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By U.S. Mail and 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

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ is pleased to provide comments regarding the Department of Labor’s (“Department”) proposed amendment to its regulation under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and section 4975(d)(2) of the Internal Revenue Code of 1986, as amended (the “Code”) (“Proposal”).² We appreciate the opportunity to comment and hope that our comments are helpful and can be the beginning of a meaningful dialogue on how best to help plan fiduciaries understand fees.

We strongly support the Department’s goals of increasing disclosure to plan fiduciaries and plan participants to assure they understand the cost of services they receive. These initiatives – enhanced section 408(b)(2) reporting, increased Form 5500 Schedule C reporting, and detailed participant disclosure – have helped plan fiduciaries and participants better understand how fees work in an extremely positive way. Although these initiatives have been very costly on service

¹ SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

² The Proposal provides no authority for, and does not purport to amend, the regulations under Code section 4975. We continue to seek clarification regarding whether that failure is intentional.

providers, and their cost certainly underestimated by the Department, most people would agree that these initiatives have made a material difference in how plans look at their service provider and investment choices. We commend the Department for its leadership in this area.

We are concerned, however, that the Proposal will impose additional and unnecessary costs on service providers where no evidence exists that the current disclosure rules are inadequate. Uncited anecdotal evidence is not a substitute for objective evidence that would illustrate the need for further regulation in this area and that need justifies the significant additional cost of the Proposal. The additional costs of creating plan-by-plan guides will be passed on to the plans and participants, adversely affecting participants' efforts to save for retirement. The Department has been in the forefront of reminding plan fiduciaries and participants that fees are an important focus of inquiry for both plans and participants, and that fees can significantly reduce retirement income. It is ironic, then, that seemingly without very much at all in the way of objective evidence that plan sponsors cannot understand the disclosures they have been provided, the Department has decided to layer on an additional obligation for a Department-perceived gap that does not appear to be shared by the plan fiduciary audience for these disclosures.

We understand that the Office of Enforcement has been collecting and reviewing 408b-2 disclosures as part of its audits/investigations of service providers and plans. If our understanding is correct, we encourage the Department to share the findings of this review as the beginning of a public dialogue on the nature and scope of any problems with the current 408b-2 disclosure regime and what solutions (e.g., informal guidance, web seminars, local meetings, or as a last resort, further regulation) are most appropriate for addressing such problems. For example, the Proposal requires the identification of a person to answer questions or provide additional information. Virtually all of our members are already providing these contacts, as the Department understands from its review of selected disclosures. To the extent that service providers have not identified a contact, we believe they will find it reasonable to do so and would do so based on the Department's informal urging.

SIFMA, along with the American Bankers Association, the American Council on Life Insurers, and the Spark Institute have filed comments with the Office of Management and Budget relating to the Information Collection related to the Proposal. We look forward to working with the Department and OMB to rethink the need for additional disclosure, and to point out the flaws in the Department's cost analysis accompanying the proposed amendment. SIFMA also respectfully requests the Department's consideration of a hearing on the Proposal. SIFMA respectfully requests an opportunity to testify at the hearing and to supplement our comments in light of the testimony at the hearing.

Background

In 2007, nearly 7 years ago, the Department proposed a rule to increase service provider fee disclosure and to require more fulsome disclosure of conflicts (72 FR 70988, Dec. 13, 2007). In July, 2010, an interim final rule was published (75 FR 41600, July 16, 2010). On February 3, 2012, the Department published a final rule in the Federal Register concerning disclosures that must be furnished before plan fiduciaries enter into, extend or renew contracts or arrangements

for services to certain pension plans in order for such a contract or arrangement to be “reasonable,” as required by ERISA section 408(b)(2), 77 FR 5632 (Feb. 3, 2012). That rule required disclosure to all existing clients by April 1, 2012, a date that was then extended to July 1, 2012.

The effort required from service providers in connection with that final rule was enormous.³ In addition, most of our members provided a dedicated email address or central phone number to track complaints, questions and concerns from plan fiduciaries. The final rule makes clear that a plan fiduciary is protected from liability under ERISA only if it communicates any disclosure failures to the appropriate service provider, and if such failure is not timely corrected, notifies the Department of Labor.⁴ The Department does not point to a single notice it received from any plan fiduciary, despite the fact that a fiduciary who believed that the disclosure he received was unclear or otherwise lacking in specificity, would be required to point that out to both the service provider and to the Department or be subject to penalties. SIFMA polled its members regarding the number of questions and comments it received through their dedicated contact channel and the responses ranged from 2-3 to under a dozen after the initial disclosures were sent. The time spent by these members responding to questions was generally under one hour per question. The thirteen broker-dealers responding provided services to several million plans. We believe all of the questions were answered promptly and without resort to the Department. That experience alone raises questions on the need for a guide. In particular, none of our members reported receiving any questions regarding any fiduciary’s inability to locate disclosures. Thus, the Department’s analysis of the benefits of the guide is entirely speculative.

