THE FINANCIAL SERVICES ROUNDTABLE

Impacting Policy. Impacting People.

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February 11, 2008

Via email at e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: 408(b)(2) Amendment
Room N-5655
US Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

RE: Proposed Regulation on 408(b)(2) Amendment

Dear Sir or Madam:

The Financial Services Roundtable[1] ("Roundtable") submits this letter in response to the Department of Labor's ("DOL") proposed amendment to Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Roundtable supports the DOL's intent to enhance disclosures for plan sponsors and ensure that these disclosures are clear and concise. In finalizing this regulation, the Roundtable *encourages* the DOL to harmonize these requirements with current legal requirements in other industries, such as those within the securities industry. Additionally, the Roundtable *urges* the DOL to aim for a workable disclosure that has a positive impact in the promotion and expansion of retirement plans.

That being said, however, the Roundtable is concerned about the unintended consequences that may occur due to the broad application of the proposal. Our concerns are outlined below.

<u>Overly-broad Service Provider Definition</u>

Specifically, the Roundtable *recommends* that the DOL clarify the definition of a "service provider." Currently, the proposed regulation divides the term "service provider" into three categories based on both the types of services one performs under the plan, as well as whether or not one received direct or indirect compensation under the plan. The Roundtable contends that these categories are too broad and essentially would take into account all parties associated with a plan, including outside vendors that do not have any interaction with the plan but only indirectly receive compensation. This definition of a "service provider" is unintentionally expansive in that it would require reporting of relationships in which a service provider does not have direct knowledge, such as subadvisory relationships where a manager of a fund provides information to a subadvisor, funds that are a part of larger funds ("fund of funds"), or hedge fund relationships.

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue and 2.1 million jobs.

For example, under this definition, one could conclude that a person who provides services to a mutual fund in which a plan invests would be considered a "service provider," provided that person meets one of the three categories within the definition. This interpretation would counter the underlying intent of ERISA and be inconsistent with the long time view of the DOL that service providers to mutual funds are not providing services to the plan nor are the assets of the mutual fund considered assets of the plan.[2] Therefore, the Roundtable *recommends* that DOL clarify that service providers to mutual funds are not included within the definition.

Additionally, as with mutual funds, a similar problem arises with respect to other pooled investment vehicles such as private equity funds, hedge funds, bank collective funds, real estate operating companies and venture capital operating companies. In all such cases, service providers to such pooled investment vehicles contract only with the pooled investment vehicle and rarely, if ever, will know the identity of the participants in such pooled investment vehicles. Accordingly, compliance with the regulation by such service providers would be impossible.[3]

With respect to investment options, the information that a plan sponsor needs is 1) the investment management fee and expenses for the fund, and 2) payments that the fund is making to outside parties that directly relate to that plan sponsor's investment. Some institutions issue payments to recordkeepers, who in turn, factor that into the pricing for their bundled services. Requiring disclosure by the recordkeeper or a third-party administrator ("TPA") receiving these fees would provide plan sponsors with what they need. The investment fund's fees are already disclosed. Soft dollar fees received by the investment fund institution in the operation of their business do not directly tie to any recordkeeper or any plan sponsor. Such fees are factored into the pricing of the institution's funds. This level of disclosure should be adequate to accomplish the goals of the DOL in providing plan sponsors with information they need to make their choices.

Confusing Definition of Bundled Services

Another aspect of the amendment that should be clarified is what types of services should be included within a "bundle of services." Currently, the proposed regulation allows a service provider that "offers a bundle of services to the plan that is priced as a package" to report aggregate compensation, with limited exceptions.

Clarification of the definition of the "bundle" is required, since the above definition could lead to duplicate reporting under certain business models. For instance, financial entities, such as insurance companies that market products to and service small pension plans frequently enter into cooperative arrangements in which responsibilities for serving a retirement plan are split between a vendor, such as an insurance or trust company, and an unaffiliated TPA. The actual division of labor varies among different arrangements, but in a typical arrangement the vendor would provide recordkeeping, internet and voice response functionality, backroom trading functions, and participant statements. In such an arrangement, the third party administrator would typically provide compliance and plan design services. The TPA may also perform routine administrative functions such as the handling of withdrawals and suspense payments, since plans usually authorize the TPA to execute a broad range of transactions. One additional feature of these arrangements is that the vendor commonly compensates the TPA for services provided, and the TPA may also bill for services rendered or have these charges deducted from plan assets.

[2] See DOL Interpretative Bulletin 75-3, 29 C.F.R. §2509.75-3 (1975).
[3] See Attachment A that discusses the various direct and indirect relationships a fund may have.

Under the above type of business model, several possible "bundles of services….priced as a package" could be identified under the regulations. The TPA may be a service provider since it is providing a "bundle of services" related to administrative services to the plan. The vendor may also be a service provider since it may provide a "bundle of services" related to recordkeeping, administrative and investment services. An insurance company or vendor using the above business model typically does not track the specific fees that the TPA charges directly to the plan.

