

ERISA 408(b)(2) Sample Advisory Agreement and Memorandum

The following memorandum and the accompanying sample Advisory Agreement are intended to highlight general considerations by investment advisers in complying with ERISA Regulation section 2550.408b-2(c) through the use of an advisory agreement. Advisers should consult with their own attorney in light of these considerations and their own circumstances.

Prepared by:

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Presented by:

fi360 and Pioneer Investments



MEMORANDUM

Background: Complying with the New 408(b)(2) Regulation

Department of Labor (DOL) Interim Final Regulation section 2550.408b-2(c) (the “Regulation”) requires “covered service providers” to make written disclosure of their services, status, and compensation to responsible plan fiduciaries reasonably in advance of the arrangement. Under the Regulation, the definition of covered service provider includes a service provider who performs services to a plan as an investment adviser registered under the Investment Advisers Act of 1940 or state law (“advisers”) and who reasonably expects to receive \$1,000 or more in direct or indirect compensation for its services. As most (if not all) advisers will receive that amount over the life of an agreement with a plan, advisers are almost always covered service providers subject to the Regulation. The failure of a covered service provider to comply with the provisions of the Regulation gives rise to a prohibited transaction under ERISA and the Internal Revenue Code. For more information on what the Regulation means for registered investment advisers (RIAs), please see the bulletin posted at www.fi360.com/main/pdf/reish_bulletin_031308.pdf.

While the Regulation does not require that the disclosures be included in a written agreement, from a risk management standpoint many consider it a best practice for advisers to have a written agreement and believe it makes sense to include the disclosures in the adviser’s agreement. That being said, since the Regulation takes effect April 1, 2012 for existing as well as new relationships, rather than have existing clients execute new agreements with the required disclosures, some advisers have decided to provide a separate written disclosure to existing clients by April 1, 2012. Thus, for existing relationships, advisers must disclose the current services, status and compensation by April 1, 2012; for new relationships (and for extensions or renewals of pre-existing relationships), on April 1, 2012 and thereafter advisers will need to provide the services, status and compensation disclosures reasonably in advance of entering into the arrangement (or extension or renewal).

Sample Advisory Agreement

Attached to this memorandum is a sample Advisory Agreement that covers RIA services to the fiduciaries of a participant-directed retirement plan with non-discretionary investment advice and other common services. The sample Advisory Agreement is designed as a starting point to help an RIA meet its disclosure obligations under the Regulation. Advisers should note that there are significant legal consequences with respect to entering into an advisory agreement. As a result, each adviser should work with legal counsel to determine what changes should be made to the sample Advisory Agreement to make it appropriate for the adviser. For example, the sample Advisory Agreement is designed for use by an RIA firm or individual that is not affiliated with, or in a controlled group with, any other entities or businesses. (An affiliate is generally one who directly or indirectly controls or is controlled by or is under common control with another person or entity. Examples of possible adviser-affiliated entities include broker-dealers, insurance companies, insurance brokers, recordkeepers, third party administrators, and accounting firms.) If this assumption is incorrect, the Advisory Agreement would need to be revised. Further, there are a number of additional disclosures applicable to other covered service providers, such as recordkeepers, broker-dealers, and certain other plan fiduciaries that manage certain investments

in which a plan may invest. As a result, the attached sample agreement should not be used to satisfy the disclosures for other service providers.

The sample agreement contains common contract provisions and risk management language in addition to the disclosures required by the Regulation. For purposes of complying with the Regulation, only the status, service and compensation must be disclosed. Thus, for advisers who want to just make a disclosure to existing clients rather than getting a new agreement executed, they could prepare a disclosure statement, with assistance from their legal counsel, starting with the appendices to the agreement along with the status statements from Sections 4(A) and (B) of the agreement.