³ Most service providers spent thousands of hours creating the disclosure, with participation of line business staff, supervisory business staff, compliance staff, internal and external legal counsel, computer programmers and others. Our members spent significant amounts on this disclosure, ranging from several hundred thousand dollars for smaller firms to up to 8 million dollars for larger firms with several lines of business in the retail and institutional space, such as brokerage, clearing, recordkeeping, advisory, custody, futures trading, and prime brokerage. The cost analysis for the regulation estimated that the total initial cost to comply with the regulation in its first year was about \$75 million, and about \$22 million thereafter. We think those estimates were incorrect by a factor of 5 or more.

⁴ See 29 CFR 2550.408b-2: (ix) Exemption for responsible plan fiduciary. Pursuant to section 408(a) of the Act, the restrictions of section 406(a)(1)(C) and (D) of the Act shall not apply to a responsible plan fiduciary, notwithstanding any failure by a covered service provider to disclose information required by paragraph (c)(1)(iv) or (vi) of this section, if the following conditions are met . . . [notification of DOL with respect to noncomplying service providers] :

(E) The notice shall be filed with the Department not later than 30 days following the earlier of (1) The covered service provider's refusal to furnish the information requested by the written request described in paragraph (c)(1)(ix)(B) of this section; or (2) 90 days after the written request referred to in paragraph (c)(1)(ix)(B) of this section is made.

The Department Has an Inadequate Record to Propose the Guide Requirement

Nonetheless, the Department is proposing to amend the rule now, less than 2 years after the very first disclosures were sent to plan fiduciaries. The Department cites only its own subjective judgment for the fact that a guide is needed. The Department notes in its Proposal that there were sharply diverging views on whether a guide was necessary or cost-effective. As the preamble of the final rule reflects, the Department had its mind made up to propose a guide, far in advance of any evidence that fiduciaries would find the disclosures difficult to understand. There still appears to be no objective evidence to support the action taken by the Department in proposing this fundamental expansion of the Regulation.

Executive Order (EO) 12866 has governed the rulemaking process since 1993 and was reaffirmed by this Administration in March 2009, through Executive Order 12497. The Office of Management and Budget supplemented EO 12866 with guidance on the preparation of agency regulatory impact analyses through Circular A-4 (issued September 17, 2003). Circular A-4, section B, entitled *The Need for Federal Regulatory Action*, provides that:

Before recommending Federal regulatory action, an agency must demonstrate that the proposed action is necessary. ... Executive Order 12866 states that “Federal agencies should promulgate only such regulations as are required by law, necessary to interpret law, or are made necessary by compelling public need, such as a material failure of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people

Executive Order 12866 also states that “Each agency shall identify the problem that it intends to address (including where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.”

The Department still has no evidence of compelling public need for a guide. The Department concedes as much, by proposing to do focus groups of small business to shore up its stated intention to require a guide for all plan sponsors. That initiative itself is flawed since focus groups will include only small business but the regulation will require guides for all plan sponsors, regardless of size. The fact that the Department is doing focus groups at all is a clear admission that it proposed the rule before it had evidence that a rule was necessary. In addition to a real “ordering” problem, the focus groups are not designed to provide a full and fair result. As we noted in our letter to OMB, by asking only small employers to attend the focus groups and by slanting the questions in a manner that is apparently designed to evoke the answer the Department needs to support its 2012 decision to require a guide, the Department has proceeded with a rulemaking which is inconsistent with the letter and spirit of the Administrative Procedures Act and the Executive Orders. The Department appears to have no evidence that fiduciaries of small plans are unable to understand the disclosures the Department mandated only two years ago; we do not believe that the Department should speculate or substitute its judgment

for that of plan fiduciaries. Nor should a rule be proposed before the Department has a record to support the proposal.⁵

The fact that the Department does not have a factual record to support its proposal is further underscored by the fact that the Proposal poses over fifty factual questions. It simply does not pass Administrative Procedures Act muster to rush to issue a rule when the agency has so few facts on which to base its proposal. We urge the Department to withdraw the proposal and issue a Request for Information to obtain the kind of information which would support reasoned rulemaking. See Request for Information on Lifetime Income Options, August 10, 2010, 75 FR 48367; Request for Information Regarding Stop Loss Insurance, May 1, 2012, 77 FR 25788. The Department may argue that it is seeking such information now, but for all intents and purposes, it appears that the Department has made up its mind, regardless of the facts.