A business model, such as the one described above, does not neatly fit under the regulation. In an effort to comply with the regulations, disclosure by several service providers may lead to double reporting, confusion among plan sponsors, and inadvertent non-compliance by service providers.

Additionally, in the business model discussed above, an independent broker dealer typically provides investment advice and services to the plan. Currently, broker dealers do not enter into an agreement with the plan. As proposed, the regulations will require broker dealers to enter into such agreement even where the services are provided as part of a bundled arrangement. The insurance company/vendor does not have control over the broker dealers rendering such services to the plan. Therefore, all liability and responsibility for entering, maintaining and retaining such agreements should rest solely with the broker dealer even though, in such a business model, the insurance company or vendor may be collecting and sending some plan fees to the broker for such services.

Therefore, the Roundtable *recommends* that "bundled" services be clarified to take into account these various business models and should exclude services provided within the ordinary course of business, such as those described above.

Extension of Effective Date

DOL currently proposes that this amendment take effect 90 days after the publication of the final regulations. The Roundtable *strongly recommends* that the DOL extend this effective date a minimum of 12 months, due to the various procedural changes and training that will need to occur in order to be compliant with the new amendment.

Additionally, the Roundtable *recommends* that this amendment only apply to new contracts and to materially altered contracts. For new or materially altered contracts, DOL should permit such disclosures to occur during the account opening procedures identified by ERISA rather than including such boilerplate language in a contract.

For current contracts, the Roundtable recommends that the DOL require a representative letter to be sent to plan sponsors that would highlight the specific information set forth in DOL's amendment. This letter would accompany the necessary disclosures that are currently sent to plan sponsors and would alleviate the burden of reopening existing contracts.

These recommendations support the DOL's intention of providing service providers with considerable flexibility to make these disclosures, as discussed in the preamble to the amendment.[4]

[4] See the Amendment's preamble, Section B(1)(b).

Unclear Conflicts of Interest Guidance

Currently, the proposed regulations required service provider to disclose any conflicts of interest where there is a material, financial, referral, or other relationship that creates or may create a conflict under the current contract. This requirement is very broad and would essentially require service providers to examine all contacts, including those not directly involved in this contract. Typically, a service provider of a plan does not have the knowledge of the other service providers in the plan. As such, this proposal would create an unnecessary burden on service providers to acquire and evaluate information on other service providers from plan fiduciaries.

Additionally, the proposal requires a service provider to describe any policies or procedures in place to address actual or potential conflicts of interest. A majority of institutions have policies in place that would identify the actual or potential conflicts and identify the procedures to take to alleviate such conflicts. These policies are generally very detail-oriented. The Roundtable is concerned that identifying such policies or procedures may place our members at a competitive disadvantage by releasing confidential, proprietary information. As such, the Roundtable *recommends* that DOL identifies best practices when a service provider identifies a conflict of interest, but does not require such provider to disclose specifics of each conflict. Retaining such a requirement would result in unclear disclosures due to the wide-breadth of information that would need to be included and would circumvent the original intent of this proposed regulation.

Extension of Material Changes Notification

Under the proposed regulation, service providers must notify plan fiduciaries of any material changes to the information provided within 30 days of the service providers' knowledge of this change. Currently, service providers notify customers of changes to fees or other material changes prior to the effective date of the change. Other changes, however, may be more difficult to disclose in advance (*i.e.*, conflicts of interest). Therefore, the Roundtable *recommends* an extension of the material change notification to at a minimum 90 days. This additional time will present service providers with the opportunity to investigate changes and determine whether or not these changes are material to the current contract.

Fees

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 Depository Trust Company ("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. In such instances, the fee will be the per-transaction charge multiplied by the number of transactions (which are directed by a named fiduciary or investment manager). The directed trustee or custodian will not know in advance the number or types of transactions in which it will be directed to engage. As a result, it is impractical to try to estimate the fees in such circumstances. Therefore, the Roundtable *recommends* that DOL clarify that disclosing the method by which such fees are calculated would fulfill the reporting requirements under the proposed regulation's §2550.408b-2(c)(1)(iii)(A)(2). Furthermore, the Roundtable believes this underscores DOL's intent for the regulation to permit fees to be disclosed in multiple formats such as formulas, percentage of plan assets, or per capita charges.

Coordination with other Regulators

The Roundtable encourages the DOL to work with other regulators when finalizing this amendment. Currently, a number of regulatory agencies are examining the disclosures used within their respective industries.[5] The Roundtable *recommends* that the regulators work together to develop a commonality among the disclosure requirements so as not to create any undue burden on the industry to comply.

Conclusion

In summary, the Roundtable supports the DOL's intent to enhance disclosures for plan sponsors; however, the Roundtable is concerned about the unintended consequences discussed above that may occur due to the broad application of the proposal.

