

408(b)(2) DELIVERY

A JOINT VENTURE OF DALBAR AND FIDUCIARYPLANREVIEW.COM ("FPR.COM")

February 2011

SUMMARY

DALBAR and FPR.com have developed a solution for broker/dealers to comply with fee disclosure regulations for 401(k) and other ERISA participant directed plans defined under ERISA 408(b)(2). (See Appendix B for Fact Sheet on 408(b)(2) Fee Disclosure)

The 408(b)(2) Delivery service combines access to data maintained by record keepers with Rep and broker/dealer records to prepare and deliver the required disclosures to plan fiduciaries. Electronic delivery is used primarily, supported by paper delivery where necessary. 408(b)(2) Delivery consists on the following four steps:

- Step 1 –Enroll and Collect ERISA Plan Data
- Step 2 –Determine 408(b)(2) Business Strategy
- Step 3 –Collect Data from Reps
- Step 4 –Electronic Delivery of Disclosure Document to Plans

The 408(b)(2) Delivery service relieves the broker/dealer of the burden of identifying all applicable ERISA plans, making adjustments for individual reps and constructing the communication and electronic delivery system required to meet the compliance requirements.

THE NEED

Effective January 1, 2012 broker/dealers are required to make certain disclosures to each ERISA plan from which it receives compensation, either directly or indirectly. This regulation, ERISA 408(b)(2) mandates that the broker/dealer:

- Identify each covered ERISA plan from which it receives compensation (Covered ERISA plans generally include all participant directed 401(k) and 403(b) plans that are subject to ERISA).
- Determine the total compensation received from each plan
- Describe the services provided to each plan for the compensation received
- State whether the broker/dealer is a fiduciary to the plan and therefore qualified to provide investment advice
- Deliver the required disclosures by January 1, 2012 to all existing covered ERISA plans
- Provide the disclosure to all new business with covered ERISA plans
- Provide notice of any changes to all affected plans.

These activities in addition to the deadline create an immediate and urgent need to define and execute a solution that will meet the requirements of 408(b)(2)

LIABILITY

Under the ERISA 408(b)(2) regulation plan fiduciaries can avoid liability by reporting any service provider (including broker/dealers) that does not supply the required disclosure.

Estimates of payments to be made to broker/dealers must be disclosed by record keepers. Such disclosures make all plan fiduciaries aware of the fact that disclosures are due from broker/dealers, even if no written agreement exists between the plan and the broker/dealer. Failure to receive required disclosures is a fiduciary breach by plan fiduciaries, unless they protect themselves by the plan fiduciary reporting the failing broker/dealer to authorities (Department of Labor, IRS and FINRA). Even if such a failure is not detected by the plan fiduciary it is certain to be uncovered by the annual audit.

This exposes the broker/dealer to the cost of legal defense and possibly of the disgorgement of past compensation and the imposition of IRS excise taxes on ERISA business. Such complaints are also reportable to FINRA. The Department of Labor provides a form letter (See Appendix C for Delinquent Service Provider Disclosure) that, after 90 days, plan fiduciaries can use to relieve their own liability by reporting covered service providers that:

- Fail to provide disclosures
- Fail to provide additional information that may be requested by the plan fiduciary
- Have inaccuracies in the required disclosures that remain uncorrected

PROGRAM DESCRIPTION

Step 1 –Enroll and Collect ERISA Plan Data

Broker/dealers enroll in the service by providing DALBAR/FPR.com with an authorization to retrieve required data concerning the applicable ERISA plans held at various record keepers. The broker/dealer also provides commission and other records of payments received from record keepers in order to validate the accuracy of the record keeper data.

FPR uses its electronic linkage to record keepers to retrieve the required records and to reconcile the data with commission and other payment records provided by the broker/dealer.

- Records are scanned electronically to obtain the most accurate data from record keepers.
- Burden on record keepers is reduced by the uniform system and single point of contact for all enrolled broker/dealers and reps.

Step 2 –Determine 408(b)(2) Business Strategy

DALBAR/FPR.com delivers a report to the broker/dealer that identifies each of its registered reps and investment adviser representatives and the associated ERISA plans.

Using this report, the broker/dealer's policy and the regulatory requirements DALBAR/FPR.com works with the broker/dealer to identify which reps will be identified as "fiduciaries" and which will not.

Plans that do not have a fiduciary rep may be offered an independent fiduciary such as FPR.com to protect the broker/dealer being considered a functional fiduciary.

- Broker/dealer controls the disclosure content, format, description of services and fiduciary status of each rep.
- Broker/dealer receives details of every plan. These details can be used to update internal books and records.