Overview of the Proposal

A. The “Multiple or Lengthy” Document Test

The Department proposes a new section (c)(1)(iv)(H) that requires a guide to be furnished with the initial disclosures if such disclosures are contained in multiple or lengthy documents.⁶ The Proposal does not define the term multiple or lengthy, and seeks comment on this point. The Proposal suggests that the Department is prepared to get into the smallest detail to make sure that guides are provided, regardless of whether the documents provided are straightforward and easy to understand.⁷

⁵ The Department’s entire record for why a guide is necessary does not relate to the 2012 rule it published but seems to suggest lack of ability to understand disclosures in general. “Anecdotal evidence suggests that small plan fiduciaries in particular often have difficulty obtaining required information in an understandable format, because such plans lack the bargaining power and specialized expertise possessed by large plan fiduciaries. Therefore, the Department anticipates that the guide requirement will be especially beneficial to fiduciaries of small and medium-sized plans.” 79 FR 13951. This quote suggests that bargaining power is related to the ability to understand the documents a fiduciary signs. It further suggests that small plans don’t have this bargaining power but then inexplicably extends the benefit of the guide to medium plans, although the anecdotal evidence doesn’t support their need for it. And of course, the proposal would impose the guide requirement with respect to all clients, small, medium and large.

⁶ Many of our members provided website disclosure that lists every fee charged in one place. We are unable to tell from the Department’s proposal whether “all in one place” detailed disclosure would require a guide and what that guide would look like.

⁷“The Department has reserved for comment the number of pages that will trigger the guide requirement even if the initial disclosures are furnished in a single document. Commenters should address whether such a page number requirement is an appropriate standard, whether standards must be included to prevent formatting or other manipulation of the page number requirement (e.g., by reducing font size or margins), what number of pages should be included as

We urge the Department not to micromanage this process. The final rule already contains a procedure for reporting service providers to the Department if the service provider fails to provide additional or requested information. We believe that this process should be allowed to work.

The remainder of our responses to the Department’s request for comments is qualified by this overarching view: there should be no required guide, and the existing process in the final rule should be allowed to work. If the Department determines to move forward nonetheless, and the costs identified below do not exceed the Department’s identified dollar benefit, we respond below to the questions posed in the Proposal.

B. The Proposal’s Dismissal of Other Regulator Required Documents

The Department suggests that service providers are in the best position to identify the location of relevant information in “multiple, highly technical or lengthy disclosure materials”. 79 FR 13951. The Department does not point to the kind of documents it views as highly technical or lengthy, but it seems axiomatic that a plan fiduciary would be in breach of its fiduciary duty if it selected products or services for its plan that it did not understand, regardless of whether the document is long or detailed. We assume the Department is not referring here to a mutual fund statutory prospectus or summary prospectus, since the SEC, as primary regulator of registered investment companies, closely regulates the content of such documents and presumably would not require their distribution to even the most unsophisticated investors if they were too lengthy or technical to understand, as the Department apparently recognized in requiring their distribution to participants under section 404(c). We assume that the Department is not suggesting that a summary prospectus is “too lengthy” or too hard to understand. The same would be true for any pooled fund or other product document with which our members are familiar: generally these documents have easy to identify headings, tables of contents, or other readily understandable guides to fees, conflicts of interest, and transactions with affiliates. The Department seeks a standard of “evident and easy to find”, 79 FR 13952. We would be happy to provide sample brokerage disclosures, brokerage contracts, advisory agreements, securities lending agreements, and custody agreements, which reflect “evident and easy to use” headings and tables of contents.⁸ We urge the Department not to generalize and assume that a long contract is hard to navigate or that a technical agreement cannot be understood by the plan fiduciary who agrees he has the authority and ability to sign it. If the fiduciary cannot understand the disclosure, both the Department and the courts have emphasized that the fiduciary is obligated to obtain expert advice.

the standard, and whether any alternative standards exist that would be more beneficial to responsible plan fiduciaries reviewing lengthy documents.” 79 FR 13951.

⁸ See discussion *infra* regarding this very subjective standards and why such a standard is inappropriate in light of the severe penalties for failure to meet the rule.

