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CIKR
Council of Independent 401(k) Recordkeepers

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Attention: 408(b)(2) Interim Final Rule

The American Society of Pension Professionals & Actuaries (ASPPA) and the Council of Independent 401(k) Recordkeepers (CIKR) appreciate the opportunity to comment on the Interim Final Regulation issued under ERISA§ 408(b)(2) on July 16, 2010.

ASPPA is a national organization of more than 7,000 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. The large and broad-based ASPPA membership gives it unusual insight into current practical problems with the Employee Retirement Income Security Act and qualified retirement plans with a particular focus on the issues faced by small- to medium-sized employers. ASPPA membership is diverse and united by a common dedication to the private 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.

Background

ASPPA and CIKR strongly support the Department's regulatory initiative to improve the disclosure of fees to responsible plan fiduciaries under Interim Final Regulation § 2550.408b-2(c) (the "final regulation"). ASPPA and CIKR believe strongly in fee transparency and the final

regulation, together with the Department's other initiatives in this area, will help plan fiduciaries and participants make better, more informed decisions.

As requested in the preamble to the final regulation, ASPPA and CIKR have several suggestions and recommendations for your consideration which are set forth in this letter. In addition, we have assembled a diverse group of industry experts from our membership to consider implementation issues associated with the final regulation, particularly from a technological standpoint. This "task force" is in the midst of gathering information from various stakeholders and a series of meetings has begun. We look forward to sharing with you in the months ahead, the concerns and comments of this group.

Comments on the Interim Final Regulation

I. Definitions

A. $1,000 De Minimis Threshold for Covered Service Providers

A change made from the original proposal was the institution of a $1,000 (or more) threshold that an otherwise covered service provider (including affiliates and subcontractors) (collectively "CSPs") must reasonably expect to receive in compensation before being subject to the final regulation. This de minimis standard was inserted to exclude relatively small service contracts or arrangements from being subject to the final regulation. We support this change in that it will allow plan fiduciaries to direct their attention to the service arrangements that will have the greatest potential impact on plan participants.

However, based on feedback from our members, the $1,000 threshold is too low. At that level, it would bring under the final regulation arrangements that are relatively insignificant to plan fiduciaries. Disclosure of small contracts and arrangements will distract fiduciaries from focusing their attention on the more important service relationships. For this reason, a better threshold would be $2,500. In addition, and for much the same reasons, we believe the threshold for excluding non-monetary compensation should be increased from $250 to $500.

In addition to increasing the thresholds, we believe both limits should be applied based on the calendar year (or some other 12-month period, such as the plan year) rather than the term of the contract or arrangement. A 12-month limit will avoid the potential for abuse which could occur if contract periods are set for a short period of time in an effort to evade the purpose of the thresholds. A 12-month calculation period would also better match up with normal plan accounting and the annual reporting cycle that plans and fiduciaries follow in conjunction with filing Form 5500.

Furthermore, the dollar amounts should increase automatically based on changes in the cost-of-living so that they remain meaningful with inflation. In the absence of a cost-of-living adjustment, one can anticipate that the de minimis amounts will become insignificant and will fail to exclude the intended small service arrangements from the disclosure obligation. An appropriate consumer price index promulgated by the Bureau of Labor Statistics could form the basis for this cost-of-living adjustment. The adjustment should be based on the fiscal year ending

on September 30th so that an adjusted threshold, effective at the beginning of the calendar year, could be announced a reasonable period of time before taking effect.

ASPPA and CIKR recommend increasing the threshold base amount that an otherwise CSP must reasonably expect to receive in compensation before being subject to the final regulation to $2,500 and the threshold for excluding non-monetary compensation to $500. Both thresholds should be applied based on the calendar year or some other 12-month period, such as the plan year.

ASPPA and CIKR also recommend that the final regulation include an automatic cost-of-living adjustment so that these figures will not become dated and less effective in the future.