Step 3 –Collect Data from Reps

A DALBAR model 408(b)(2) disclosure (See Appendix A for DALBAR Advisor Fee Disclosure Template) and a list of affected plans will be sent to each affected rep for verification and any necessary amendments made. Amendments include outside business activity which must be included in the 408(b)(2) disclosures. These changes are reviewed by the broker/dealer.

- Details of outside business activity and any exceptions are captured and the rep’s records can be updated.
- Broker/dealer controls what is reported to plan fiduciaries.

Step 4 –Electronic Delivery of Disclosure Document to Plans

Disclosures are amended as needed and 408(b)(2) disclosures prepared and delivered to plan fiduciaries.

- Exposure to defending the broker/dealer from complaints and regulatory action is materially reduced.

TIMETABLE (2011)

	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec
Step 1	Enrollment									
		Collect and validate data								
Step 2			Issue broker/dealer reports							
				Decide on strategy						
Step 3						Collect data from reps				
Step 4								Deliver disclosures		

COST

There is an enrollment fee of \$10,000 plus a per/plan cost of \$100 plus 1 bp (volume pricing is available). The enrollment fee is payable at the time of enrollment and the per/plan fee is payable at the start of Step 3, above. Expenses incurred for hard copy mailing (if or when necessary) will be billed separately.

The alternative for broker/dealers is to develop an in-house solution, requiring the expertise, administration and overhead that is likely to cost significantly more than the fees offered here. Additionally, an in-house solution may be more difficult to defend than a “standard” that will emerge from enrolling in the DALBAR/FPR.com Delivery service.

ONGOING REQUIREMENTS

Broker/dealers are required to make 408(b)(2) disclosures to affected plans if there is a material change in either compensation, services provided or fiduciary status. Disclosures are also required for all new clients.

Enrollment in the 408(b)(2) Delivery provides broker/dealer firms with the data and reports that can be used to meet the ongoing requirements internally. Firms may also elect to participate in the Ongoing 408(b)(2) Delivery provided by DALBAR/FPR.com. The cost of the ongoing service will depend on the actual volume of changes and new business volume.

ABOUT DALBAR

DALBAR, Inc. is the financial community's leading independent expert for evaluating, auditing and rating business practices, customer performance, product quality and service. Launched in 1976, DALBAR has earned the recognition for consistent and unbiased evaluations of investment companies, registered investment advisers, insurance companies, broker/dealers, retirement plan providers and financial professionals. DALBAR awards are recognized as marks of excellence in the financial community.

www.DALBAR.com

ABOUT FIDUCIARYPLANREVIEW.COM

FPR.com is an independent fiduciary for ERISA plans providing highly automated investment selection and monitoring through access to record keeping system data. FPR.com assumes the investment management risk and relieves the plan sponsor, broker/dealer and their representatives from fiduciary responsibility under ERISA Sec 3(38). FPR.com complements and maintains the Advisor's valuable client relationship by meeting the plan's fiduciary duties with a minimum interference.

www.FiduciaryPlanReview.com

Appendix A

DALBAR Advisor Fee Disclosure Template

Advisor Fee Disclosure Template

Model Disclosure Draft #3

January, 2010



Federal Reserve Plaza
600 Atlantic Ave, FL 30
Boston, MA 02210
617.723.6400
www.dalbar.com

[Advisor Name]

[Firm Name]

[Address, etc.]

Report of Fees and Expenses

For [Plan Sponsor Name]

(Date)

Introduction

This report is designed to help you to better understand the services provided by [Firm] and the associated costs to you and your employees in your retirement plan. In order to achieve this goal the cost components are first presented, showing how the costs are paid. The specific services provided for those costs are shown followed by required disclosures.

Regulatory Requirements

In response to the need for improved clarity about the fees and expenses the United States Department of Labor ("DoL") has introduced the requirement¹ for certain service providers that receive more than \$1,000 to make explicit disclosures to certain retirement plans that they service. These disclosures begin on July 16, 2011.

The DoL requires that the disclosure contain four essential elements:

- ✓ Who the service provider is
- ✓ A description of the services provided
- ✓ A declaration of the fiduciary status of the provider
- ✓ The fee or expense charged by the provider

What This Report Contains

(Description of what is included and what is not.)

Report sections are:

- Summary of Fee and Expense Estimate
- Explanation of Services Rendered
- Disclosures: Important facts to understand about business relationships among service providers
- Appendix: Fact Sheet from the DoL that outlines the regulatory requirements.