Similarly, annuity contracts, bank custody and trust agreements, and recordkeeping agreements are detailed and contain important information that regulators of those products have made clear must be included. Again, these documents have headings, tables of contents, and other internal guides for the reader. If a plan fiduciary is competent to make the decision on the contract, it should be able to read a table of contents without the Department requiring the writer of the document to point out what page these important disclosures are on. If a plan fiduciary is not sufficiently competent, he or she should not be signing the contract. There is still another flaw in this approach: the guide requirement suggests that there are only a few things the plan fiduciary should look at in the disclosure: fees, conflicts, affiliate transactions, termination fees. What about indemnities? Governing law? Required arbitration? Risks? The guide will encourage plan fiduciaries to look only at what the guide is required to identify, a result that is inconsistent with a plan fiduciary's duty of prudence.

C. Excessive Micromanagement

The proposal asks a series of questions which would apparently help the Department fashion a rule that would make routine and homogenize every aspect of the guide requirement, leaving virtually no room for differences among service providers and their services and products. All of the questions seem to ignore basic search tools available to anyone with a smart phone or a computer looking at a website or a PDF. Finding anything today is actually simple, quick and free. And yet these search capabilities are ignored. The Department asks for comment on whether the rule should require a page reference or a section reference or a choice. If a guide is ultimately required, we urge the Department to allow service providers a choice. The requirement of a page number is arbitrary and unduly burdensome. If the Department is suggesting that every broker, recordkeeper or consultant receiving revenue sharing from mutual funds or other pooled funds, must identify the prospectus page number in each mutual fund on the plan's menu, we think the Department has seriously underestimated the ability of a service provider to comply with this requirement and keep such disclosure updated in any reasonable timeframe and the amount of time it will take for each of these entities to provide that specificity.⁹ Since the disclosures will be provided prior to the contract being signed, it seems quite likely that the plan fiduciary will not have identified the funds for its menu, that requirement is actually a requirement that the service provider identify the page number or section reference for every fund, option or type of service it offers. In an open architecture setting, that would require this information for every fund, option or service available anywhere. Surely, the cost of this enormous burden far outweighs the benefit of pointing out the obvious to a plan fiduciary who should be familiar with – or hire an expert to help with – the navigation of a fund description, annuity contract, mutual fund or other investment vehicle. Nor is it necessary: as noted above, prospectuses, fund descriptions, annuity contracts as well as most other service contracts, have tables of contents or easily identifiable headings.

⁹ There is no free data base that identifies this information. While Morningstar maintains such a data base, it is not free. We know of no technology that can import certain information, or identify it by page number or section number, that would be available for service providers to use. The creation of such a data base by each service provider is duplicative, extraordinarily expensive and will take years to create, if small service providers could accomplish it at all.

The Department states categorically that electronic links to a contract or prospectus are not enough.

“A similar standard applies for information disclosed electronically. A covered service provider may not merely furnish the link to a separate contract or to a prospectus. Either a more specific link directly to the required information must be furnished, or a page or other sufficiently specific locator, such as a section, must be furnished in addition to an electronic hyperlink.” 79 FR 13952.

We urge the Department to rethink this prohibition. Especially with fund descriptions and prospectuses, the easy to navigate table of contents and section headings should eliminate the need to create links within an electronic document.

The Department also seeks comment on whether the guide should have mandatory language or require a receipt.¹⁰ We again urge the Department to refrain from requiring cookie cutter guides or so micromanaging the process that it is geared for the lowest common denominator and not tailored to the type of service or client that will be producing or using the guide. We similarly believe that reminding plan fiduciaries of the importance of the guide suggests that the guide is more important than the disclosure. Warning plan fiduciaries that this document is important is patronizing and states the obvious; plan fiduciaries are well aware of the fiduciary liability that comes with choosing service providers, investment options, and fee arrangements, and the significant litigation that has been filed in this area. There needs to be a balance on the usefulness of these “warnings” and the exhaustion factor on the recipients who are assaulted daily with the warning of the importance of each document they receive.

The Department asks for comment on formatting requirements, and how such formatting requirements could lend themselves to presentation of the initial disclosures required by the rule or take advantage of innovations in the preparation and delivery of disclosures that might currently exist in the marketplace. We urge the Department not to impose additional burdens on service providers whose disclosures are not “short enough”. The exemption has serious consequences if fee information is omitted. It seems quite unfair for the Department to insist on full disclosure but then limit the number of pages it can take. The Department seems concerned about ranges but then at the same time, seems concerned about service providers who list every fund from which fees are paid and the amount of those fees. Disclosure can’t be both short and complete. Examples of lengthy disclosure reflect an effort to be completely clear and

¹⁰ The Proposal asks: “For instance, in addition to the separate document requirement, would the guide be improved by requiring specific language, such as an introductory statement in the guide as to the purpose of the guide? Further, if the guide is furnished electronically, for example as an attachment to email, would responsible plan fiduciaries benefit from a notice comparable to the notice required pursuant by 29 CFR 2520.104b-1(c)(1)(iii) (requiring the provision of notice to participants at the time a document is furnished electronically that apprises participants of the significance of the document when it is not otherwise reasonably evident as transmitted).

transparent, not an attempt to obfuscate the facts. The Department has evidence of scores of different methods of approaching these disclosures and should be open to the variation.