B. Certain Recordkeeping or Brokerage Service Providers

The final regulation provides a new category of CSP for certain providers of recordkeeping or brokerage services. Specifically, Reg. §2550.408b-2(c)(1)(iii)(B) defines as a CSP someone who is providing "[r]ecordkeeping services or brokerage services [] to a covered plan that is an individual account plan … that permits participants or beneficiaries to direct the investment of their accounts, if one or more designated investment alternatives will be made available (e.g., through a platform or similar mechanism) *in connection with* such recordkeeping services or brokerage services" (Emphasis added). It is not entirely clear what "in connection with" means in certain circumstances commonly found in today's marketplace.

For example, it is common for an insurance company or other investment provider to contract directly with the covered plan to offer one or more designated investment alternatives. Concurrently, the plan will enter into a separate independent contract for third party administration services with a service provider unaffiliated with the investment provider. In such cases, the third party administration services often include services that fall within the definition of "recordkeeping services" found in Reg. §2550.408b-2(c)(1)(viii)(D). However, these third party services are offered on an independent basis and are not tied to any particular investment alternative chosen by plan fiduciaries. Nevertheless, the third party administrator works closely with the investment provider in order to obtain the necessary data to perform its duties. In this context, the third party administrator may receive statements or an electronic feed on a daily basis as necessary to perform plan administration and recordkeeping. The third party administrator may even have a separate contract with the investment provider, independent of the plan's arrangement, to facilitate and clearly establish responsibilities with respect to the transmission of data.

If the third party administrator is receiving indirect compensation (from the investment provider or otherwise) in connection with performing administrative services, it is clear that the final regulation would apply under the "other services for indirect compensation" definition (see Reg.§ 2550.408b-2(c)(1)(iii)(C)). However, it is extremely common in the circumstances described above for the third party administrator to receive only direct compensation, as defined in the final regulation, or compensation paid from the plan sponsor's funds. Although not clear, it would appear that the third party administrator should be outside the definition of recordkeeper found in Reg. §2550.408b-2(c)(1)(iii)(B) because of the plan's independent relationship with the investment provider. This is particularly true in that it would be difficult (and at times potentially

impossible) for the third party administrator to have access to the data necessary to fulfill the investment disclosure obligation required under Reg. §2550.408b-2(c)(1)(iv)(G). In these circumstances, there is no policy justification for classifying the third party administrator as a "recordkeeper or brokerage services" CSP under Reg. §2550.408b-2(c)(1)(iii)(B).

ASPPA and CIKR recommend that the final regulation specifically clarify that independent third party administrative service arrangements (which might include "recordkeeping services") are not offered "in connection with" the offering of designated investment alternatives (as defined in Reg. §2550.408b-2(c)(1)(iii)(B)) when the plan has a separate, independent contractual relationship with the investment provider. The final regulation should also make clear that a third party administrator's arrangement with an investment provider to facilitate and assure the transmission of data necessary to perform administrative services does not alter this analysis. It would also be helpful if the Department would provide examples of the application of this rule.

C. Definition of Compensation

The final regulation defines as compensation, '… anything of monetary value (for example, money, gifts, awards, and trips)…" (see Reg.§2550.408b-2(c)(1)(viii)(B)). However, the definition does not address the purpose for which such amounts might be received. The final regulation generally requires disclosure of any "compensation" if received in connection with the covered plan's contract or arrangement with the CSP. This expansive definition disregards the non-compensatory nature of payments for (or reimbursement of) expenses related to education and training of CSPs.