¹ See DoL 408(b)(2) fee disclosure requirements in Appendix

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Summary of Fee and Expense Estimates

Estimates presented are based on expenditures and activity in [year] and on the following:

- o Plan Assets at xx/xx/xxxx \$99,999,999
- o Number of participants 99,999

Annual Estimate reflects to total fees and expenses paid to [Firm Name].

[Firm Name] acts in a fiduciary capacity and accepts the responsibility for the advice provided to the plan and employees that elect to use my services. As a fiduciary, I will act in the best interest of these employees and their beneficiaries.

-or-

[Firm Name] provides services to the plan and employees but does not act in a fiduciary capacity. Services provided are not fiduciary in nature as defined by ERISA rules and regulations.

Service categories listed here are described in greater detail in the next section, *Explanation of Services*.

Category of Service	Paid By	Annual Estimate
<u>Net Cost of Selection & Monitoring of Service Providers:</u>		
1.1 Investment selection and monitoring	Record Keeper	\$99,999
1.3 Selection and monitoring of record keeper	Employer	\$99,999
<u>Net Cost of Services to Participants:</u>		
3.1 Manage participant accounts	Participant	\$99,999
3.2 Participant communications	Record Keeper	\$99,999
<u>Net Cost of Management of Plan Investments:</u>		
4.1 Management of plan investments	Plan	\$99,999
-Total Annual Net Cost Estimate		\$999,999
-Total Annual Estimate (as a percent of plan assets)		x.xx%
Estimated Net Annual Cost per Participant		<u>\$9,999</u>

Explanation of Services

SERVICE CATEGORY	WHAT IS INCLUDED	PROVIDED	EXPLANATION/COMMENT
Selection and Monitoring of Service Providers			
1.1 Investment selection and monitoring	Define the client's investment-related goals and objectives for this plan vis a vis other benefit programs and participant demographics.		
	Design overall structure of investment offering to possibly include: <ul style="list-style-type: none"> - Core Menu Offerings/Asset Classes - Auto Diversified Offerings - Self-Directed Brokerage or Mutual Fund Window - Lifetime Income Option 		
	Review QDIA investment alternatives and the rules for placing participants in the appropriate QDIA and the auditing of whether participants are placed in the correct options.		
	Define the client's objectives with respect to company stock including the rules/issues associated with company stock		
	Prepare and maintain the client's Investment Policy Statement ("IPS") including the mapping or replacement of new investment options consistent with PPA rules		
	Conduct due diligence and implement structure of investment options (e.g. passive versus active, single manager versus multi-manager, mutual fund versus collective trust, etc).		
	Prepare periodic investment reports		
	Search for new investment managers including whether the replaced investment option will be mapped or retained		

SERVICE CATEGORY	WHAT IS INCLUDED	PROVIDED	EXPLANATION/COMMENT
1.3 Selection and monitoring of record keeper	Evaluate the service provider on a regular basis to measure compliance with service level agreements and assist with necessary corrective action		
	Provide client with full fee disclosure reporting to promote the fiduciary duty of fee reasonableness		
	Benchmark fees, services, support and success measures to promote the fiduciary duty of fee reasonableness		
	Assist fiduciary in the applicability and specific use of ERISA spending accounts (also known as Plan Expense Reimbursement accounts)		
	Prepare Request for Information (RFP), send to the appropriate service providers, analyze submitted results and possibly interview candidates		
	Review, advise and assist with the negotiation of the service agreement with the current or new service provider		
	Assist in the process of converting the plan to the newly selected providers and act as the liaison between former and newly appointed provider		
Services to Participants & Beneficiaries			
3.1 Management of participant investments	Provide participant advice that is consistent with the DOL's guidance on unbiased advice (i.e. level fee method or computer model)		
3.2 Participant communications	Evaluate and determine the educational needs of the plan participants and establish educational goals/metrics		
	Conduct enrollment, investment education and other education meetings		
	Assist participants with respect issues related to their defined contribution plan or any other financial matters		
	Provide phone support or email support to participants wishing to understand the actions they should take with regards to their 401(k) plan or other financial matters		
	Provide financial planning services to participants that is broader than advice on		

SERVICE CATEGORY	WHAT IS INCLUDED	PROVIDED	EXPLANATION/COMMENT
	the 401(k) plan		
	Provide newsletters to participants wishing to understand the actions they should take with regards to their 401(k) plan		
	Review plan's success in meeting participants needs and retirement goals and make recommendations for changes		
Management of Plan Investments			
4.1 Management of plan investments	Develop and maintain model portfolios for certain investment options		