D. Tables of Contents/Section Headings

As noted earlier, we think the specific page or section references to each specific piece of this information are unnecessary. If the Department continues to believe a guide should be required, we suggest that the guide identify fee sections, termination sections, and service sections. We agree, however, that identifying a person or office, including contact information, is helpful and will facilitate a plan fiduciary's understanding of the information required to be disclosed. Most of our members already provide a contact, and we do not believe that the provision of a contact and the fielding of calls and emails that may be received by a service provider will cause an undue burden.

E. The Separate Document Requirement

The Proposal requires that the guide be a separate document. We see no reason for the separate document requirement and we believe it will actually be less helpful than if it is attached like a table of contents to the main disclosure provided to the client. Making sure the guide is separate seems precisely the opposite of what the Department should want – the coupling of the guide to the disclosure so that it connects the guide to the primary information provided. The Department notes:

The Department's goal, in requiring that the guide be a separate document, is to ensure that it is brought to the attention of the responsible plan fiduciary and prominently featured so that the fiduciary can use it effectively in his or her review of the required disclosures. 79 FR 13952.

We think allowing the guide to be uncoupled from the primary disclosure is a mistake and will not achieve the Department's goal.

F. Annual Distribution Requirement

Similarly, we believe that a requirement that the guide be sent out annually is a mistake. The Department wisely did not require the basic disclosure to be sent out annually. Sending out the guide alone makes no sense, because it is intrinsically attached to the primary disclosure and will leave recipients confused and worried that other documents were left out of the package. The cost of providing the basic disclosure and a guide annually would be significant – and we note that the Department's cost analysis does not take this implicit requirement into account.

The Guide Requirement Will Require Plan by Plan Customization

The Department's determination that a guide is not overly burdensome is based on a faulty premise. The Proposal notes:

The Department believes that covered service providers are best positioned to provide the guide in a cost-effective manner, because they have the specialized knowledge required to determine where the required disclosures are located, and they generally will be able to structure their disclosures so that **they need to locate the information only once** when preparing **guides for large numbers of clients**, each of whom otherwise would have to locate the information separately in the underlying disclosures. 79 FR 13950-1.

Virtually every plan is different, and will need a different guide. Depending on when a client began its relationship with a service provider, it may be using a different contract with provisions on different pages and in different sections. Some plans have loan provisions, others do not. Some have hardship withdrawal provisions, others do not. Some have brokerage windows, others do not. Banks and broker-dealers may offer 400-1200 mutual funds on their menus. They may have separated managed accounts and collective trusts. They may have annuity contracts for stable value arrangements. It would be mere coincidence if any two plans had the exact same services for their plan and the exact same mutual funds. Every plan is different. If the indirect fees paid by the mutual funds must be referenced by page number in the prospectus or summary prospectus, and the service provider offers 1200 investment options in different combinations, the task of identifying the mutual funds used by each plan and the proper page number for those mutual fund fees is monumental. We do not know what the Department means when it suggests that a single guide will work for large numbers of clients. We cannot think of a single service provider who believes this is accurate or accurately describes its book of business. Virtually every service provider will be drafting a separate guide for each of its clients. Will a new guide have to be provided each time a plan sponsor adds or deletes a mutual fund, collective fund or ETF from its plan menu? Will a new guide need to be provided every time a page changes in a prospectus or fund description? The penalties for failure are quite hefty; the Department's approach simply doesn't work in the real world.

Fundamental Legal Concerns

This regulation implements a statutory exemption. The penalties for failing to meet the terms of the exemption are disgorgement with interest and payment of an excise tax. It is particularly worrisome then, that the standard for compliance is entirely subjective, and can be challenged by any reader or by the Department if one determines that he or she couldn't "quickly and easily" find the necessary information. We have searched all of the Department's exemptions and regulations and we are unable to find another example of a situation where exemptive relief was conditioned on the recipient's view that the information was "quickly and easily" identified. We urge the Department to use an objective standard.

