading similar disclosure obligations into section 4975, absent an explicit statement by the Department rejecting such disclosures as unnecessary and unduly burdensome in the IRA context.
- In the highly competitive IRA services marketplace, any ambiguity as to the scope of the Proposed Regulation is likely to lead to inconsistent and potentially contradictory disclosures to customers among different service providers, with the potential result of confusing rather than enlightening.

The Proposed Regulation should not apply to IRAs. In urging the Department to clarify the intended scope of the Proposed Regulation, we also support the Department's conclusion that any perceived need for additional disclosure with respect to ERISA plans should not extend to IRAs. There are many reasons for this, including:

- Under the securities laws, the IRA accountholder is treated as the actual owner of the securities held in his or her IRA, and is thus entitled to all securities law disclosures in the same manner as if the accountholder owned those securities directly. In contrast, in the case of an ERISA plan, for most securities law purposes (*e.g.*, prospectus and proxy delivery), the securities law obligation extends only to the plan itself, not to individual participants.²
- IRA accounts are often sold in the "retail" marketplace to individuals side-by-side with personal and common law fiduciary accounts (*e.g.*, personal trusts, guardianships). Thus, there is often a single *customer* who creates multiple *accounts* for tax or estate-planning purposes. Requiring different disclosures based *solely* on the type of account – rather than the type of product or service – would only lead to confusion.
- To a large degree, the Proposed Regulation attempts to compel the disclosure of information that the Department believes a plan fiduciary should obtain in order to make a hiring decision that is in the interest of plan participants and beneficiaries; the plan fiduciary's decisions are supposed to be disinterested. In contrast, an IRA accountholder is not a fiduciary to his/her own IRA, and the relationship between the accountholder and the IRA is one of *self-interest*.
- Participant-directed 401(k) plans typically offer a limited, pre-screened universe of investment products and services. Many self-directed IRAs offer a much larger universe of options (*e.g.*, mutual fund platforms with thousands of fund options, or brokerage accounts with essentially "unlimited" investment choices). In this context, providing the types of disclosures set out in the Proposed Regulation could be enormously burdensome

² See, *e.g.*, Remarks of Paul F. Roye, Director, SEC Division of Investment Management, before the Institutional Investor Defined Contribution Forum (May 7, 2003), *reprinted at* <http://www.sec.gov/news/speech/spch050703pfr.htm> .

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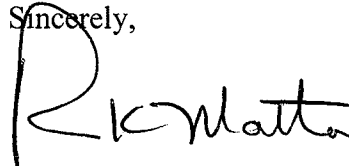
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and costly. The immediate results of increased customer disclosure likely would be decreased customer choice and increased costs.

- Any contemplated amendment to the regulations under Code section 4975(d)(2) should be carefully analyzed and coordinated with other commonly relied-upon exemptions. For instance, many advisory IRA relationships rely upon a combination of Code section 4975(d)(2) and class PTE 86-128 to cover the provision of brokerage services and receipt of brokerage commissions. The Department has previously made a finding that the various disclosure requirements of PTE 86-128 should be waived for non-ERISA plans. Indirectly imposing new disclosure obligations on IRAs via 4975(d)(2) would contradict the Department's earlier finding and constitute a *de facto* amendment of PTE 86-128.

We appreciate this opportunity to comment on the Proposed Regulation. Please feel free to contact the undersigned if we may be of further assistance in this important matter.

Sincerely,



Richard K. Matta