October 21, 2008

The Honorable Susan Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th St., N.W.
Washington, DC 20503

Re: U.S. Department of Labor Final Regulation Addressing Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure

Dear Dr. Dudley:

We are writing to express concern regarding a final regulation recently sent to the Office of Management and Budget ("OMB") by the Department of Labor ("DOL"). The final regulation, which amends DOL Regulation § 2550.408b-2, addresses what information an employee benefit plan service provider must provide to the hiring plan fiduciary regarding the service provider's fees and services.

Our concerns relate to the effective date of the regulation. Although we have not seen the final regulation, there had been much discussion prior to the issuance of the final regulation regarding an effective date earlier than the first plan year beginning at least 12 months after the final regulation is published, i.e., earlier than January 1, 2010 in the case of a calendar year plan if the regulation is published during 2008. An earlier effective date would cause enormous administrative burdens, as discussed below. And those burdens would not be addressed by a provision making the "applicability date" of the regulation January 1, 2010 or later. Again, we have not seen the regulation, but based on informal conversations regarding the possible inclusion of an "applicability date" in the final regulation that would fall after the effective date, we are very concerned that this approach would not preclude lawsuits based on actions on or after the earlier effective date. Thus, regardless of the applicability date, service providers and plan administrators would have to comply as of the effective date.

A delayed effective date of at least a year is needed because, in order to comply with the new regulation, there will need to be significant modifications of computer systems, the training of operational and administrative staff, the preparation of new communication and administrative materials for plan fiduciaries, as well as the development of actual disclosure documents. Although much of the information required by the proposed regulation is already being provided, the regulation adds new requirements that will require significant systems changes. Also, any systems changes need to be thoroughly tested prior to implementation to prevent errors and resulting confusion. Moreover, in addition to the development and testing of service provider systems, plan sponsors will need time to establish their own processes for analyzing and reacting to all of the new information.

Finally, the above burdens will be particularly acute with respect to investment products that do not have pre-existing rules and systems that currently produce fee data in the manner prescribed by the proposed regulation. For those products, much of the administrative systems will have to be developed from scratch.

An effective date earlier than the first plan year beginning at least 12 months after the publication of the final regulation will only result in forced noncompliance, as many service providers and plan fiduciaries will be unable to comply. Efforts to comply in an unrealistic time period will result in numerous errors and problems, leading in turn to extremely high administrative costs as service providers and plan fiduciaries expend resources in correcting the errors that will inevitably occur.

Thus, an earlier effective date would clearly run afoul of section 6 of Executive Order 12866 (as amended by Executive Orders 13258 and 13422). Under section 6, the Office of Information and Regulatory Policy within OMB is responsible for providing "meaningful guidance and oversight so that each agency's regulatory actions are consistent with...the principles set forth in this Executive order." The "Principles of Regulation", as set forth in section 1 of Executive Order 12866, include instructions for an agency to "design its regulations in the most cost-effective manner to achieve the regulatory objectives" and for an agency to "tailor its regulations and guidance documents to impose the least burden on society, including individuals, businesses of differing sizes, and other entities consistent with obtaining regulatory objectives."

Clearly, a regulation that requires compliance as of an unrealistic effective date fails to comply with section 1 of Executive Order 12866. Such a regulation would cause unnecessary disruption by requiring administrative modifications far too quickly, resulting in a very large number of errors that will require much hard work and great expense to detect, analyze, and correct.

The cure to this problem is straightforward: a realistic effective date of plan years beginning at least 12 months after publication of the final regulations.

Thank you for your consideration of our views.

Sincerely,

American Bankers Association
American Benefits Council
American Council of Life Insurers
Committee on Investment of Employee Benefit Assets
The ERISA Industry Committee
Investment Company Institute
National Association of Manufacturers
Profit Sharing/401k Council of America
Securities Industry and Financial Markets Association
United States Chamber of Commerce