The Department does not specify whether, once this requirement goes into effect, it will have to be provided to existing clients or only to new clients who are onboarded after the effective date. The Department needs to specify which group needs to receive the guide. If, as we suspect, it is all existing clients, we note that the effective date should be no earlier than 2 years after final publication in the Federal Register. This two year period is the absolute minimum time it will take for service providers to create the data base they need to do any guide at all.

The Department reserves the decision on what size disclosures will need a guide. That is a critical piece of information which requires notice and comment. Without that information, covered service providers will have no idea whether the guide requirement will apply to them. Unless the Department intends to repropose the rule once it has come to a decision on this issue, we believe this fact alone undermines the Proposal's effectiveness under the Administrative Procedures Act. Length of a document alone does not determine its clarity or confusion. A long document can be very clear and a short document very confusing. Using the length of a document as a determinate of its effectiveness is arbitrary.

The Department's Questions

The Department poses more than 50 questions on which it specifically invites comments, in addition to those discussed elsewhere in this comment. Those questions include:

- Specific suggestions or data concerning the structure of the guide, as proposed, and whether its requirements are feasible and cost-effective. For example, how many (and what types of) products and services will require a guide? Do economies of scale exist such that the guide service providers prepare for one product or service could be used for multiple clients? Can service providers give the Department an estimate of the costs they will incur to create a guide? While aggregate costs of the guide are helpful, commenters are strongly encouraged to break down these costs into their constituent elements when possible. For example, when possible, break down the costs of the guide requirement as applied to each of the specific content requirements in paragraph (c)(1)(iv) of the final rule (i.e., subparagraphs (A) through (G) of the final rule), and as applied to the different types of covered service providers described in paragraph (c)(1)(iii) of the final rule.
- Comments and suggestions as to alternative tools that would assist plan fiduciaries in reviewing the initial disclosures. Commenters are encouraged to state whether they believe these tools would be more, or less, beneficial to plan fiduciaries, as compared to the proposed guide, taking into account the costs and burdens to covered service providers, and possibly other parties, to prepare such tools.
- Comments on whether the amendment instead should require that covered service providers furnish a summary of specified "key" disclosures. If so, what "key" information warrants inclusion in a summary?
- How costly would it be to prepare a summary and who would bear its costs? Would these costs decrease significantly after an initial transition period and, if so, how significantly? Which parties, other than covered service providers, might be involved in the preparation of a summary?
- What liability and other legal issues might arise for covered service providers and others from summarizing "key" information, and how should these issues be managed?
- How would responsible plan fiduciaries likely use the summarized information and what effect, if any, would it have on their review of the underlying disclosures?
- Further, what are the likely benefits and costs of requiring that covered service providers furnish any required tool (whether a guide, a summary, or other tool) in a specified format? Is a guide or other tool likely to increase the probability that responsible plan fiduciaries review the initial disclosures, because the required information is easier to

find? What formatting requirements (e.g., a chart, page limits), if any, lend themselves to presentation of the initial disclosures required by the rule?

- Finally, what innovations in the preparation and delivery of disclosures currently exist in the marketplace, and how might a formatting requirement take advantage of these innovations?

We note again as an overall comment that it is disappointing that the Department did not informally consult with service providers or their trade associations, obtain information on the cost of the initial disclosures to understand better the cost of the guide, speak to plan sponsor groups regarding their interest in a guide, etc., all in advance of proposing a rule which has so little evidence of need and so mistaken an estimate of cost. We are troubled that the Department does not use its considerable resources to work more collaboratively with the plan community to understand better the effect of its proposed rulemaking. Moreover, the Department's questions assume that plan fiduciaries did not review, or review adequately, the initial disclosures they received. We do not believe that assumption is true, nor do we know the Department's basis for it. Has the Department investigated plan sponsors who stated that they had not read the disclosures? Have small business groups told the Department that their members did not read the disclosures? We have met with representatives of many of these groups and they say precisely the opposite: that plan sponsors read and understood the disclosure.