The code of conduct rules of the Financial Industry Regulatory Authority ("FINRA") specifically acknowledge that educational and training expenses, although of value to the recipient, should not be considered prohibited compensation if the payment or reimbursement is in connection with a meeting held for the purpose of training or education of associated persons of a member and certain requirements are met. The requirements include: attendance is not preconditioned on the achievement of a sales target or any other incentives pursuant to a non-cash compensation arrangement; the location of the meeting is appropriate to the purpose of the meeting; the payment or reimbursement is not applied to the expenses of guests of the person; and the payment or reimbursement by the mutual fund provider is not preconditioned on the achievement of a sales target or any other non-cash compensation arrangement permitted under NASD rules. (See NASD Rule 2830(l)(5) at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3691). This same approach should apply under the final regulation for education and training provided to a CSP. These educational meetings are an extremely common practice in the retirement plan industry and play an important role in ensuring that CSPs are kept informed of new regulatory, legislative and other developments impacting retirement plans.

ASPPA and CIKR recommend that the final regulation specifically exclude from the definition of compensation payments for (or reimbursement of) educational and training expenses for CSPs if provided in accordance with FINRA/NASD rule 2830(l)(5) or similar standards promulgated by the Department.

II. Reporting of "Conduit" Payments

The final regulation generally requires disclosure of the direct and indirect compensation a CSP expects to receive in connection with the provision of certain covered services to a covered plan. The regulation does not address circumstances where the CSP "receives" a payment but has a contractual obligation to pass through that payment to another CSP.

For example, a recordkeeper might offer an arrangement in which it subcontracts with an unaffiliated custodian to make various mutual funds available to a covered plan. The custodian receives indirect compensation in the form of revenue sharing payments from the funds and is contractually obligated to pass 90% of it through to the recordkeeper. In effect, the custodian is nothing more than a collection agent providing a conduit for getting the revenue sharing payments to the recordkeeper. Under the final regulation, it would appear the payments received by the custodian are indirect compensation because the custodian "received" them, even though there is a contractual obligation to remit 90% of the payments to the recordkeeper. The recordkeeper would also disclose the compensation it receives from the custodian as indirect compensation. As a result, the very same dollars are reported as indirect compensation twice making it appear that in the aggregate, the custodian and recordkeeper are receiving substantially more compensation than is in fact the case. The result is confusion and the potential for misunderstanding by plan fiduciaries, particularly those who are less sophisticated. For this reason, CSPs who are acting merely as a collection agent and who are otherwise obligated to pass through payments they collect (that would otherwise be compensation) should not be considered to have "received" such amounts if they are obligated to remit such payments to other unaffiliated CSPs. It is important to note that in all of these instances, the compensation will be disclosed by the CSP who ultimately receives the compensation.

ASPPA and CIKR recommend that the final regulation clarify that a CSP is not in "receipt" of compensation if the CSP is under an obligation to forward such amounts so that the "recipient" CSP is merely a conduit for collection.

III. Format of Disclosure

A. Use of Summary Disclosure Statement and Format

The preamble to the final regulation invites comment on whether the Department should add a requirement that CSPs furnish a "summary" disclosure statement that would include key information intended to provide an overview for responsible plan fiduciaries.

In our original comments filed in response to the proposed regulation, we specifically recommended that the final regulation include a summary mandate, even when other forms of disclosure are provided. We believe the requirement of a summary is particularly pertinent with respect to the investment disclosure required by the final regulation. Such a summary would be more readily usable by a fiduciary than a stack of prospectuses or other more technical materials. In the absence of a summary, the process of sifting through the information provided by competing service providers may prove more burdensome then helpful.

The mandate of a summary would also reduce the obfuscation that could otherwise occur through distribution of materials that are less than clear on their face. For example, it is possible that a CSP offering an unaffiliated designated investment alternative that is not regulated by a state or federal agency might simply pass out the investment contract where the information is buried in pages of legal and technical jargon. Although a CSP would be obligated to assist in ferreting out the relevant information, a fiduciary may not always know what to ask. It should be made clear that providing a fiduciary with a 100-page investment contract for an investment whose disclosure materials are not regulated will not be sufficient unless there is a detailed summary with specific cross-references to where the information may be found in the primary materials.

