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Filed Electronically

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, N.W.
Washington, DC 20210

Re: 408(b)(2) Amendment: Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure

Ladies and Gentlemen:

The purpose of this letter is to provide comments on behalf of JPMorgan Chase & Co. and its affiliates ("JPMorgan") regarding the Department of Labor's ("Department") proposed regulation under the Employee Retirement Income Security Act of 1974 ("ERISA") that 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 ERISA. JPMorgan is a leading global financial services firm with assets of $1.6 trillion and operations in more than 50 countries. JPMorgan provides services to thousands of employee benefit plans.

JPMorgan appreciates the opportunity to comment on the proposed regulation. We support the Department's efforts to assist plan sponsors and plan fiduciaries in obtaining the information necessary to enable them to determine that the compensation received by plan service providers is reasonable for the services rendered to the plan. However, we are concerned that the regulation in its proposed form, without further clarification, will not consistently provide plan sponsors and plan fiduciaries with meaningful and useful information. Moreover, the proposed regulation may require service providers to provide plan sponsors and plan fiduciaries with excessive information that may overwhelm small plan sponsors and, therefore, prove not to be useful to them. Of further concern is that a failure to provide all required disclosures notwithstanding the good faith efforts of a service provider may result in a

prohibited transaction, which we believe is too extreme a penalty in such circumstances. We have attempted to describe below our concerns and their impact on the nature of the disclosures that may be required of large, diversified financial services organizations.

The Scope of the proposed regulation is too broad

Pooled Investment Vehicles

The preamble of the proposed regulation would appear to require a service provider to disclose information about compensation earned by persons that are not, under the Department's plan asset regulation and the provisions of ERISA, handling the plan's assets or providing services to the plan. For example, a service provider or a plan sponsor would be required to obtain compensation information from a mutual fund or other non-plan asset vehicle, such as operating companies, including real estate operating companies and venture capital operating companies, if it is not already available. This would either effectively require the mutual fund or other non-plan asset vehicle to comply with the requirements of Section 408(b)(2), or the plan will not be permitted to invest in the mutual fund or non-plan asset vehicle, thereby forgoing investment options that the plan fiduciary believes to be attractive. We do not think this is consistent with ERISA Sections 408(b)(2) or 3(21)(B).

By its terms, ERISA Section 408(b)(2) only applies to parties in interest with respect to a plan. ERISA Section 3(21)(B) specifically provides that an investment advisor or principal underwriter to an investment company (mutual fund) is not, by virtue of such relationship alone, a fiduciary or party in interest with respect to a plan that invests in such mutual fund. This would also be the case for other non-plan asset vehicles.

The Department also should consider the difficulty this would cause with respect to mutual funds, which are regulated under the Investment Company Act of 1940 and by the Securities and Exchange Commission. This statute and regulator already mandate the disclosure of detailed information, and the Department should consider whether requiring plan service providers to seek information that is not otherwise required to be disclosed by mutual funds to other investors in the same mutual fund is appropriate. In any event, we believe that the disclosure required by Section 408(b)(2) should be limited to compensation earned by the service provider and its affiliates, and not include compensation earned by persons providing services to mutual funds or other non-plan asset vehicles in which the plan may hold an investment.

With respect to pooled investment vehicles that are deemed to hold plan assets, such as collective investment funds, we ask that the Department clarify how the proposed regulation would apply to service providers to plan asset vehicles. As with non-plan asset vehicles, the service providers to a plan

asset pooled investment vehicle will contract only with the pooled investment vehicle itself and will not know the identity of the investors in the pooled investment vehicle. Accordingly, we request that the requirements of the proposed regulation be clarified to indicate that any disclosure obligations under Section 408(b)(2) with respect to a plan asset pooled investment vehicle be imposed on the fiduciary of such plan asset pooled investment vehicle and not on the non-fiduciary service providers thereto.

Agents

It is not clear whether the term "agents", as used in the definition of "affiliate", includes subcontractors, subcustodians or vendors engaged by a service provider in the ordinary course of its business. It should not. A service provider may engage many vendors, such as pricing services, proxy voting services, printers, etc. that are provided to all customers of the service provider and which are paid for by the service provider. Applying the proposed regulation to such vendors will not provide any meaningful information to a plan fiduciary. It would be extremely difficult, if not impossible, to determine whether any of those vendors may have independent relationships with a particular plan at any time, much less from time to time. The regulation should be revised to make clear that such subcontractors, subcustodians or vendors of a service provider are not subject to the regulation nor is the service provider who contracts with such parties required to disclose information regarding such parties.

