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December 19, 2011

Mr. Michael Davis  
Deputy Assistant Secretary/EBSA  
US Department of Labor  
200 Constitution Avenue, NW, Ste. S-2524  
Washington, DC 20210

**Re: Recommendation to Extend the Applicability Dates of the 408(b)(2) and 404(a) Regulations**

Dear Mr. Davis:

The American Society of Pension Professionals and Actuaries (“ASPPA”) and the Council of Independent 401(k) Recordkeepers (“CIKR”) are writing to request that the Department of Labor (the “Department”) extend the applicability dates of both the pending Interim Final Regulation §2550.408b-2(c) (the “408(b)(2) regulation”) as well as Regulation §2550.404a-5 (the “404(a) regulation”). ASPPA and CIKR previously emphasized the need for an orderly transition period. This would allow for the time which will be necessary to develop and finalize the processes that will be necessary for implementation. Although work in this regard has been under way for some time, it cannot be completed until the rule is finalized. Since it is now mid-December and the applicability date of the 408(b)(2) regulation is little more than three months away, it is clear that a further extension is necessary.

ASPPA is a national organization of more than 7,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA membership is diverse and united by a common dedication to the employer-based retirement plan system.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. The independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of \$120 billion in assets.

## Discussion

ASPPA and CIKR have strongly supported the Department's efforts to improve fee transparency. We have provided extensive comments at every stage of this process. Full disclosure by service providers of what they charge and how they are getting paid is critical information plan fiduciaries need in order to fulfill their responsibilities. Greater fee transparency allows plan sponsors to make better, more informed decisions, which ultimately is to the benefit of plan participants.

With that said however, it is important that sufficient time be provided to build the infrastructure that will be necessary to support the new disclosure regime. Although the vast majority of providers have been hard at work preparing for the new disclosure requirements, completing this work will nevertheless require additional time after the final regulation is issued. This is particularly true as there remain open a number of issues that could greatly affect the ultimate design of any compliance system.

For example, a very important issue that remains to be resolved is whether the 408(b)(2) regulation, when finalized, will require a summary disclosure statement. The preamble to the 408(b)(2) regulation invited comment on the costs and burdens that would be associated with a summary mandate, the benefits to plan fiduciaries that would ensue and how to effectively construct such a requirement.<sup>1</sup> With little more than three months remaining until the 408(b)(2) regulation is slated to become effective, it is still not clear how the Department will resolve this issue. If a summary of some type is required, the parameters for what it must contain and how it is to be formatted will significantly impact system design. Yet it is difficult, if not impossible, to begin such work without first having the specifications that must be satisfied. It doesn't make sense, to build a system to potentially accommodate a summary without the parameters for the system's design.

In addition to systems work, our members tell us that there are additional problems engendered by the delay in the release of the final regulation. Needless to say, engagement contracts used by service providers to ERISA plans will be greatly affected by the new rules. Engaging legal counsel to assist in this process is both expensive and time consuming. Many providers are small businesses who must be very mindful of their overhead costs in order to provide their services at competitive prices and keep down costs to plans and plan participants. For obvious reasons, our members are reluctant to incur this expense at this point in the process out of a well placed fear that they will need additional legal help when the regulation is finalized. It would be a waste of time and money to ask for legal guidance when there is no sure standard to apply.

## Recommendation

***ASPPA and CIKR continue to recommend*** that the applicability dates for both the 408(b)(2) regulation and the 404(a) regulation be extended. As we come to the "finish line," we believe that it is of critical importance that sufficient time be provided to make the necessary system changes to implement the final rules. Without knowing what changes will be made in the final 408(b)(2) regulation, it is difficult to predict how much time will be needed. Our recommendation would be to extend the applicability date to one year after the 408(b)(2) regulation is published in final form. Similarly, we believe that the applicability date for the 404(a) regulation should be extended until one year after the final 408(b)(2) regulation is published.

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<sup>1</sup> Department of Labor, *Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure*, 75 Fed. Reg. 41600, 41607 (Jul. 16, 2010).



These comments were primarily authored by Craig P. Hoffman, APM, General Counsel and Director of Regulatory Affairs at ASPPA. We welcome the opportunity to discuss this further with you. Please contact Craig Hoffman, at (703) 516-9300, with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM  
Executive Director/CEO

/s/

Judy A. Miller, MSPA  
Chief of Actuarial Issues

/s/

Craig P. Hoffman, Esq., APM  
General Counsel

/s/

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