Disclosures

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Appendix B

Fact Sheet on 408(b)(2) Fee Disclosure

Fact Sheet



U.S. Department of Labor
Employee Benefits Security Administration
July 15, 2010

Interim Final Regulation Relating to Improved Fee Disclosure for Pension Plans

The Employee Retirement Income Security Act (ERISA) requires plan fiduciaries, when selecting and monitoring service providers and plan investments, to act prudently and solely in the interest of the plan's participants and beneficiaries. Responsible plan fiduciaries also must ensure that arrangements with their service providers are "reasonable" and that only "reasonable" compensation is paid for services. Fundamental to the ability of fiduciaries to discharge these obligations is obtaining information sufficient to enable them to make informed decisions about the services, the costs, and the service providers.

This interim final rule represents a significant step toward ensuring that pension plan fiduciaries are provided the information they need to assess both the reasonableness of the compensation to be paid for plan services and potential conflicts of interest that may affect the performance of those services.

Background

- ▶ The Employee Benefits Security Administration (EBSA) is responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I of the ERISA.
- ▶ The agency oversees approximately 708,000 private pension plans, including 483,000 participant-directed individual account plans such as 401(k)-type plans.
- ▶ In recent years, the way services are provided to employee benefit plans and the way service providers are compensated (e.g., through revenue sharing and other arrangements) have become increasingly complex.
- ▶ Many of these changes may have improved efficiency and reduced the costs of administrative services and benefits for plans and their participants. However, the complexity resulting from these changes also has made it more difficult for many plan sponsors and fiduciaries to understand how and how much service providers are compensated.
- ▶ Although the Department has issued considerable guidance relating to the obligations of plan fiduciaries in selecting and monitoring service providers, this interim final rule establishes, for the first time, a specific disclosure obligation for plan service providers – a disclosure obligation designed to ensure that ERISA plan fiduciaries are provided the information they need to make better decisions when selecting and monitoring service providers for their plans.
- ▶ The Department published a notice of proposed rulemaking and related class exemption in December 2007 and held a public hearing on March 31 and April 1, 2008.

Overview of Interim Final Service Provider Disclosure Regulation

- ▶ The interim final regulation applies only to defined contribution and defined benefit pension plans and focuses on the disclosure of the direct and indirect compensation certain service providers receive.
- ▶ The interim final regulation applies to plan service providers that expect to receive at least \$1,000 in compensation in connection with their services and that provide:
 - ▲ certain fiduciary or registered investment advisory services;
 - ▲ recordkeeping or brokerage services to a participant-directed individual account plan in connection with the investment options made available under the plan; or

- ▶ certain other services for which indirect compensation is received.
- ▶ The rule focuses on service providers and compensation arrangements that are most likely to raise questions for plan fiduciaries with respect to the amount of compensation being received by a service provider for plan-related services and potential conflicts of interests that might compromise the quality of those services.
- ▶ The interim final regulation also includes a class exemption from the prohibited transaction provisions of ERISA for a plan fiduciary who enters into a contract without knowing that the service provider has failed to comply with its disclosure obligations.

Disclosure Requirements

Disclosure of Services and Compensation

- ▶ Information required to be disclosed by plan service providers must be furnished in writing to the plan fiduciary. The rule does not require a formal written contract delineating the disclosure obligations.
- ▶ Information that must be disclosed includes a description of the services to be provided and all direct and indirect compensation to be received by the service provider, its affiliates or subcontractors. Direct compensation is compensation received directly from the plan. Indirect compensation generally is compensation received from any source other than the plan sponsor, the covered service provider, an affiliate, or subcontractor.
- ▶ Because certain services and costs are so significant or present the potential for conflicts of interest, information concerning those services and costs must be disclosed without regard to whether services are furnished as part of a bundle or package. For example, service providers must disclose whether they are providing recordkeeping services and the compensation attributable to such services, even when no explicit charge for recordkeeping is identified as part of the service contract.
- ▶ Service providers must disclose whether they are providing any services as a fiduciary to the plan.
- ▶ Information also must be disclosed about plan investments and investment options. These disclosure obligations are placed on the fiduciaries to investment vehicles that hold plan assets and on recordkeepers and brokers who, through a platform or other mechanism, facilitate the investment in various options by participants in individual account plans, such as 401(k) plans.