Thank you again for the opportunity to share our views with you on this subject. If you have any questions, please feel free to contact me, Melissa Netram, or Paul Begey at 202-289-4322.

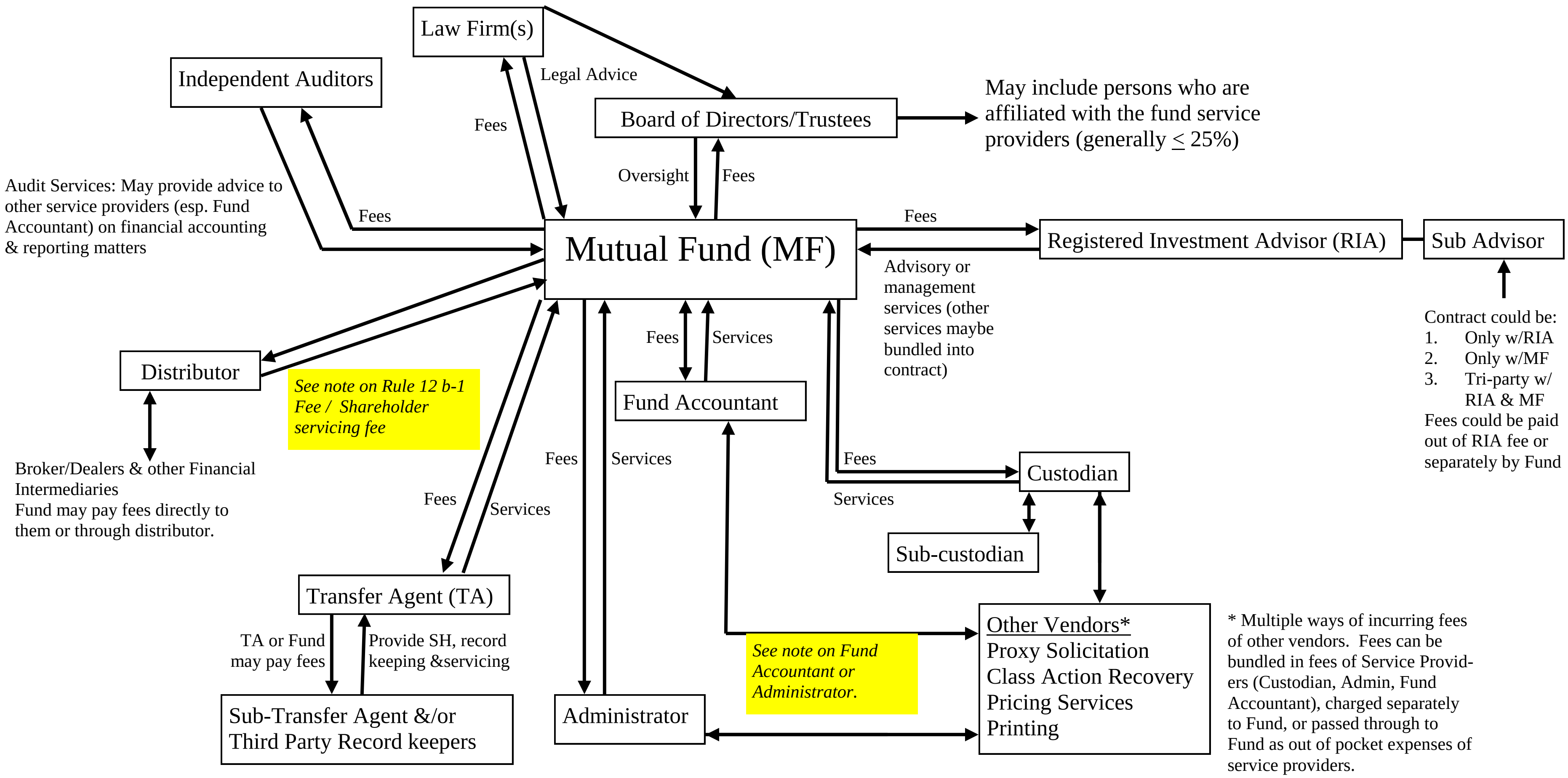
Sincerely,

Richard M. Whiting

Richard Whiting
Executive Director and General Counsel

[5] For example, the Securities and Exchange Commission currently has a proposed regulation on a mutual fund prospectus summary. See 72 Federal Register 67790 (November 30, 2007).

Attachment A



<u>Rule 12 b-1 Fee / Shareholder Servicing Fee</u> may be paid directly to the financial intermediaries or through the distributor

<u>Fund Accountant</u> duties generally include maintaining fund's financial books & records (general/ledger), calculating NAV, and producing financial statements.
<u>Administrator</u> duties may include coordinating with other service providers, providing personnel and support, corporate secretarial services, and registration services.