Notes to the Agreement: Drafting Considerations

The following sections correspond to the footnotes in the attached sample Advisory Agreement:

1. The Regulation requires that the disclosures be made to the “responsible plan fiduciary,” defined as “a fiduciary with authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement.”
2. The Regulation requires that, if a service provider is acting as a registered investment adviser, the adviser must disclose whether the adviser is registered under the Investment Advisers Act of 1940 or state law. This sentence should be completed as applicable.
3. Under the Regulation, an adviser must generally disclose changes to the required disclosure information within 60 days. While this provision is not required to be included in the agreement, advisers should consider whether it makes sense to include in the Advisory Agreement.
4. The Regulation imposes on advisers a 30-day requirement for responding to requests for information necessary to satisfy a plan’s reporting obligations.
5. Under the Regulation, advisers must disclose errors and omissions within 30 days in order to avoid having an inadvertent error or omission cause a prohibited transaction. Including this provision in the agreement allows the adviser to make necessary corrections.
6. In response to recent litigation, this provision is designed to provide an explanation as to why revenue sharing funds (which may be more expensive) may be selected.
7. The sample agreement contains sample standards of care applicable to Fiduciary and Non-Fiduciary Services. The standard for Fiduciary Services tracks the requirements under ERISA (*i.e.*, the prudent man standard). For the Non-Fiduciary Services, the sample standard used is gross negligence or intentional misconduct. Advisers should discuss with legal counsel whether a different standard of care (*e.g.*, ordinary care) should be used for the Non-Fiduciary Service standard of care. We have not included any indemnity provision. Advisers should consult with their own legal counsel and internal policies regarding whether an indemnity provision is appropriate.
8. The Regulation requires that the disclosure be made “reasonably in advance” of the contract or arrangement being entered into, extended or renewed.

9. Thirty days is a common timeframe for termination notices. However, advisers should consider what timeframe they feel is appropriate.
10. The Advisory Agreement contains language allowing the client to authorize communications via email. To the extent this will be used to satisfy adviser's disclosure obligations, adviser should work with legal counsel to establish procedures for documenting such electronic disclosure. For example, advisers should consider sending the email with a "read" confirmation requested and keeping it in client's file (hard copy or electronic) along with a copy of what was disclosed.
11. The adviser should complete the applicable law provision as appropriate for the adviser. The adviser should consult with their business or securities law counsel to make that determination.
12. The sample agreement contains sample arbitration language. Each adviser should determine whether an arbitration clause is appropriate and if so, the applicable state for holding any arbitration. Again, this should be done in consultation with legal counsel. If the RIA is associated with a broker-dealer, this should be coordinated with the broker-dealer's legal counsel or compliance personnel.
13. The sample agreement includes amendment language requiring the mutual consent of both parties. Alternatively, the amendment provision could be revised to allow the adviser to make unilateral changes to the agreement by providing sufficient advance notice in accordance with Department of Labor Advisory Opinion 97-16A (the "Aetna Opinion"). Under the Aetna Opinion, an adviser may be subject to a fiduciary and/or prohibited transaction claim if the agreement gives the adviser power to unilaterally change its fees under the agreement. By tracking the advance notice requirements and giving the responsible plan fiduciary an opportunity to terminate the agreement and find a new provider before the amended fee takes effect, under the Aetna Opinion advisers can avoid the fiduciary and prohibited transaction issues that arise from setting one's fees without approval from plan fiduciaries and without the administrative difficulty of obtaining signed documents from all the adviser's clients. Alternatively, advisers could provide that the agreement, including the fee provisions, can only be amended by a writing signed by both the adviser and the responsible plan fiduciary. Advisers should discuss with legal counsel whether to use the Aetna Opinion amendment process. If so, Section 10(H) could be replaced with the following language:

The Agreement may also be modified, including without limitation the services to be provided by Adviser or the fees charged by Adviser, in the manner set forth herein and consistent with the procedure described in Department of Labor Advisory Opinion 97-16A.

Adviser may propose to increase or otherwise change the fees charged, to change the services provided or otherwise modify this Agreement by giving Client reasonable advance notice of the proposed change. The notice shall be given in the manner described in this Agreement. The notice will (1) explain the proposed modification of the fees, services or other provisions; (2)

fully disclose any resulting changes in the fees to be charged as a result of any proposed change in the services or other changes to this Agreement; (3) identify the effective date of the change; (4) explain Client's right to reject the change or terminate this Agreement; and (5) state that pursuant to the provisions of this Agreement, if Client fails to object to the proposed change(s) before the date on which the change(s) become effective Client will be deemed to have consented to the proposed change(s).