Issues regarding "compensation or fees"

The definition of "compensation or fees" should be limited to compensation or fees related to the plan relationship

The "compensation or fees" to be disclosed should exclude fees a service provider or its affiliate receives for services rendered to pooled investment vehicles, including mutual funds, if such services are independent of the plan relationship that is the subject of a particular contract. For example, a directed trustee should not have to disclose the fact that it or its affiliate also provides custodial, transfer agent, fund accounting, securities lending or similar services to a third party mutual fund or other pooled investment vehicle in which the plan invests and which are not related to the directed trustee services. Similarly, an investment manager should not be required to make disclosures to a plan sponsor regarding the compensation that the investment manager's affiliate may receive as trustee to the plan under a separate, independent arrangement.

The Department should clarify the application of the proposed regulation in the context of pooled investment vehicles. In particular, a plan sponsor may retain an investment manager that is permitted under its management agreement to direct the investment of plan assets into a pooled investment vehicle maintained by the investment manager or its affiliate (or is directed by the plan sponsor to make such

investment). We ask the Department to clarify whether the investment in the pooled investment vehicle is the provision of a "bundle of services" that requires the disclosure of compensation that may be paid by the pooled investment vehicle to third parties that are not affiliated with the investment manager, such as securities or real estate brokers, appraisers and pricing services, accountants and auditors, printers and lawyers, and whose fees are paid by the pooled investment vehicles. If such disclosure is required, we would ask the Department to clarify the nature of the required disclosure to the plan sponsor insofar as these fees payable to third parties are subject to negotiation from time to time by agreement between the investment manager (or its affiliate) and the third parties and may not be known at the time the plan invests in the pooled investment vehicle.

Transactional fees

While the regulation generally requires disclosure of the fees as a monetary amount, in certain circumstances it permits use of a formula, percentage of the plan's assets, or per capita charge for each participant or beneficiary. However, it is not entirely clear when use of these alternatives to use of a monetary amount is permitted. It is common for directed trustees and custodians to charge both a basis point fee as well as a per transaction fee that varies with the type of the transaction. For example one fee will be charged for DTC-eligible securities, a different fee for non-DTC eligible securities, and different fees for global securities based on the country in which the security is issued. Clarification is requested that all such fees qualify for reporting under 2550.408b-2(c)(1)(iii)(A)(*2*) by disclosing the method by which such fees are calculated.

Other fees and compensation

The Department should clarify that, in the event that a service provider is earning compensation covered by both the general exemption of ERISA Section 408(b)(2) as well as compensation pursuant to arrangements covered by another prohibited transaction exemption, the latter compensation may be disclosed separately and only to the extent required by such other prohibited transaction exemption. For example, a trustee may be compensated for securities lending services pursuant to Prohibited Transaction Exemption ("PTE") 82-63. The trustee should not be required to disclose in the contract pursuant to which it is being retained as trustee the information required by PTE 82-63, so long as it discloses that information in the manner required by PTE 82-63. In addition, we ask the Department to clarify that compliance with the disclosure requirements of the specific exemption (in this case PTE 82-63) rather than the more general exemption (Section 408(b)(2)) would not affect the fiduciary's ability to rely on the Section 408(b)(2) exemptive relief to the extent it is necessary. Similarly, a number of banks and investment managers have received individual prohibited transaction exemptions (e.g., PTE 2003-24) that may permit the bank or investment manager (or its affiliate) to receive certain compensation in connection with transactions directed by the bank or investment manager. We ask the

Department to clarify that compliance with the disclosure requirements of the specific exemption (e.g., PTE 2003-24) rather than the more general exemption (Section 408(b)(2)) with respect to transactions described in the more specific exemption would not affect the fiduciary's ability to rely on the Section 408(b)(2) exemptive relief to the extent it is necessary to cover services not covered by another specific exemption.

Attesting to fiduciary status should not be required

Service providers should not be required to state whether they (or an affiliate) will provide any services to the plan as a fiduciary. Fiduciary status under ERISA calls for a legal determination that is context specific and often unclear.

ERISA §3(38) already requires an investment manager to acknowledge that it is acting as a fiduciary. However, ERISA does not require such an acknowledgment in any other circumstance. Under ERISA Section 3(21)(A), a party is only a fiduciary "to the extent" that it meets the definition. Accordingly, even a trustee can be performing functions that are ministerial rather than fiduciary. As the Department itself noted, whether a party is acting as a fiduciary in a particular set of circumstances is ultimately a question that would be decided by a court.