Ongoing Disclosure Obligations

- ▶ Changes: A service provider generally must disclose a change to the initial information required to be disclosed as soon as practicable, but no later than 60 days from the date on which the covered service provider is informed of such change.
- ▶ Reporting and Disclosure Requirements: Service providers also must, upon request, disclose compensation or other information related to their service arrangements that is requested by the responsible plan fiduciary or plan administrator in order to comply with ERISA's reporting and disclosure requirements.

Benefits of Interim Final Regulation

- ▶ The Department estimates that the rule will be economically significant. The non-discounted costs for the first year are estimated to be approximately \$153 million.
- ▶ The first year costs are attributable to reviewing and analyzing the regulation, conducting a compliance review to ensure that service providers comply with the regulation, and preparing any new disclosures required by the regulation. Costs in the second and subsequent years are expected to fall to an estimated \$37 million.
- ▶ The Department estimates that benefits would result from reduced time and cost for fiduciaries to obtain compensation information needed to fulfill their fiduciary duties, the discouragement of

harmful conflicts of interest, reduced information gaps, improved decision-making by fiduciaries about plan services, enhanced value for plan participants, and increased ability to redress abuses committed by service providers.

Public Notice and Comment on the Interim Final Regulation

The interim final regulation will be published in the Federal Register on July 16, 2010. The Department invites public comments from interested persons on the regulation by August 30, 2010, and specifically requests input on the feasibility and cost effectiveness of requiring plan service providers furnish to plan fiduciaries a summary disclosure statement as part of the regulation. Public comments can be submitted electronically by email to e-ORI@dol.gov or by using the Federal eRulemaking portal at www.regulations.gov. Persons interested in submitting comments on paper should send or deliver their comments to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210, Attention: 408(b)(2) Interim Final Rule. All comments will be available to the public, without charge, online at www.regulations.gov and www.dol.gov/ebsa, and at the EBSA Public Disclosure Room.

Effective Date

The final regulation is effective for contracts or arrangements between plans and service providers as of July 16, 2011.

Contact Information

For questions about the regulation, contact EBSA's Office of Regulations and Interpretations at (202) 693-8500.

Appendix C

Delinquent Service Provider Disclosure

Sample Notice – Delinquent Service Provider Disclosure

[Date of Notice]

Delinquent Service Provider Disclosure Coordinator,
Office of Enforcement
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W., Suite 600
Washington, DC 20210

Re: [Plan Name]
[Sponsor EIN/Plan number]
[Plan sponsor's name; address]

Delinquent Service Provider Disclosure Coordinator:

The employee benefit plan referred to above has entered into a contract or arrangement for the provision of services with the following service provider:

[Name of covered service provider]
[Address of covered service provider]
[EIN of covered service provider, if known]
[Contact person for covered service provider]
[Telephone Number of contact person]

This matter relates to the following services provided to the plan by the service provider:

[Brief description of services provided to plan by covered service provider]

I am the responsible plan fiduciary to whom disclosures must be made pursuant to 29 CFR § 2550.408b-2(c)(1). I have determined that the plan has not received the following information from the service provider as of [INSERT DATE]:

[Brief description of information the covered service provider failed or refused to disclose or furnish]

I requested in writing such missing information from the service provider on [INSERT DATE]. As of the date of this letter, the service provider has not submitted the information pursuant to my request.

I acknowledge that I have 30 days following the earlier of the covered service provider's refusal to furnish the requested information or the date which is 90 days after the date of my written request to the service provider to file this notice with the Department in order

to fulfill the requirements of paragraph (c)(1)(v) under the Department's regulations at 29 CFR § 2550.408b-2(c)(1).

The covered service provider [chose one]: continues to provide services under the contract or arrangement or was terminated.

Finally, we have the following additional comments/information relating to this matter:

[Comments/information]

I declare that I have examined this notice and to the best of my knowledge and belief, it is true, correct and complete.

[Signature]

[Title of person signing on behalf of subject plan = i.e., "responsible plan fiduciary"]

[Address, e-mail address, and telephone number]

[Plan sponsor's name, address and telephone number]

Appendix D

DALBAR Standard Service Agreement

DALBAR PURCHASE AGREEMENT

Agreement Number: _____

This Purchase Agreement (Agreement) is entered into on _____
("Effective Date") by and between

_____ (Company), a
_____ (State of Incorporation) corporation located at
_____ (Address)

_____ (City) _____ (State) _____ (Zip)
("Customer"), and DALBAR, Inc., a Massachusetts corporation located at Federal Reserve Plaza, 600 Atlantic Avenue, Boston, Massachusetts 02210 ("DALBAR") and sets out the terms between the two parties as follows:

RECITALS

Whereas, DALBAR has developed and maintains information, owns technology and processes and has experience and expertise in ERISA Services (Product Line) and

Whereas, DALBAR desires to sell certain deliverables consisting of:

certain services described in Attachment A and known as
408(b)(2) Delivery ("Services")

collectively known as the "Offer" to Customer and

Whereas, Customer desires to accept the Offer with the purpose of meeting ERISA compliance requirements ("Goal");

Now, therefore, in consideration of the mutual covenants and promises contained herein and for other good and valuable consideration the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE 1. -PURCHASE

1.1 Deliverables

1.1.1 DALBAR will use the information, technology, processes and expertise it owns to develop and deliver the Offer to Customer for Customer's private use as described in Attachment A.

1.1.2 Customer will pay fees under the following arrangement:

Fixed Fee Arrangement, in which the Offer is made exclusively to Customer and Customer pays the fee described in Attachment A in advance, is entitled to approve a "Scope of Work" that is prepared at the start of the engagement after which cannot be altered, and may change at its discretion to an Open Ended Arrangement;

- 1.1.2 DALBAR will provide answers and explanations of the content of Offer via telephone, e-mail or in writing for 60 days after each component of Offer is delivered.
- 1.1.3 Offer described in Attachment A is subject to change by DALBAR and Customer has the right to terminate this Agreement with refunds as described in Article 5, if Customer finds changes made to Attachment A to be unacceptable.
- 1.1.4 Customer will provide the information or resources described in Attachment A, under the heading “Prerequisites”, if any exist.

1.2 Term

- 1.2.1 This agreement commences on the Effective Date and expires 60 days after delivery of the Offer unless terminated earlier under the provisions of Article 5.

1.3 Delivery

- 1.3.1 Offer may be delivered on paper, in electronic form or a combination of the two that is mutually agreed to by Customer and DALBAR.
- 1.3.2 Offer is delivered when mailed by DALBAR or in the case of electronic documents, when Customer is notified of the availability on the Internet or as an e-mail attachment.
- 1.3.3 Customer may ask questions or request explanations about the contents of Offer at time of delivery of Reports and for a period of 60 days thereafter.

ARTICLE 2 -PAYMENT

2.1 Invoicing

- 2.1.1 For Fixed Fee Arrangements, DALBAR will issue an invoice or charge a credit or debit card for the total fee upon acceptance of this Agreement.
- 2.1.3 Travel or other expenses are invoiced separately after they are incurred.

2.2 Terms

- 2.2.1 Customer will make payment to DALBAR of the amount invoiced within 30 days of issuance of the invoice.

ARTICLE 3 -OWNERSHIP AND USE

3.1 Proprietary Information

- 3.1.1 The information, technology, processes and intellectual property owned by DALBAR and used in Offer are the property of DALBAR with the exception of information provided by Customer that is described in Article 4.

3.2 Use of Information

- 3.2.1 DALBAR grants Customer the right to use contents of Offer for its own internal purposes and Customer agrees to maintain the confidentiality of the information contained in the Offer unless there is explicit permission from DALBAR to release certain specific information (“Rights”).
- 3.2.2 Neither party shall use the name of the other party, nor the nature of the relationship between the parties, nor any information about the contents of this Agreement, for publicity, marketing or other purposes without the express written consent of said other party prior to such use.

3.3 Representations

- 3.3.1 DALBAR represents and warrants as follows: (a) DALBAR has the right and authority to enter into this Agreement without receiving the consent or approval of any other person or organization, and this Agreement shall be binding upon and fully enforceable against DALBAR; (b) Customer’s use of the contents of Offer and exercise of the Rights shall not infringe any confidential relationships, copyright, patent, trademark or service mark right, trade dress right, artistic and moral rights, trade secret right, character right, right of publicity, privacy right, or any other proprietary right of any other person or organization; and (c) no person or organization has any reversionary rights in the Offer or the Rights.
- 3.3.2 DALBAR further represents and warrants that this Agreement will not conflict with or violate any commitment, agreement, or understanding DALBAR has or will have to or with any other person or entity.
- 3.3.3 Customer represents and warrants that it has the right and authority to enter into this Agreement without receiving the consent or approval of any other person or organization, and this Agreement shall be binding upon and fully enforceable against the Customer.