If Client objects to any change to this Agreement proposed by Adviser, Adviser shall not be authorized to make the proposed change. In that event Client shall have an additional sixty (60) days from the proposed effective date (or such additional time beyond 60 days as may be agreed by Adviser) to locate a service provider in place and instead of Adviser. If at the end of such additional sixty (60) day period (or such additional time period as agreed by Adviser), the parties have not reached Agreement on the proposed changes, this Agreement shall automatically terminate.

14. This signature line is for the RIA firm. If the firm also wants the individual account representative (IAR) to sign, an additional signature line could be added providing that the agreement is "acknowledged by" the IAR.
15. Under the Regulation, a covered service provider must disclose the services it expects to provide. We have included sample fiduciary services based on common provisions but each adviser must determine whether the descriptions reflect what it will do and/or if other services should be listed.
16. To the extent the plan has asset allocation models that are advised by the adviser or an affiliate and adviser is providing investment advice with respect to a qualified default investment alternative (QDIA), this may raise a prohibited transaction issue and adviser should consult with legal counsel.
17. Under the Regulation, a covered service provider must disclose the services it expects to provide. We have included sample non-fiduciary services based on common provisions but each adviser must determine whether the descriptions reflect what it will do and/or if other services should be listed. Additional services to consider include the following:
 - (i) Perform analysis of the fees and expenses associated with the investments and the service providers.
 - (ii) Perform provider searches and analysis of services provided by bundled providers, recordkeepers and other service providers.
 - (iii) Perform benchmarking services, and provide analysis concerning the operations of the Plan.

18. The sample Advisory Agreement provides that the adviser will provide investment education and not advice to participants because we understand that is the common practice. However, the agreement may be modified to provide that the adviser will provide fiduciary investment advice to participants. Generally, under Interpretive Bulletin 96-1, “investment education” includes the following four types of information:

- Information about the terms of the plan and the benefits of participating in the plan;
- General information about financial and investment concepts;
- General information about the asset allocation models offered by the plan, without recommending any specific model to the participant;
- Tools that a participant can use to determine risk tolerance, perform gap analysis and other similar interactive investment materials.

Advisers who wish to provide investment education rather than advice should work with counsel to make sure their services fit within Interpretive Bulletin 96-1.

19. With respect to compensation, under the Regulation, a covered service provider must disclose:

- The direct and/or indirect compensation the adviser, an affiliate or subcontractor will receive. Either the amount or a formula (*e.g.*, an asset-based percentage) can be used to disclose the compensation;
- Compensation paid among the covered service provider, an affiliate or subcontractor, if such compensation is transaction-based or charged against the plan’s investment;
- The manner in which the compensation will be received (*e.g.*, whether the plan will be billed or the compensation will be deducted directly from plan assets);
- Whether adviser expects to receive any compensation in connection with termination of the agreement; and
- How prepaid amounts will be calculated and refunded upon termination.

When considering what compensation an adviser (or its affiliates or subcontractor) may receive, it is important to consider how the Regulation defines compensation. Compensation is anything of monetary value (*e.g.*, money, gifts, awards, and trips) but does not include “non-monetary compensation valued at \$250 or less, in the aggregate, during the term of the contract or arrangement.”

The sample Advisory Agreement is drafted on the assumption that none of the adviser, an affiliate, or a subcontractor will receive any indirect compensation (generally compensation received from a source other than the plan, plan sponsor, the covered service provider, an affiliate or a subcontractor). If this assumption is not correct, the

Advisory Agreement must be revised accordingly. Note that an independent contractor is considered a subcontractor. Thus, for example, if an adviser has independent contractor representatives whose compensation is transaction-based or is charged directly against the plan's investments, this sample agreement should be revised to separately disclose the representative's compensation. (See Regulation section 2550.408b-2(c)(1)(iv)(C)(3), which requires disclosure of "a description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor . . . if it is set on a transaction basis (e.g., commissions, soft dollars, finder's fees or other similar incentive compensation based on business placed or retained) or is charged directly against the covered plan's investment and reflected in the net value of the investment (e.g., Rule 12b-1 fees); including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor).")