Conflicts of interest

The requirement to disclose conflicts of interest, particularly potential conflicts, is too broad. Large, diversified, financial institutions provide multiple services that a plan may seek to obtain, such as trustee or custodian services, investment management, investment advice, investment banking, securities lending, foreign exchange transactions, transition management and more. In addition, such financial institutions may provide services to securities issuers, including but not limited to, bond issuers and mutual funds, the investment in which is directed by unaffiliated investment managers or named fiduciaries. Large, diversified financial institutions also may provide services to entities that are in the business of providing services to clients, including plans. The requirement of the proposed regulation that a service provider disclose whether it (or its affiliate) has any material financial, referral, or other *relationship or arrangement with . . . another service provider to the plan, or any other entity, that* creates or may create a conflict of interest for the service provider in performing the relevant services, is unclear and overbroad.

As drafted, the regulation may apply to situations that could occur frequently in the case of a large, diversified financial services provider. For example, suppose service provider #1 serves as a directed (non-discretionary) trustee of a plan and service provider #2, which is unaffiliated with service provider #1, buys for the plan a security in which an affiliate of service provider #1 has an interest, such as by

serving as an underwriter of the security. Such a transaction may currently be covered by another statutory, class or individual prohibited transaction exemption. For a large, diversified financial institution to have to disclose that it provides other services that may be engaged by an unaffiliated service provider would require reams of disclosure for a potential conflict of interest, the occurrence of which the institution may not even be aware, if it occurs. There must, at a minimum, be a causal relationship between the service provider and the potential conflict of interest before such a potential conflict is required to be disclosed. That is, if the service provider does not have the ability to cause a plan to engage in the potential conflict or the potential conflict is unrelated to the services that the service provider has been engaged to provide, it should not have to disclose such potential conflicts.

In addition, Section 406 of ERISA prohibits a plan fiduciary from causing the plan to engage in certain prohibited transactions in which are considered "self-dealing" transactions. In the case of a large, diversified financial institution, conflicts and potential conflicts caused by the mere fact that the institution does provide multiple financial services are inherent in performing services for plans. Section 406(b) of ERISA recognizes these conflicts of interests and prohibits the plan fiduciary from causing the plan to engage in certain transactions. Under clause (D) of the proposed regulation, a plan fiduciary that is, for example, an investment manager, may be required to disclose that it has an affiliate that is a securities dealer and that such affiliation may create a conflict for the investment manager. Under clause (F) of the proposed regulation, the investment manager would presumably disclose the fact that its policy is to comply with Section 406(b) of ERISA and that it does not deal with its affiliates absent an appropriate exemption. The Department should clarify that disclosure of such policy is sufficient, and that the investment manager need not disclose in detail the policies it may have designed to prevent it from violating Section 406(b) of ERISA.

In addition, paragraph (iii)(F) of the proposed regulation would require the service provider to disclose not only whether it has any policies or procedures that address actual or potential conflicts of interest, but also provide an explanation of these policies or procedures and how they address such conflicts of interest. It should be noted in this regard that large, diversified, financial institutions are required by their regulators (in some cases, multiple regulators) to maintain policies and procedures designed to address conflicts of interest, which are subject to review by such regulators. In the case of large, diversified financial institutions that include investment managers (whether the bank(s) themselves or affiliated registered investment advisers), the number of potential conflicts of interest are large (running the gamut from gifts and entertainment, trade allocations among multiple clients, to self-dealing and dealings with affiliates), and the policies or procedures maintained by the institution to deal with these potential conflicts of interest may be voluminous. The relevant policies generally are not limited to a section in a policy manual entitled "conflicts of interest" but instead are contained throughout a policy manual that deals with numerous aspects of the business. We question whether an unfocused, massive disclosure of information to a plan sponsor would really be helpful to the plan sponsor and would really

serve to educate the plan sponsor, and request that the Department amend the proposed regulation to require the explanation of these policies and procedures to be provided only upon request of the plan sponsor. In this way, the plan sponsor can determine whether reviewing a massive policy manual from every service provider would be helpful or educational, or whether it would be better served by receiving thoughtful responses to specific questions it may have.

We respectfully urge the Department to consider whether the large volume of information that would be required to be disclosed by service providers will really be useful to plan sponsors. In the case of some service providers, the quantity of information that would be required to be provided is quite large. Plan sponsors that have numerous service providers, from trustees, custodians, recordkeepers, investment managers, etc. may be buried in disclosures. In our experience, large plan sponsors already have the "market power" to obtain from service providers the information the plan sponsor considers to be relevant to its decision making process. Also, in our experience, some plan sponsors do not ask for much information. The Department should consider whether requiring these plan sponsors to be provided with significant quantities of disclosure is really useful to these plan sponsors, particularly in light of the costs they may bear. In this regard, we note that the LRN - RAND Center for Corporate Ethics, Law and Governance within the RAND Institute for Civil Justice recently released a report ("RAND Study") commissioned by the U.S. Securities and Exchange Commission, /news/press/2008/2008-randiabdreport.pdf. Although not directly relevant here, one of the findings of the RAND Study was that "investors do not take the necessary time and effort to fully read and understand disclosures." If that is true, we urge the Department to consider the usefulness of mandating automatic disclosures to plan sponsors rather than requiring service providers to respond to questions and disclosure requests from plan sponsors. Indeed, the Department should consider whether some service providers, having provided significant disclosures to plan sponsors under the proposed Regulation, will be willing to then provide a plan sponsor with more focused responses to questions if the answers to the plan sponsor's questions are already contained in the disclosure provided to the plan sponsor.

