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Via Email: e-ORI@dol.gov

Office of Regulations and Interpretations,
Employee Benefits Security Administration,
Room N-5655,
U.S. Department of Labor,
200 Constitution Avenue NW,
Washington, DC, 20210
Attention: RIN 1210-AB08; 408(b)(2) Guide

Subject: Comment on Amendment Relating to Reasonable Contract or Arrangement under Section 408(b)(2) – Fee Disclosure

Dear Ladies and Gentlemen:

Wells Fargo (“WF”) appreciates the opportunity to comment on the amendment relating to reasonable contract or arrangement under section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) published on March 12, 2014 (commonly referred to as “Fee Disclosure”), which would require that certain service providers to pension plans disclose information via a summary guide about the service providers’ compensation and potential conflicts of interest. WF includes Wells Fargo Retirement, a division of Wells Fargo Bank, N.A., a leading provider of retirement solutions to businesses, institutions and individuals throughout the United States.

Wells Fargo Retirement (“WFR”) is among the top ten national leaders in providing total retirement management, investments and trust and custody solutions tailored to over 8,000 institutional retirement plans. Since 1952, WFR has serviced the entire scope of institutional retirement clients – from single- participant 401(k) plans to complex billion-dollar defined contribution plans for America’s Fortune 500 companies. WFR has been on the forefront of offering comprehensive and effective disclosure of service provider fee information to plan sponsors. As a service provide to thousands of retirement plans, WFR supports simple, fair and complete fee disclosures.

WF commends the Department of Labor (the “Department”) for providing guidance to facilitate the free flow of information between service providers and plan fiduciaries. WF strongly supports transparency in plan service arrangements, as we believe it critical that plan fiduciaries have the opportunity to evaluate reasonableness of the compensation being paid to various service providers. However, we believe certain issues may arise in trying to implement the Department’s proposal, and have submitted comments to address those issues.

Together we’ll go far



Clarify when a Guide is Required

Under the proposed regulation, a guide would not be required if the disclosures are contained in a single, concise document. As part of the WFR offering, we currently provide our plan sponsors with what we believe is a single, concise fee disclosure, which includes the elements noted in the proposed regulation. However, since the Department has not provided clear guidance on the level of detail required in the disclosures,¹ providers typically referred to documents such as service contracts, fee schedules, and prospectuses and similar investment disclosures, in addition to the disclosure document. Given the lack of guidance on the level of detail required and the fact that a failure to adequately disclose the services provided could be viewed as a prohibited transaction, service providers unsurprisingly will cross-reference documents with detailed (and lengthy) descriptions to avoid the risk, even with a (presumably) adequate description in a disclosure itself. The Department should specifically allow such cross references to continue when service providers have made a good-faith attempt to describe the services provided (or other requirement in the regulation) without adding a requirement of a guide in such situations. A requirement to include a guide would merely add an additional expense to the process of providing the disclosures, and would often be passed through to participants as an additional cost of providing services.

In certain circumstances, cross referencing other documents previously provided avoids what would otherwise be a duplication in the single document disclosure. Moreover, such duplicative disclosure could make the document exceed the size limits the Department is contemplating. For example, if a bundled retirement plan service provider offers collective trust funds as investment options, the service provider may briefly describe in the single document that it or an affiliate may provide trustee and/or investment management services for the collective fund. However, it would be duplicative to insert a long narrative of such services when they are already contained in the disclosure document² utilized by the collective fund. Again, because the provider risks a prohibited transaction if the brief description were later found to be insufficient, the provider will want to cross reference the collective fund disclosure document for added comfort. If the provider were required to determine page numbers or section references for each such collective fund assembling a guide (each of which may vary as to the pages/sections where services are described or how they are referred to), just in case the concise, single document were judged insufficient, the process would be time consuming and costly, again increasing the cost of services to plans and their participants.

A similar issue may involve fees that are summarized in a single disclosure document, but discussed in more detail in the actual contract or fee schedule signed between the parties. Because of the lack of guidance as to exactly how much of a description is required for such items, the Department should allow service providers to continue cross referencing other documents when the single disclosure document has a good faith description of the particular item required by the regulation, and not require a “guide” in such situations.

¹ See 77 FR 5636, where the Department declined to include additional standards for the description of services in response to requests to define the level of detail necessary for a description of services.

² While a collective fund disclosure document will generally contain the provisions required under the 408(b)(2) fee disclosure regulation, it also usually contains additional provisions similar to prospectuses subject to the security laws.

Whether More Disclosures are Required

The Department anticipates that the guide requirement will be “especially beneficial to fiduciaries of small and medium-sized plans”; however, the Department has not provided an adequate rationale for this assumption as several industry groups have called into question the objectivity of the focus groups utilized to make such a determination³. While WF strongly supports transparency in plan service arrangements, with over 8,000 institutional retirement plans, it has been our experience, based on our plan sponsor clients’ feedback that the initial disclosure has been found to be a highly effective method of monitoring their plans’ overall costs and evaluating whether those costs are reasonable. Where the initial disclosures can be appropriately provided in a straightforward form, a guide would merely increase costs without a corresponding benefit. At this point in time, we believe that it is premature and imprudent to propose more disclosures without the Department first identifying and determining whether any changes are needed through the customary investigatory process.