As described above, indirect compensation that will be received by an adviser (or an affiliate or subcontractor) must be disclosed. Additionally, any indirect compensation paid among an adviser, its affiliate or a subcontractor must be disclosed if it is charged directly against a plan's investment or is transaction-based. Finally, indirect compensation must generally be used to offset the adviser's regular fees or paid to the plan in order to avoid a prohibited transaction. Under the prohibited transaction rules of ERISA and the Code, neither a fiduciary adviser nor its affiliates can receive additional fees resulting from the fiduciary's advice. See ERISA Section 406(b)(3). If, however, the fee received by the adviser (or by any affiliate of the adviser) will not be affected by the participant's investment decision, there is no prohibited transaction. See Department of Labor (DOL) Advisory Opinion 97-15A. Each adviser should discuss with its own legal counsel whether any indirect compensation will be received or paid and how to address any related prohibited transaction issues.

In DOL Advisory Opinion 97-15A, the DOL considered a bank that provided trustee and other services to employee benefit plans. The bank also had arrangements to provide services to various mutual funds offered by the plans under which the mutual funds would pay the bank fees based on the assets invested in the funds. However, the bank disclosed the mutual fund arrangements to the plans and provided that the bank would offset the fees payable by the plans by the fees the bank received from the mutual funds. Under this agreement, to the extent the bank received fees from mutual funds in connection with a plan's investments in excess of the fee that the plan owed the bank, the plan would be entitled to the excess. Thus, the bank would never receive more than the basic fee agreed to by the plan and would not receive any additional compensation from the mutual funds as a result of the bank's advice to the plans. Because the bank's advice would therefore not result in any additional fees to the bank, the DOL determined that such an arrangement would not violate ERISA Section 406(b)(3).

Thus, section 3(c) of the Advisory Agreement provides that in addition to disclosing any additional compensation, the adviser must offset it against the fee.

20. The sample Advisory Agreement provides that fees will be billed quarterly in advance. Advisers will need to revise this as appropriate for their own fee structures. Additionally, if an adviser will be allowed to deduct from the plan account, the Securities Exchange Commission's deemed custodian rules must be considered. If an adviser has custody of

client funds or securities, the adviser is subject to the SEC's custody rules, which include an annual surprise examination. For these purposes, "custody" means "holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them." This includes the right to tell the custodian how much to withdraw from client funds to pay the advisory fee. However, if that is the only custody an adviser has, the adviser can avoid the annual surprise examination requirement if the qualified custodian sends the adviser's bill to the client and the adviser has policies and procedures that address the risk of deducting fees to which the adviser is not entitled. Securities counsel should be consulted regarding this custody issue. The sample agreement assumes that there is no fee due upon termination of the agreement. If that is not correct, the adviser must disclose any such termination fee.

21. The Advisory Agreement contains sample fee provisions based on common provisions. Each adviser will need to carefully review this to make sure all required compensation information is accurately described.
22. This language assumes that fees will be billed in advance and addresses the requirement to disclose how any prepaid fees will be returned. If fees will be billed in arrears, this language should be modified accordingly.
23. If market value will not be determined by the custodian or recordkeeper, this provision should be revised accordingly.

CAUTION: This memorandum and the accompanying sample Advisory Agreement were drafted based on the authors' understanding of the practices of some RIA firms. As a result, it has not been designed for--nor is it appropriate for--any particular RIA firm without analysis and revision. If any RIA uses this agreement, the RIA should consult with competent legal counsel to obtain advice about necessary (or even preferred) changes.

The sample Advisory Agreement assumes that the adviser has no "affiliates." The Regulation states that "[a] person's or entity's 'affiliate' directly or indirectly (through one or more intermediaries), controls, is controlled by, or under common control with such person or entity; or is an officer, director, or employee of, or partner in, such person or entity." This is a critical assumption since, as set forth above, covered service providers are required to disclose certain compensation paid to "affiliates" and "subcontractors."

This document and the sample Advisory Agreement are based on information available and relevant DOL guidance issued as of September 8, 2011, and does not incorporate any changes or revisions to the law or applicable regulation that may arise after that date.