ARTICLE 4 -CONFIDENTIALITY

4.1 Confidential Information

- 4.1.1 For the purposes of this Agreement, the term “Confidential Information” means non-public information about the disclosing party’s business or activities that is proprietary and confidential, which shall include, without limitation, all business, financial, technical and other information of a party marked or designated “confidential” or by its nature or the circumstances surrounding its disclosure, should reasonably be regarded as confidential. Confidential Information includes not only written or other tangible information, but also information transferred orally, visually, electronically or by any other means.
- 4.1.2 Confidential Information will not include information that (i) is in or enters the public domain without breach of this Agreement, (ii) the receiving party lawfully receives from a third party without restriction on disclosure and without breach of a nondisclosure obligation, (iii) the receiving party can establish that it knew prior to receiving such information from the disclosing party.

- 4.1.3 “Trade Secret” means any information provided or obtained from one party to the other party without regard to form, which: (a) derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, other persons who can obtain economic value from its disclosure or use, and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- 4.1.4 The restrictions set forth herein shall continue (i) with respect to the Trade Secrets and any Confidential Information which is Trade Secret, for as long as such information continues to be a Trade Secret under applicable law, and (ii) with respect to Confidential Information, for a period of five (5) years from the date of expiration or termination of this Agreement.

4.2 Non-Disclosure

- 4.2.1 Each party agrees (i) that it will not disclose to any third party or use any Confidential Information or Trade Secrets (together “Proprietary Information”) disclosed to it by the other except as expressly permitted in this Agreement and (ii) that it will take all reasonable measures to maintain the confidentiality of all Proprietary Information of the other party in its possession or control, which will in no event will be less than the measures it uses to maintain the confidentiality of its own information of similar importance.
- 4.2.2 Notwithstanding the foregoing, each party may disclose Proprietary Information (i) to the extent required by a court of competent jurisdiction or other governmental authority or otherwise as required by law or (ii) on a “need-to-know” basis under an obligation of confidentiality to its contractors, legal counsel, accountants and advisors.
- 4.2.3 Except as set forth elsewhere in this Agreement, the terms and conditions of the Agreement will be deemed to be the Confidential Information of each party and will not be disclosed without the prior written consent of the other party.
- 4.2.4 Each party acknowledges that Proprietary Information owned by the other party shall remain the exclusive property of same, and constitutes valuable trade secrets of same, and that the unauthorized disclosure or use of such Proprietary Information shall cause irreparable harm to the owner. In no event shall one party be deemed by virtue hereof to have acquired any right or interest by license or otherwise in or to the Proprietary Information of the other.

ARTICLE 5 - TERMINATION

5.1 Termination by Customer

- 5.1.1 By providing DALBAR 30 days notice, Customer may terminate this agreement before its expiration for any of the following reasons: (i) Subsequent change(s) to Offer in Attachment A that are unacceptable to Customer; (ii) The Offer that is delivered does not meet the Goal described in this Agreement; (iii) DALBAR notifies Customer of intent to assign this Agreement to another party and Customer objects to assignment.

- 5.1.2 Notice of termination is provided through written or electronic communication to DALBAR, specifying the number assigned to this agreement and the reason for termination and include a duly signed statement that Customer agrees to make no further use of the Proprietary Information or Reports or Products that were received. Concurrent with the notice of termination Customer will return all copies of Proprietary Information owned by DALBAR, Reports, Products and associated materials to DALBAR.
- 5.1.3 Upon receipt of notice of termination and all copies of Proprietary Information owned by DALBAR, Reports, Products and associated materials, DALBAR will refund to Customer the portion of payments made in advance for Reports or Products that are not returned. Payment will be made on receipt of all copies of Proprietary Information, Reports and Products.

5.2 Termination by DALBAR

- 5.2.1 By providing customer 30 days notice, DALBAR may terminate this Agreement before its expiration for any of the following reasons: (i) DALBAR desires to make change(s) to the Product Description in Attachment A that are objected to by Customer; (ii) In DALBAR's best judgment, the Offer will not meet the Goal described in this Agreement; (iii) Customer notifies DALBAR of intent to assign this Agreement to another party and DALBAR objects to assignment.
- 5.2.2 Notice of termination is provided through written or electronic communication to Customer, specifying the number assigned to this agreement and the reason for termination. Concurrent with the notice of termination DALBAR will return all copies of Proprietary Information owned by Customer, Reports and associated materials to Customer.
- 5.2.3 Upon receipt of confirmation of termination from Customer, DALBAR will refund to Customer the unused portion of payments made in advance for Reports or Products.