Had the Department engaged in any research, it would have determined that brokers spent between \$100,000 and \$8 million creating and distributing 408(b)(2) disclosures. SIFMA's informal survey of its members had 13 responders. The average cost incurred for the 13 firms responding per broker dealer was \$2 million. These disclosures generally consisted of an overview, with references to the client account opening document, a list of transaction pricing, information on ranges of 12b-1 fees and other revenue sharing, potential pricing on advisory accounts, and other charges like wire transfer, overdraft, and ACH charges. These disclosures are not hard to understand and not hidden. It would be impossible for a broker dealer who spent \$4 million on these disclosures to speculate that, some specific dollar amount was spent putting together just the transaction charges, or the revenue sharing amounts or any other specific type of charge. It is no more reasonable to ask a service provider to isolate what was spent on three sentences in the disclosure than it would be to ask the Department to isolate the cost of the Department's time spent on a paragraph of the regulation. Like the industry, many individuals at the Department would have worked on the paragraph, then supervisors would have edited it and made suggestions to it, then lawyers would have had to review the language, to ensure that it met the requirements of the regulation, and then various levels of final review would take place at the Assistant Secretary, Deputy Secretary and even Secretary level. It is unrealistic to ask the industry to determine how much it cost to create a distribution ready paragraph on direct compensation compared to how much it cost to create a distribution ready paragraph on indirect compensation.

The Department requests comments on alternative tools. We think it would be interesting to discuss local meetings, perhaps cosponsored by the Department and service providers, walking plan fiduciaries through sample disclosures. Informal guidance might be helpful. Meetings with trade groups to walk through sample disclosures would be another possibility. Website seminars for plan sponsors on understanding disclosure and for service providers on commonly

misunderstood provisions (should the Department identify any) may also be useful. The Department has done such a good job providing guidance to fiduciaries on health plans and savings plans; this would be a good opportunity to work together to focus plan fiduciaries on these costs at the local community level.

Cost Analysis

The Proposal's cost analysis is inadequate and based on faulty assumptions. It does not meet the requirements of Executive Order 12866.¹¹ The cost analysis, in framing its justification under the Executive Order, did not consider such non-regulatory alternatives as the publication of tips or other informal guidance to encourage voluntary correction of perceived deficiencies, web seminars, small employer group meetings locally, sponsored both by the Department and local service providers to train plan fiduciaries on using the disclosure, meetings with various industry groups to talk about problematic disclosure so there can be an open exchange about why the service providers used the form it did and why the Department is concerned about it. SIFMA would be happy to sponsor meetings with representatives of advisors, brokers, and futures/swap clearing agents to facilitate this exchange. In addition, the cost analysis fails to consider targeted regulatory solutions, such as an "on-request" requirement that would enable fiduciaries of all plan sizes who encounter challenges locating information to request assistance from the covered service provider.

The Department suggests that it is skeptical that the guide will be burdensome, but does not share how it came to that skepticism. It notes that service providers generally will need to locate the information only once for a large number of clients. That statement ignores the fact that each service provider will have to locate that page number in every investment product and service disclosure that it offers, including every version of service disclosure since many clients are operating under different versions of documents over time. This volume will be tens of thousands of documents for brokers, consultants, banks, recordkeepers and insurers. Each such service provider will have to create a data base to store this information for every one of those services and products and will need to keep it updated. The cost of creating and updating this database is estimated to be millions of dollars initially, and hundreds of thousands annually *per service provider*.

The Department's cost estimate is wrong. For ease of reference, it is quoted below:

While the final rule covers contracts and arrangements, the burden of creating the guide will be proportional to the number of products and services included in the contracts. In

¹¹ Section 1 of EO 12866 provides, in relevant part, that:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits

order to estimate the total cost associated with the guide requirement, the Department must determine the number of products and services that will require a guide. The Department is uncertain regarding the number of products or services; however, the Department believes that the total number of products offered by financial services firms exceeds the total number of services provided by other service providers. In 2012, there were a total of 16,380 mutual funds, closed-end funds, exchange traded funds, and unit investment trusts.¹⁴ There also were 776 financial service firms that provided investment management services in the U.S. Seventy-six percent of these firms were independent fund advisors and the rest were brokerage firms, banks and thrifts, insurance companies, or non-U.S. fund advisors.

¹⁴ 2013 Investment Company Fact Book, <http://www.icifactbook.org/>, retrieved 11 September 2013.

Due to the uncertainty regarding the number of products and services that would be subject to the guide requirement, the Department has created low-range, medium-range, and high-range estimates. The Department calculated these estimates by multiplying the number of products offered by financial service firms (16,380) by three, four and five resulting in a low-range estimate of 49,140 products and services, a middle-range estimate of 65,520 products and services, and a high-range of 81,900 products and services.