The sample Advisory Agreement has been prepared without regard to the law of any state or to any federal laws other than ERISA. Advisers should consult with their own attorneys before incorporating any of the provisions set forth in the sample agreement into their own service agreements with clients, or adopting or otherwise relying upon these sample materials for use in the adviser's own practice.

Sample Advisory Agreement

Presented by

CAUTION: This document should not be used without consultation and advice from an attorney. The provisions in this Sample Advisory Agreement, and other possible provisions that are not included, have material legal consequences. Furthermore, this sample document should not be used without the accompanying memorandum, which must be carefully read and understood in order to properly use these materials. Footnote indicators correspond to notes listed in the memorandum.

ADVISORY AGREEMENT

Plan Sponsor:

[name]

[address]

[email address]

Plan:

[name of plan]

Investment Adviser:

Effective Date:

_____, 20__

The Plan Sponsor, as the responsible plan fiduciary¹ for the Plan (the fiduciary with authority to cause the plan to enter into the arrangement), engages the Investment Adviser (“Adviser”) to provide the services described in this Agreement.

1. Fiduciary Authority. The Plan is a participant-directed plan and the Plan Sponsor has the authority to designate investment alternatives under the Plan and the related trust, and to enter into an Agreement with third parties to assist in these and related duties. In this capacity, the Plan Sponsor (or, to the extent the Plan Sponsor has delegated its investment authority to an investment committee, the committee) is referred to as the Client.
2. Services. Adviser agrees to provide the following services (collectively, “Services”) to Client, the Plan and the Plan participants:
 - (A) Fiduciary Services: Adviser will perform the Fiduciary Services described in Appendix A.
 - (B) Non-Fiduciary Services: Adviser will perform the Non-Fiduciary Services described in Appendix B.
 - (C) Client acknowledges that Adviser has no responsibility to provide any services related to the following types of assets: employer securities; real estate (except for real estate funds and publicly traded REITs); stock brokerage accounts or mutual fund windows; participant loans; non-publicly traded partnership interests; other non-publicly traded securities or property (other than collective trusts and similar vehicles); or other hard-to-value or illiquid securities or property (collectively, “Excluded Assets”). The Excluded Assets shall be disregarded in determining the Fees payable to Adviser under this Agreement, and the Fees shall be calculated only on the remaining assets (the “Included Assets”).

3. Fees.

- (A) The compensation of the Adviser for the Services is described in Appendix C.
- (B) The Plan is obligated to pay the fees described in Appendix C. However, the Plan Sponsor, at its option, may choose to pay the fees.
- (C) Adviser does not reasonably expect to receive any other compensation, direct or indirect, for its Services under this Agreement. If Adviser receives any other compensation for such services, Adviser will (i) offset that compensation against its stated fees, and (ii) will disclose the amount of such compensation, the services rendered for such compensation and the payer of such compensation to Client pursuant to the terms of section 4(C) of this Agreement.

4. Representations of Adviser. Adviser represents as follows:

- (A) It is registered as an investment adviser under [the Investment Advisers Act of 1940 OR under the laws of the state of _____].²
- (B) In performing the Fiduciary Services, it is acting as a fiduciary of the Plan under the Employee Retirement Income Security Act ("ERISA") for purposes of providing non-discretionary investment advice only.
- (C) It will disclose, to the extent required by ERISA Regulation Section 2550.408b-2(c), to Client any change to the information in this Agreement required to be disclosed by Adviser under ERISA Regulation Section 2550.408b-2(c)(1)(iv) as soon as practicable, but no later than sixty (60) days from the date on which Adviser is informed of the change (unless such disclosure is precluded due to extraordinary circumstances beyond Adviser's control, in which case the information will be disclosed as soon as practicable).³
- (D) In accordance with ERISA Regulation Section 2550.408b-2(c)(1)(vi)(A), it will disclose within thirty (30) days following receipt of a written request of the responsible plan fiduciary or Plan Administrator (unless such disclosure is precluded due to extraordinary circumstances beyond the Adviser's control, in which case the information will be disclosed as soon as practicable) all information related to this Agreement and any compensation or fees received in connection with this Agreement that is required for the Plan to comply with the reporting and disclosure requirements of Title I of ERISA and the regulations, forms and schedules issued thereunder.⁴
- (E) If Adviser makes an unintentional error or omission in disclosing the information required under ERISA Regulation Section 2550.408b-2(c)(1)(iv) or (vi), Adviser will disclose to Client the corrected information as soon as practicable, but no later than thirty (30) days from the date on which Adviser learns of such error or omission.⁵