Although we suggest that the format of the summary not be specified, an example of such a summary would be a chart similar to that contemplated by the proposed regulations on participant disclosure. We note the proposed regulation promulgated under ERISA §404(a) included the mandate of a "comparative chart" (see Proposed Regulation §2550.404a-5(d)(2), 73 FR 43014). With respect to fiduciary disclosures of the investment information relating to designated investment alternatives, the use of a chart would be consistent with the formatting for participant disclosure of the same information. This should lessen the burden on CSPs and investment providers since, in many cases, much of the information could be duplicated.

Although we believe the final regulation should include the requirement of a summary, we recognize that the Department might not agree based on other comments that may be received. However, many CSPs, particularly those who provide certain recordkeeping or brokerage services as described in Reg. §2550.408b-2(c)(1)(iii)(B), may nevertheless choose to provide a summary to assist responsible plan fiduciaries in comparing alternative CSPs and service arrangements. Even if not mandatory, the final regulation should be supportive of CSPs who choose to voluntarily provide a summary. It should affirmatively provide that even in the absence of a summary mandate, CSPs who would otherwise qualify under Reg. §2550.408b-2(c)(1)(iv)(G)(2), continue to be protected if the disclosure information is excerpted from qualifying original source materials and then provided in the form of a summary or is obtained from an independent source that aggregates the investment information and makes it available on an electronic basis (see discussion at IV below).

ASPPA and CIKR recommend that a summary of the relevant disclosure information be made mandatory in the final regulation.

B. Transitional Concerns for Summary Requirement

Although the effective date of the final regulation is 10 ½ months away, there is considerable systems work that needs to be done before then. It is difficult to anticipate all of the potential issues that will arise as system engineers begin the process of rewriting software code and programs to accommodate the new disclosure requirements. This work is already underway, but it could be very problematic if the mandate for a summary was to be made effective on the general effective date of the final regulation (i.e., July 16, 2011).

ASPPA and CIKR recommend that there be a one-year transition period, ending July 16, 2012, during which summaries would be permitted but not mandated. This would allow CSPs who wish to voluntarily make use of a summary sooner to utilize the alternative approach for the dissemination of investment related information found in Reg. §2550.408b-2(c)(1)(iv)(G)(2) when that information is excerpted and included in the summary.

C. Electronic Transmission

The preamble to the proposed regulation states, "Written disclosures may be provided in separate documents from separate sources and may be provided in electronic format…" [72 FR 70990] The preamble to the final regulation provides, "[N]either the proposal nor the interim final rule requires the covered service provider to make its disclosures in any particular manner or format." [75 FR 41607] Additionally, the regulatory impact analysis section of the preamble, at subsection 5, indicates that the Department assumes that 50% of the disclosures between CSPs and fiduciaries will be delivered in electronic form. [75 FR 41621]

Electronic transmission of information will be absolutely necessary to reduce the costs and burdens associated with satisfying the final regulation. However, it is not clear what standards CSPs are expected to meet in order to utilize this approach. ERISA Regulation §2520.104b applies to participant and beneficiary disclosures made by the plan administrator. The preamble to this regulation specifically noted that the safe harbor standards for electronic transmission would apply to "…the transmittal of all documents required to be furnished or made available under Title I of ERISA and the regulations thereunder that would be within the jurisdiction of the Department of Labor." [67 FR 17266] However, it is not clear how Reg. §2520.104b applies in the context of the new disclosure obligations of a CSP.

ASPPA and CIKR recommend that the final regulation specifically affirm that electronic transmission rules do apply. In addition, greater detail on what procedures are permitted should be provided either in the final regulation or other guidance from the Department.

ASPPA and CIKR also recommend that electronic transmission be permitted in accordance with the broader standard for electronic delivery presently permitted under the good faith standard of Field Assistance Bulletin 2006-03 for benefit statements. We believe this is appropriate given the relative sophistication of plan fiduciaries. CSPs should be permitted to give fiduciaries an e-mail notice of availability and then simply post the information on a website. The plan fiduciary would still have the right to request and obtain a paper version of any required disclosure.