Length and Format

The Department requested comments on the page length criterion, including page format and font size and other constraints to prevent manipulation of that criterion. While the approach is conceptually simple, complexities would arise in its execution. For example, different types of service providers will have different levels of detail in disclosures. A service provider providing investment management only services will have shorter disclosures than a bundled service provider for a 401(k) plan with 100,000+ participants. Accordingly, what is lengthy and complex for the former may not be seen as such for the latter. As an organization that supports simple, fair and complete fee disclosure, we believe the best solution is to ensure that the covered service providers are available to discuss fees with their clients. A dialogue rather than a guide would be the best solution to plan fiduciaries obtaining answers as needed. Therefore, the Department should consider allowing plan fiduciaries to request additional information or a guide to the disclosures if such fiduciaries feel the disclosures are too complex for them to analyze effectively. Such an approach would better accommodate the wide variety in services provided to retirement plans than an inflexible rule on page length applied to all service providers.

Alternative Locators

The Department requested comments regarding whether a “document and page locator” and/or “sufficiently specific” locator should be allowed if the Department proceeds with requiring a guide. We believe the use of the “sufficiently specific” locator should be available for a variety of reasons. First, many service providers have labeled their disclosures into sections already, but which pages such sections fall on may well depend on the services selected by the fiduciary, the number of investment options offered, and other similar factors unique to each plan. These sections already sufficiently identify where the various disclosure information is located. Adding a page number requirement to such disclosure would insert significant additional programming cost to automate the process – a cost which is of questionable benefit when the section references show where disclosure information can be found. Furthermore, where other documents are referenced, such as prospectuses or service contracts, those documents will often have similar sections; however, the page numbers for such sections would

³ See [Joint Trades Letter to DOL Re: Proposed 408\(b\)\(2\) Guide Focus Groups \(May 12, 2014\)](#).

likely vary. Such variance would require significant manual intervention (and associated cost likely borne by participants) if a page number requirement were instituted. In addition, a page number requirement heightens the risk of information being misstated when it is otherwise already accurately described in the underlying substantive disclosure, since a certain level of human error is always unavoidable. This would give rise to questions about the accuracy of the disclosure, especially since misstatements could be construed as prohibited transactions.

Cost of a Guide

In its regulatory impact analysis, the Department estimated that there are approximately 12,000 covered service providers furnishing 408(b)(2) disclosures, and their additional cost to provide the guide would not exceed \$22.2 million annually. Based on our experience, we question the accuracy of this cost analysis. The estimate assumes that, “for each unique product or service”⁴ provided, it would take a covered service provider no more than four hours to identify the requisite disclosures, construct the guide and validate its accuracy. The estimate appears not to take account of the cost, for example, of information technology infrastructure to support the guide or of guides that would have to be produced on a plan-specific basis. Further, as noted below, this exercise would be significantly more complex for covered service providers offering an open architecture with respect to available products and services. Accordingly, we believe that it likely will take significantly longer than four hours and be considerably more costly than the DOL estimates to develop the disclosure guides.

Although the Department acknowledges that there is “uncertainty regarding the number of products and services that would be subject to the guide requirement” it developed estimates based on the number of mutual funds, closed-end funds, exchange traded funds and unit investment trusts in existence in 2012.⁵ We believe this universe understates the potential range of products and services offered. Consequently the DOL’s proposal underestimates the potential complexity associated with the process of developing a disclosure guide, particularly one that requires reference to either a specific page number or section.

This is particularly true in the case of broker-dealers offering open architecture solutions for plan sponsors. For example, brokerage firms offer many different types of investment product options including stocks, bonds and investment advisory services. Each investment product has its own pricing structure and disclosure format. Furthermore, each plan sponsor and participant can select among these investment options, creating self-directed plans. Accordingly, under the DOL’s proposal, brokerage firms may effectively be required to develop complex and lengthy disclosure guides to reflect the investments available for each plan. Moreover, such a guide most likely would reference a large number of documents that each plan sponsor or participant already receives.

Again, we appreciate the opportunity to comment on the amendment under section 408(b)(2). We believe WF offers an important and unique perspective as a national leader in providing total retirement management service.

⁴ Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 79 Fed. Reg. 13949, 13958, (March 12, 2014)(amending CFR Part 2550).

⁵ *Id.*

A handwritten signature in black ink, appearing to read "Joe Ready". The signature is fluid and cursive, with the first letter "J" being particularly large and stylized.

Joe Ready
Director
Wells Fargo Institutional Retirement and Trust