5. Client Acknowledgements. Client acknowledges that:

- (A) It has retained, and will exercise, final decision-making authority and responsibility for the implementation of any recommendations or advice rendered to Client by Adviser.
- (B) It is the intention of the Client not to bear any of the cost of operating the Plan (unless in its discretion, it decides to do so). Accordingly, when rendering Fiduciary Services, Adviser is hereby directed to recommend investment alternatives that will pay, directly or indirectly, amounts to or on behalf of the Plan to cover all or most of the expenses of the Plan, unless (1) it is otherwise specifically directed by the Client or (2) it is clearly imprudent to do so.⁶
- (C) In performing the Non-Fiduciary Services, Adviser is not acting as a fiduciary of the Plan as defined in ERISA.
- (D) In performing both Non-Fiduciary Services and Fiduciary Services, Adviser does not act as, nor has Adviser agreed to assume the duties of, a trustee or the Plan Administrator, as defined in ERISA, and Adviser has no discretion over the investment of Plan assets or to interpret the Plan documents, to determine eligibility or participation under the Plan, or to take any other action with respect to the management, administration or any other aspect of the Plan.
- (E) Adviser does not provide legal or tax advice.
- (F) Investments are subject to various market, political, currency, economic, and business risks, and may not always be profitable; and further that Adviser does not and cannot guarantee financial or investment results.
- (G) Adviser (i) may perform other services for other clients, (ii) may charge a different fee for other clients, and that Adviser (iii) may give advice and take action that is different for each client even where retirement plans are similar.
- (H) Adviser may, by reason of performing services for other clients, acquire confidential information. Client acknowledges and agrees that Adviser is unable to divulge to the Client or any other party, or to act upon, any such confidential information with respect to its performance of this Agreement.
- (I) Adviser is entitled to rely upon all information provided to Adviser, whether financial or otherwise, from reputable third parties or by Client, Client's representatives or third-party service providers to Client, the Plan, or the Adviser without independent verification. Client agrees to promptly notify Adviser in writing of any material change in the financial and other information provided to Adviser and to promptly provide any such additional information as may be reasonably requested by Adviser.
- (J) Adviser will not be responsible for voting (or recommending how to vote) proxies of the mutual fund shares held by the Plan (or its trust). Responsibility for voting

proxies of investments held by the Plan or its trust remain with Client (or, if applicable, the Plan participants).

6. Representations of Client. Client represents and warrants as follows:

- (A) It is the “responsible plan fiduciary” for the control and/or management of the assets of the Plan, and for the selection and monitoring of service providers for the Plan, in accordance with the requirements of ERISA. Adviser is entitled to rely upon this statement until notified in writing to the contrary.
- (B) The execution of this Agreement and the performance thereof is within the scope of authority authorized by the governing instrument of the Plan and applicable laws. The signatory on behalf of Client represents that (i) the execution of the Agreement is authorized, (ii) the signator has authority to execute the Agreement on behalf of the plan, and (iii) it will provide supporting documentation as may be reasonably required by Adviser.
- (C) Upon request, Client shall deliver to Adviser copies of the plan documents, including any and all amendments thereto, and shall provide Adviser with copies of any subsequent amendments or restatements of those documents.
- (D) The Plan and related Trust permit payment of Fees out of Plan assets. Client has determined that the Fees charged by Adviser are reasonable and, if paid out of Plan assets, are a proper obligation of the Plan.

7. Standard of Care.⁷

- (A) Adviser will perform the Fiduciary Services described in Appendix A in accordance with the prudent man rule set forth in ERISA section 404(a)(1)(B).
- (B) Adviser will perform the Non-Fiduciary Services described in Appendix B and shall not be liable for any liabilities and claims arising thereunder unless directly caused by Adviser’s intentional misconduct or gross negligence.