IV. Investment Information Safe Harbor for Recordkeepers

As previously indicated, we are supportive of the mandate of a summary. With respect to the information reproduced in the summary, it is absolutely critical that the final regulation specifically affirm that the protections afforded regarding the dissemination of investment-related information found in Reg. §2550.408b-2(c)(1)(iv)(G)(2) continue to apply when that information is included in the summary by the CSP. In other words, CSPs providing certain recordkeeping or brokerage services should be able to rely on the information that is extracted for the summary from disclosure materials that are prepared by an unaffiliated issuer as long as

the materials are subject to state or federal regulation and the CSP has no knowledge that the materials are incomplete or inaccurate. In addition, the original materials from which the information is extracted should be required only to be made available through an electronic link, unless the plan fiduciary specifically requests that these primary source investment disclosure materials be provided other than through electronic transmission.

There is also concern that obtaining the information necessary to populate the summary may be difficult, costly and potentially prone to input errors if the recordkeeper has to input the information manually. A much preferred approach would be to make it available to CSPs through an electronic "feed" or similar electronic access. At the present time however, it is uncertain at best that there is a provider who collects all the necessary data on a centralized basis that CSPs could access electronically. Nevertheless, anecdotal reports indicate that this may change. It is likely that several independent entities that otherwise provide centralized investment data across a broad range of investments may enter this market to facilitate this process. The market for this type of service will grow because plan fiduciaries will likely need this same capability to fulfill their responsibilities under the pending participant fee disclosure regulation. For this reason, the final regulation should anticipate this very real potential and provide the same protections available under Reg. §2550.408b-2(c)(1)(iv)(G)(2) to investment information obtain from an unaffiliated "aggregator" who has collected the data from disclosure materials regulated by a state or federal agency.

ASPPA and CIKR recommend that the safe harbor for dissemination of investment related information contained in Reg. §2550.408b-2(c)(1)(iv)(G)(2) apply to CSPs that otherwise qualify when the information is excerpted from the original source materials and reproduced in the summary. These protections should apply even if the final regulation does not include a summary mandate. In addition the same protections should apply to investment information obtained from an unaffiliated "aggregator" who has collected the data from disclosure materials regulated by a state or federal agency which were prepared by an unaffiliated issuer.

V. Timing of Disclosure

A. Timing When Information Changes

The final regulation modified the disclosure requirements when there is a change in the required information. Under the proposal, only "material" changes needed to be disclosed to plan fiduciaries, generally within 30 days of the date that the CSP acquired knowledge of the change. Under the final regulation, any change in the required information, material or otherwise, must be disclosed. The deadline for doing so,

> "…is as soon as practicable, but not later than 60 days from the date the covered service provider is informed of such change, unless such disclosure is precluded due to circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable." [Regulation §2550.408b-2(c)(1)(v)(B)]

It is highly likely that changes to the information initially provided will occur on a regular and frequent basis. This will undoubtedly be the case with respect to the fee and expense information

associated with the plan's designated investment alternatives. It is quite common for the information associated with the investment-related disclosures to change every year (and sometimes more often). Plans that offer 30, 40, or 50 or more designated investment alternatives have become the norm. In these circumstances, updated disclosures with respect to the investment related information will need to be made on virtually a monthly basis. Yet many times, the change is insignificant and buried in the technical language of the prospectus. Plan fiduciaries, especially those who are responsible for small plans, will be inundated with new disclosures so frequently that they will become desensitized to the information that is being provided. The net result is "information overload." To avoid this potential and allow for a focused review of the salient information, changes in the investment related information should only be required to be disclosed on an annual basis. The most current information could be made available through the investment issuer's website. Changes to other, non-investment related information should remain subject to the "as soon as practicable/60-day" standard described above.

