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VIA ELECTRONIC MAIL (e-ori@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA)
Room N-5669, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Attn: 401(k) Plan Investment Advice RFI

Re: **Prohibited Transaction Exemption for Provision of Investment
Advice to Participants in Individual Account Plans (RIN 1210-AB13)**

Ladies and Gentlemen:

We appreciate the opportunity to provide comments to the U.S. Department of Labor's (DOL) with respect to the prohibited transaction exemption for the provision of investment advice. We also applaud the DOL for issuing Field Assistance Bulletin 2007-01, providing additional guidance on certain of the questions related to the new exemption. While we continue to have additional questions – some arising under the FAB itself – we believe the FAB will prove to be most helpful to advisers seeking to comply with the exemption.

As employee benefits attorneys, our practice includes providing guidance to plan sponsors and service providers to retirement plans regarding ERISA's requirements. Because we are not intimately involved with the operation of computer systems, we have focused our comments on the DOL's request for information with concerning the disclosure of fees and other types of compensation. Our responses to these inquiries are provided below.

In general, we support complete transparency of fees and other types of compensation paid to plan service providers. That said, we believe the need for transparency must be balanced with the cost of providing information to plan fiduciaries and participants. As discussed below, we support the DOL's efforts, as evidenced by the proposed 2008 Form 5500, to provide plans and participants with meaningful information for a reasonable cost.

DOL Request for Information

1. In general, what types of information relating to fees received by fiduciary advisers and their affiliates would be helpful to participants and beneficiaries in making their investment decisions?

In order for participants to evaluate whether investment advice is cost-effective and devoid of conflicts, they should be provided with the information needed to answer two questions: (1) what is the advice going to cost me? and (2) what does the adviser get out of giving the advice? In more concrete terms, the first category of information would address the fees that will affect a participant's account balance and thereby reduce the participant's benefits. The second category includes information on the benefits (monetary and otherwise) the adviser and/or its affiliates will receive (and the source of those payments), regardless of whether or not those amounts affect the participant's account balance. This second category will help participants identify conflicts of interest.

As to the first category – what is it going to cost me? -- we anticipate that the first year a participant uses a provider's services, this information will be disclosed as a formula. However, in future years, we believe that the provider should disclose the actual dollar amount that was charged for the prior year as well as the formula for the participant to be able to estimate the current year's fees. In addition, we recommend that the disclosure include the ultimate recipients of those amounts.

We recognize that it may be difficult and expensive for advisers to report costs and revenue in this manner. Yet, the actual dollar amounts would be most meaningful to participants. As a result, we recommend that the regulation to be issued by the DOL require as much information as is reasonably possible as a dollar amount. At the same time, we encourage the DOL to provide the framework for disclosure in order to create the opportunity and incentive for the marketplace to develop systems that can disclose this information in a cost-effective manner.

We anticipate that benchmarks may be developed from these disclosures at some point in the future. Participants could then use these benchmarks to conduct a cost-benefit analysis regarding the investment advice services they are receiving.

Turning to the second category of information – what does the adviser get out of giving the advice? – to identify conflicts of interest, participants should be provided with a description of any bonuses or incentive payments as well as any requirements imposed on the investment adviser to recommend the investments of an affiliated entity (or, for that matter, incentives to recommend the investments of any unrelated party as well). While we believe that

most investment advisers will provide quality advice, there need to be safeguards in place for the few advisers who may attempt to take advantage of participants.

We recognize that there may be potential incentives that are only available if certain thresholds are met. For these types of incentives, we recommend that the adviser be required to disclose the incentives that the adviser received or can reasonably expect to receive.

Additionally, participants who receive investment advice should also be provided with information regarding the types of fees and compensation (other than those described above) that the adviser and any affiliates will receive, such as 12b-1 fees. This would occur, for example, where the adviser is also the broker of the plan.

2. What types of fees and compensation (including those provided by third parties) would be encompassed by ERISA section 408(g)(6)(A)(iii)? In relevant part, this provision refers to "all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property."

We anticipate that the fees and compensation would include all dollar amounts charged to the participant's account as well as any items of value material enough to be likely to affect the advice provided. These would include float, finder's fees, commissions and 12b-1 fees, solicitation fees and bonus payments received by the broker and/or the broker-dealer. The DOL may want to use language similar to that provided on the proposed Schedules A and C to the 2008 Form 5500 to describe in broad terms the types of fees or compensation intended to be disclosed.

The disclosures would also include items such as investment management fees, transfer agency fees, administrative service fees and similar payments that an affiliated mutual fund advisory firm (or an affiliate of that firm) would receive on any funds included in the adviser's recommendations and any additional compensation an affiliated broker/dealer would receive for effecting trades.

3. What challenges might be encountered in assembling and/or presenting the information on fees and compensation described in section 408(g)(6)(A)(iii) in a manner that is clear and understandable by the average plan participant? Are there any suggestions as to how these challenges can be addressed by the Department?