8. Receipt of Disclosure. Client agrees to review and consider the disclosures made by Adviser (including in this Agreement and the Form ADV Part 2), in particular the portions related to services, compensation, and potential conflicts of interest, as well as the remainder of the disclosures concerning, among other matters, background information such as educational and business history, business practices such as the types of advisory services provided, the methods of securities analysis used, and the like. Client acknowledges receipt of the this Agreement and Adviser’s Form ADV Part 2 reasonably in advance of entering into this Agreement.⁸

9. Termination. Either party may terminate this Agreement upon [thirty (30) days]⁹ prior written notice to the other party. Such termination will not, however, affect the liabilities or obligations of the parties arising from transactions initiated prior to such termination, and such liabilities and obligations (together with the provisions of sections 7 and subsection 10(G)) shall survive any expiration or termination of this Agreement. Upon the effective date of termination, Adviser will have no further obligation under this Agreement to act or advise Client with respect to Services under this Agreement.

10. Miscellaneous.

- (A) Notices. Any and all notices required or permitted under this Agreement shall be in writing and shall be sufficient in all respects if (i) delivered personally, (ii) mailed by registered or certified mail, return receipt requested and postage prepaid, (iii) sent via a nationally recognized overnight courier service to the address on the first page of this Agreement, or such other address as any party shall have designed by notice in writing to the other party, or (iv) as otherwise mutually agreed by the parties.

In addition, Client agrees to accept electronic communication of any notice, advice, disclosure, or report in lieu of a printed copy.¹⁰

Electronic Communications: Client expressly agrees to accept electronic communication of any notice, advice, or report in lieu of a printed copy, including applicable disclosure documents and disclosures required under ERISA section 408(b)(2) at the email address listed above or such other email address as Client may designate in writing to Adviser. Client may revoke this consent at any time by providing notice to Adviser pursuant to this Section 10(A).

- (B) Assignability. This Agreement is not assignable by either party hereto without the prior written consent of the other party.
- (C) Effect. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective heirs, successors, survivors, administrators and assigns.
- (D) Entire Understanding and Modification. This Agreement constitutes and contains the entire understanding between the parties and supersedes all prior oral or written statements dealing with the subject matter herein. This Agreement can be amended or modified by the written consent of the parties.
- (E) Severability. If any one or more of the provisions of this Agreement shall, for any reason, be illegal or invalid, such illegality or invalidity shall not affect any other provision of this Agreement and this Agreement shall be enforced as if such illegal or invalid provision had not been contained herein.
- (F) Applicable Law; Forum. The laws of the State of _____ shall govern this Agreement in all respects, including but not limited to the construction and enforcement thereof, unless preempted by ERISA or other federal law.¹¹
- (G) Arbitration Agreement.¹² To the extent permitted by law, all controversies between Client and Adviser, which may arise out of or relate to any of the Services provided by Adviser under this Agreement, or the construction, performance or breach of this or any other Agreement between Adviser and Client, whether entered into prior to, on or subsequent to the date hereof, shall be settled by binding arbitration in _____, _____ County, _____, under the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon any award rendered by the arbitrator(s) shall be final, and may be entered into any court having jurisdiction.

- (H) Amendment Process.¹³ The Agreement may be modified by written consent of both parties.
- (I) Waiver of Limitation. Nothing in this Agreement shall in any way constitute a waiver or limitation of any rights which Client or Plan or any other party may have under ERISA or federal or state securities laws.

This Agreement constitutes both an agreement between the parties and a disclosure statement under ERISA Regulation section 2550.408b-2. The parties have caused this Agreement to be executed by their duly authorized officers. This Agreement shall not be binding on Adviser until accepted by it, in writing, as indicated by its signature below.

Plan Sponsor:*

Adviser:¹⁴

[Adviser Firm Name]

By: _____

By: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

*The Plan Sponsor is signing this Agreement both as the employer that sponsors the Plan and as the fiduciary responsible for selecting the Plan investments and engaging its service providers.