ASPPA and CIKR recommend that the frequency and timing of disclosure for changes in the required investment information be limited to a single annual notice. Fiduciaries who wish to receive more frequent updates should be able to do so through a website made available by the designated investment alternative provider. This could be the same site that participants might access for similar information as may be required by regulations on participant level fee disclosure.

B. Timing for Requests for Additional Reporting and Disclosure Information

The final regulation requires CSPs to provide, upon the request of the responsible plan fiduciary or covered plan administrator, any other information relating to compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements of Title I of ERISA. This requirement is consistent with the proposed regulation. However, the final regulation added a mandate that the information be provided by the CSP not later than 30 days after receiving a written request unless "precluded due to extraordinary circumstances beyond the covered service provider's control…" (see Reg §2550.408b-2(c)(1)(vi)(B)).

The new deadline does not recognize the difficulties CSPs may face in satisfying such requests. Many service providers have built automated systems for delivering such information routinely, according to a schedule that allows plan fiduciaries ample time to fulfill the reporting and disclosure requirements under Title I of ERISA. A mandatory deadline of 30 days to comply with a request for additional information will not materially improve fiduciaries' ability to comply with their responsibilities, yet will require many CSPs to make costly changes to their disclosure systems. These costs will result in higher fees for plan administration and recordkeeping that will ultimately be borne by plan participants.

Additionally, the experience of our members is that plan fiduciaries and administrators are not always clear with regard to the information they are seeking. There are also likely to be questions as to whether the specific information being requested is required to satisfy Title I of ERISA's

reporting and disclosure requirements. As a result, a dialogue may be necessary between the CSP and the plan fiduciary or administrator to ascertain what information is truly needed. The final regulation does not provide sufficient flexibility to deal with these types of circumstances as the only exception to the 30 day deadline is for "extraordinary circumstances" beyond the CSP's control. The deadline should be set in such a way as to accommodate the varying circumstances under which additional information may be requested.

ASPPA and CIKR recommend that the deadline for meeting requests for additional information be extended to a "reasonable time" after the request is received and include factors for consideration of what is "reasonable" such as the complexity of the request, the clarity of the request, the CSP's routine systems for compliance, the actual reporting and disclosure deadline for which the requested information is needed, and such other facts and circumstances as may be relevant to this determination.

VI. Description of Services

The final regulation provides that the CSP's required disclosures must include a description of the services to be provided under the contract or arrangement. The preamble to the final rule indicates that the level of detail required will vary. As a result, no standard in this regard is provided. However the preamble provides:

> "Ultimately, though, the responsible plan fiduciary must, under sections 404 and 408(b)(2) of ERISA, decide whether it has enough information about the services to be provided pursuant to the contract or arrangement to determine whether the cost of such services to the plan is reasonable. Accordingly, if a particular description of services provided by a covered service provider lacks sufficient detail to enable the responsible plan fiduciary to determine whether the compensation to be received for such services is reasonable, the responsible plan fiduciary must request additional information concerning those services." [75 FR 41608]

As described above in reference to the benefits of a summary requirement, there is concern that some CSPs may try to avoid their obligations under the final regulation by merely distributing the written contract, and little, if anything, else. In circumstances such as this, it is likely the disclosure would be technical in nature and filled with industry jargon that may be difficult for a responsible plan fiduciary to understand. Requiring a fiduciary to take the initiative in these circumstances puts the burden on the wrong party.

ASPPA and CIKR recommend that the final regulation include an affirmative obligation for the CSP to explain in "plain English" the information being disclosed. In addition, the final regulation should include a presumption that merely distributing the contractual documents will not meet this obligation. If the contractual language is written in such a way such that it meets the "plain English" standard, then the presumption could be rebutted, but the responsible plan fiduciary would still be permitted to ask for more detail if warranted.

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These comments were prepared by ASPPA and CIKR. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at ASPPA at (703) 516 -9300 ext. 128, if you have any comments or questions regarding the matters discussed herein. Thank you for your consideration.

Respectfully submitted

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