Fee disclosures involve concepts that are likely to be difficult for the average participant to understand. As a result, we recommend that the disclosure rule contain requirements similar to those for summary plan descriptions. That is, they must be "written in a manner calculated to be understood by the average plan participant," and "be sufficiently

accurate and comprehensive to reasonably apprise such participants and beneficiaries” of the information described above. Additionally, if a substantial amount of participants are literate only in a non-English language, the disclosures should be provided to them in that language.

We also suggest that the disclosures clearly differentiate between the amounts to be charged to the participant’s account and compensation related to potential conflicts of interest, so that the participants would have a context for evaluating each.

4. Is there a form or format for presenting information on fees and compensation described in section 408(g)(6)(A)(iii) (e.g., narrative, chart, combination of both) that might be particularly suitable in giving participants a clear and understandable description of the fees and compensation received by a fiduciary adviser or its affiliates? Is there an optimal time frame, relative to when the advice is provided, for providing this information to participants and beneficiaries? What impact, if any, will the receipt of a model form have on investment decisions made by participants and beneficiaries?

We have suggested that certain items be disclosed as a formula and, where available, by dollar amount. We do not have specific suggestions regarding the format of the disclosure and leave that to others with more experience in the most effective tools for communicating potentially complicated information in an understandable fashion.

Regarding the timing of disclosures, we believe there are three potential approaches. These include: (i) a waiting period; (ii) a waiver approach; and (iii) a cooling off or withdrawal period. All of these methods have advantages and disadvantages.

With a waiting period, participants would receive the required disclosures and then be given time to evaluate the disclosures before receiving the advice. The advantage to this approach, we believe, is that the participant could not be pressured into accepting advice without having adequate time to reflect on the disclosures. The principal disadvantage is that it might actually become a barrier to obtaining advice, in that participants might be unwilling to have a forced delay before they can proceed. If the waiting period approach is used, then we suggest that a seven day wait would be adequate.

Alternatively, there could be a waiting period with participants being given the opportunity to sign a waiver and proceed with the advice immediately. The argument in favor of this approach is that it solves the barrier issue noted above; the argument against it is that some participants might sign the waiver without reading and understanding it.

Under the cooling off or withdrawal period approach, participants could be given the fee disclosures and the advice at the same time, but would have a period of time, such as 15 days, to cancel the investment advice arrangement and not be charged. This approach is similar to many consumer protection laws. (We are aware of one managed account provider that

provides its services without charge during the first 30 days in order to provide just such a cooling off period). This approach would address the “barrier” that the waiting period might create, but might be a disincentive to advisers from agreeing to provide advice on these terms.

On balance, we believe that a properly structured waiver, written in plain language and with appropriate warnings, would adequately balance the competing interests. Alternatively, we believe that the “cooling off” approach is a reasonable one that has proven successful in other areas of the law.

Additional Considerations

Notwithstanding the FAB issued on February 2, we believe that further guidance is needed with respect to the circumstances under which a person is considered a “fiduciary adviser” in the level fee context. For example, the FAB addresses the situation in which a firm is engaged to provide advice. The DOL indicates that an employee, agent or registered representative, acting as such, who provides the investment advice and the firm will both be considered a “fiduciary adviser,” subject to the level fee requirement.

But there are other situations in which an affiliated entity exercises significant control over the actions of the person providing the advice in the level fee environment. In those situations, even though the relationship is not one of employer/employee or principal/agent, the entity may be exercising sufficient control that it should be included within the defined term of fiduciary adviser. (To be clear, we are addressing here only the level fee arrangement and not the computer model arrangement.)

Consider the following examples:

- Suppose a broker-dealer or investment advisory firm designs an advice approach (not using a computer model) and dictates that this approach be used by all of its agents or representatives to provide investment advice. Suppose further that the firm is not engaged to provide the advice so that, under the approach taken in the FAB, only the individual agent or representative is considered to be the fiduciary adviser. It is unclear from the PPA whether the broker-dealer or advisory firm would be considered fiduciary advisers even though they are exerting a significant degree of control over the advice approach that is used.
- Another example might be the situation in which a mutual fund provider requires that a certain number of its proprietary funds be used by the adviser when giving advice. While the computer model structure may prevent or seriously ameliorate the impact of such a requirement, because of the requirements in the PPA prohibiting bias in the model, the same would not be true in the level fee arrangement. But in this circumstance, should

the mutual fund complex be considered a "fiduciary adviser" because of the degree of control it exercises over the advice being given?

We would hope the DOL will address these kinds of issues in subsequent guidance.


We also recommend that the DOL provide guidelines with respect to the required disclosures in the final regulation, but issue the actual model in separate, perhaps less formal, guidance. We believe that this would promote the flexibility necessary to allow the form to evolve as technology advances and marketplace factors dictate broader disclosures or different approaches to the form of the disclosures.

Please let us know if you would like to discuss any of these comments with us.

Very truly yours,



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