CAUTION: This document should not be used without consultation and advice from an attorney. The provisions in this Sample Advisory Agreement, and other possible provisions that are not included, have material legal consequences. Furthermore, this sample document should not be used without the accompanying memorandum, which must be carefully read and understood in order to properly use these materials. Footnote indicators correspond to notes listed in the memorandum.

APPENDIX A

FIDUCIARY SERVICES¹⁵

The Adviser will perform the following Fiduciary Services:

- (i) Provide non-discretionary investment advice to the Client about asset classes and investment alternatives available for the Plan in accordance with the Plan's investment policies and objectives. Client shall have the final decision-making authority regarding the initial selection, retention, removal and addition of investment options.
- (ii) Assist the Client with the selection of a broad range of investment options consistent with ERISA section 404(c) and the regulations thereunder.
- (iii) Assist the Client in the development of an investment policy statement (IPS). The IPS establishes the investment policies and objectives for the Plan. Client shall have the ultimate responsibility and authority to establish such policies and objectives and to adopt and amend the investment policy statement.
- (iv) Assist in monitoring investment options by preparing periodic investment reports that document investment performance, consistency of fund management and conformance to the guidelines set forth in the IPS and make recommendations to maintain or remove and replace investment options.
- (v) Meet with Client on a periodic basis to discuss the reports and the investment recommendations.
- (vi) Provide non-discretionary investment advice to the Plan Sponsor with respect to the selection of a qualified default investment alternative ("QDIA") for participants who are automatically enrolled in the Plan or who otherwise fail to make an investment election. The Client retains the sole responsibility to provide all notices to participants required under ERISA section 404(c)(5).¹⁶

APPENDIX B

NON-FIDUCIARY SERVICES¹⁷

The Adviser will perform the following Non-Fiduciary services:

- (i) Assist in the education of the participants in the Plan about general investment principles and the investment alternatives available under the Plan. Client understands that Adviser's assistance in participant investment education shall be consistent with and within the scope of (d) (i.e., the definition of investment education) of Department of Labor Interpretive Bulletin 96-1. As such, the Adviser is not providing fiduciary advice (as defined in ERISA) to the participants. Adviser will not provide investment advice concerning the prudence of any investment option or combination of investment options for a particular participant or beneficiary under the Plan.¹⁸
- (ii) Assist in the group enrollment meetings designed to increase retirement plan participation among employees and investment and financial understanding by the employees.

Adviser may provide these services or, alternatively, may arrange for the Plan's other providers to offer these services, as agreed upon between Adviser and Client.

APPENDIX C:

FEE SCHEDULE¹⁹

- (i) Client elects and authorizes to have Fees paid as follows:

- Billed Directly to Client;
- Deducted from Plan assets

Fees are billed quarterly in advance.²⁰ Such billing period is the “Fee Period.” For purposes of determining and calculating Fees, Plan assets are based on Included Assets.

- (ii) Client authorizes the Plan recordkeeper (or other custodian of Plan assets) to remit the Fees directly to the Adviser from Plan assets; however, if Client desires, it may pay the Fees directly, rather than with Plan assets.

- (iii) The annual fee for Fiduciary Services shall be calculated as follows:²¹

[Option 1: Annual fee of _____ basis points (or _____ %) per year.]

[Option 2: Flat fee of \$_____ per year.]

[Option 3: Flat fee of \$_____ per year. This flat fee will be automatically increased _____ % on each anniversary of the effective date of this Agreement.]

- (iv) The annual fees are based on the market value of the Included Assets. The initial fee will be the amount, prorated for the number of days remaining in the initial Fee Period from the Effective Date of this Agreement, based upon the market value of the Plan assets on the first business day of the initial Fee Period and will be due on the first business day of the Fee Period. Thereafter, the fee will be based upon the market value of the Plan assets on the last business day of the previous Fee Period (without adjustment for anticipated withdrawals by Plan participants or other anticipated or scheduled transfers or distributions of assets) and will be due the following business day. If this Agreement is terminated prior to the end of a Fee Period, Adviser shall be entitled to a fee, prorated for the number of days in the Fee Period prior to the effective date of termination. Any unearned fee shall be returned by Adviser.²²

Market value of Plan assets means the value of assets as reported by the custodian or recordkeeper.²³