If the Department decides to retain the requirement that conflicts of interest be disclosed, we recommend that the requirement be limited to service providers who are making recommendations or making decisions regarding products, services or investments and who receive or may receive compensation or fees from the providers of those products, services or investments, rather than service providers who make neither recommendations nor decisions regarding such transactions or transactions which are subject to another prohibited transaction exemption.

The final regulation should apply only to contracts entered into or materially modified after the effective date

It is unclear from the proposal how it applies to contracts in existence on the effective date. No matter what effective date is provided in the final regulation, it will be impossible to amend, by even the Department's conservative estimate, over one million contracts quickly. Simply locating all of the existing contracts, and getting responses from plan fiduciaries, is a monumental undertaking. In addition, many contracts renew automatically, and the renewal could activate soon after the effective date. For this reason, we recommend that the regulation apply only to contracts entered into or materially modified after the effective date. If the Department's final rule is effective with respect to any existing contracts, the final rule should state that service providers can comply with the regulation by providing the disclosures required by the rules, and waiting to modify contracts until the contract is otherwise materially modified.

Contract terms

Because of the variety of service providers and required disclosures under other regulatory regimes, we commend the Department's position that disclosures may come from multiple sources, as described in the preamble to the proposed regulation. However, we urge the Department to dispense with the requirement that such disclosures be incorporated by reference into the contract.

Rather than require that the service provider represent that it has provided the disclosure "to the best of its knowledge", we ask that the representation recite that the service provider has used "reasonable efforts" to make the required disclosures. If reasonable efforts fail to discern all indirect compensation from any source or from another line of business, then the prospective penalty that would apply to a prohibited transaction is too severe.

Several provisions in the proposed regulations provide that the terms of the contract or arrangement shall require or include certain specific things. The Department should clarify that these requirements can be met by including a suitable written undertaking from the service provider to the responsible plan fiduciary, which could be incorporated into the broader written disclosures required by the regulations. Language does not need to be contained in the body of the contract, nor are amendments to existing contracts required.

Materiality and remedy for noncompliance

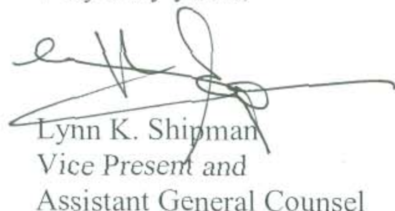
Given the scope of the required disclosures and the penalties for noncompliance, we would ask the Department to confirm that insignificant or immaterial omissions would not constitute a prohibited

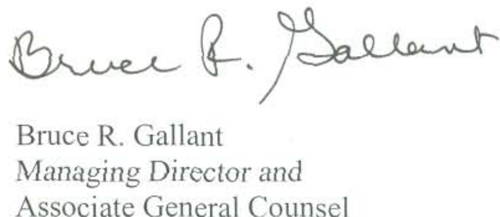
transaction so long as the service provider provides the requisite disclosure within a reasonable period after discovery.

Other exemptions

The Department specifically asked for comment on the relationship between these proposed regulations and other statutory exemptions which may cover services. As noted above, there are a number of exemptions other than Section 408(b)(2) that could provide relief for a service provider depending on the nature of the responsible plan fiduciary or the type of service provided. Some are provided in the statute, such as bank ancillary services, foreign exchange transactions, cross trading, and investment advice; others are class or individual exemptions. Many financial institutions have also obtained a number of individual prohibited transaction exemptions each of which, as with class exemptions, contains numerous, specific requirements that must be satisfied. The Department has taken the position since 1975 that more than one exemption can cover particular transactions. We urge the Department not to take the position here that services may only be exempt under Section 408(b)(2). We further urge the Department to confirm that compliance with the specific disclosure requirements of these more specific exemptions with respect to the transactions covered by those exemptions, rather than the disclosure requirements of Section 408(b)(2), will not cause the broader service arrangement to fail to satisfy the requirements of Section 408(b)(2).

Very truly yours,





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