5.3 Notices

- 5.3.1 Notices, certificates or other communication sent or given under this Agreement shall be in writing and may be served electronically, by personal delivery, facsimile, or by postage prepaid, registered or certified mail, to the respective parties at their respective last known mail addresses or to such other addresses as they may designate by written notice in the prescribed manner.
- 5.3.2 Notices given by mail shall be effective three (3) days after date of mailing; notices given electronically or by facsimile during normal working hours (8:00 a.m. to 5:00 p.m. EST) shall be effective on date of sending but otherwise shall be effective as of the next business day.

5.4 Termination of Rights

- 5.4.1 All Rights to use Reports and Proprietary Information granted to Customer in this Agreement, for which payment is not made by Customer or payment is refunded to Customer, are revoked upon termination of this Agreement.

5.5 Surviving Terms

- 5.5.1 The termination or expiration of this Agreement for any reason shall not affect any provisions of this Agreement which, by their nature, would reasonably be expected or intended to survive termination, including, without limitation, provisions relating to the parties' respective trade secret and other intellectual property rights.

ARTICLE 6 -OTHER TERMS AND CONDITIONS

6.1 Indemnification

- 6.1.1 DALBAR shall indemnify and hold harmless Customer, its subsidiaries, their officers, directors, agents and employees from any claims for loss, cost, costs of defense, damage, expense or liability by reason of bodily injury (including death) or tangible property damage arising out of, as a result of, or in connection with, DALBAR's performance under this Agreement or the negligent actions or omissions or willful wrongdoing of DALBAR, provided that Customer gives DALBAR prompt written notice of such claims and full information, reasonable assistance and cooperation for the defense or settlement of such claims.
- 6.1.2 Customer shall indemnify and hold harmless DALBAR, its subsidiaries, their officers, directors, agents and employees from any claims for loss, cost, damage, expense or liability by reason of bodily injury (including death) or tangible property damage arising out of, as a result of, or in connection with, Customer's performance under this Agreement or the negligent actions or omissions or willful wrongdoing of Customer, provided that DALBAR gives Customer prompt written notice of such claims and full information, reasonable assistance and authority for the defense or settlement of such claims.

6.2 Limitation of Liability

- 6.2.1 In no event shall either party be liable for special, indirect or, consequential damages in connection with or arising out of the furnishing, performance or use of the Reports provided hereunder.

6.3 Assignment

- 6.3.1 This Agreement shall inure to the benefit of and be binding upon the parties hereto and their successors, assigns and legal representatives; provided, however, that neither party shall have the right to assign any rights hereunder without notifying the other party and permitting that party to terminate the Agreement as described in Article 5.
- 6.3.2 Notwithstanding the preceding, however, upon written notice to the other party, either party may assign this Agreement or any rights, duties or obligations hereunder to a corporation controlling, controlled by, or under common control with, said party.

6.4 Complete Agreement

- 6.4.1 This Agreement is the exclusive statement of the agreement between the parties with respect to its subject matter and as of the date on which it becomes effective supersedes all prior agreements, negotiations, representations, and proposals, written or oral, relating to its subject matter.
- 6.4.2 No provision of this Agreement may be changed or modified except by an agreement in writing signed by both parties.

6.5 General

- 6.5.1 This Agreement shall be governed by, subject to, and construed in accordance with, the laws of the Commonwealth of Massachusetts.
- 6.5.2 Any and all disputes between the parties relating to this Agreement that are not resolved by reasonable efforts between the parties will be resolved through arbitration pursuant to the Commercial Arbitration Rules then in effect of the American Arbitration Association. All costs and expenses for such arbitration will be shared equally.
- 6.5.3 The waiver of any breach or default hereof at any time or times shall not constitute the waiver of any subsequent breach or default.
- 6.5.4 Headings included in this Agreement are for convenience only and are not to be used to interpret the agreement between the parties.
- 6.5.5 The signatories to this Agreement warrant that they are authorized by their respective parties to execute this Agreement on behalf of their respective parties.
- 6.5.6 This Agreement may be signed in counterparts which, when signed, shall constitute one document. This Agreement may be executed and delivered electronically or by facsimile and the parties agree that such electronic or facsimile execution and delivery will have the same force and effect as delivery of an original document with original signatures, and that each party may use such electronic or facsimile signatures as evidence of the execution and delivery of this Agreement by all parties to the same extent that an original signature could be used.
- 6.5.7 In witness whereof, the parties have caused this Agreement to be duly executed and delivered as of the day and year first above written.

Agreed to and accepted by Customer:

Name of Customer

Signer's Name

Signature

Title

Date

Agreed to and accepted by DALBAR:

DALBAR, Inc.

Signer's Name

Signature

Date

ATTACHMENT A

SEE 408(b)(2) DELIVERY PROPOSAL.