In order to estimate the costs associated with the guide requirement, the Department also must estimate the time required to create a guide for each unique product or service. **The Department lacks information on the time required by covered service providers to create a guide.** The Department believes it is reasonable to assume that it will take a covered service provider **no more than one-half hour to locate the required information in its own document.** Once the information is found and the appropriate document, page, and (if applicable) section number is noted, the covered service provider can construct the guide. The Department estimates that the relevant information could be found and the guide could be constructed using a total of three hours of a financial professional or similar professional's time with a labor rate of \$67.76 per hour, including time to review the document for accuracy.¹⁵ The Department constructs a low-range estimate using two hours, a medium-range estimate using three hours, and a high-range estimate using four hours. (Emphasis Supplied)

As an initial matter, we note that the Department states that it lacks information on the time required by service providers to create a guide. We know of not a single broker dealer that the Department approached to attempt to obtain this information. The fact that the Department lacks information without having made a single attempt to obtain it does not meet the requirements of any of the applicable Executive Orders. The cost analysis suggests that it will take no more than one half hour to locate the required information in its own document, as if each service provider only has one document, which is not realistic. Because the cost analysis misses the mark so fundamentally, we suggest more realistic estimates below.

As noted above, the Proposal simply doesn't reflect plan relationships with service providers. Where a plan uses a financial institution for banking services, bank collective trust investment, separate account investment, recordkeeping, investment menu, and a brokerage window, the plan will be receiving disclosure on each of those lines of business. If a plan investment offering consisted of four collective trusts and 15 mutual funds, fees related to each of those investment options must be disclosed. It is entirely unrealistic to suggest that creating a guide that identifies page numbers in all of these documents for every plan's different choices and different services would take all service providers for every plan in this country between \$6.8 and \$13.4 million annually. We believe that the guides, as the Proposal currently is drafted, will take between \$1-3 million per service provider initially, depending on the number of plans it services and the investment options and services it offers. The lion's share of this cost will be locating page numbers in every historical version of every service document and every investment product (and every share class thereof).¹² Additional annual costs will be substantial as each service provider must keep up with new versions of documents and changes in investment product fees every day of the year, since new clients are contracted with daily and each one would apparently need a correct guide. We assume the Department does not expect service providers to give out incorrect guides to each new client. The "upkeep" to the guide would be overwhelming.

We estimate that the initial cost for an average service provider to set up the necessary data base for its system would be \$228,880. If one conservatively estimates that there are 1000 broker-dealers, recordkeepers, insurers, and banks, the initial cost for the first year would exceed \$200 million.¹³ Larger financial institutions, or institutions which do not limit the investment universe

¹² The Department suggests that every investment product contained on a menu provides service providers with up to date feeds of its fees. "When a recordkeeper enters into a contract or arrangement with a covered plan to provide such services and the designated investment alternatives consist of mutual funds, the recordkeeper may receive investment-related fee and expense data from a mutual fund company, or a third-party electronic database, and the recordkeeper will incorporate this information into the guide for its contract or arrangement with the covered plan." 79 FR 13959. This comment implies that each service provider will need to create a database for plan by plan customized guides without taking into account the cost of doing so. But more important, it reflects a fundamental misunderstanding of how businesses will have to manage these customized disclosures. We urge the Department to sit down with knowledgeable industry representatives and familiarize itself with the practical challenges of this Proposal.

¹³ If one assumes it will take a person paid at the Department's assumed hourly rate 20 minutes per document and a service provider has 1500 documents to review, simply to create the data base will take 500 hours or \$33,880 (\$67.76 times 500). As noted above, because the penalties for an error in the guide appear to be the refund of all fees, and the imposition of excise taxes, no service provider will rely on a junior staff person to get it completely right, so a more senior business person and a compliance or legal staff person will also undertake the review. We have assumed that the more senior staff person would be paid \$150 per hour and the legal review would be at \$300 an hour, which is an estimate between what internal lawyers are paid and what outside counsel would charge. Except for the very largest institutions, no internal legal group would have the resources to devote to this project. The total per service provider for the initial

would spend far more. And these estimates do not include the cost of then creating a guide for each plan. If one had to find the correct page number for each of a plan's investment menu and each of its documents, even if one assumed that this task would take only 6 hours of time for the same three individuals at a blended rate of \$175 per plan, that total is \$1050 per plan. The Department's view that the same guide referencing the same documents could be used for large numbers of plans is incorrect and unsupported by the facts. So **each service provider** would be spending an *additional* \$525,000 if it provided services to 500 plans, \$5,250,000 if it provided services to 5000 plans, and \$10,500,000 if it provided services to 10,000 plans.

The Department suggests that the benefits to plans will be \$40 million per year, 79 FR 13954. We think the costs would be 50 times that amount. The Department needs to base its cost analysis on the real world, the kinds of services actually provided, the number of products that would have to be reviewed, and the real challenge of getting it right. The cost analysis is just wrong.¹⁴ Moreover, an accurate cost analysis would make this a "major rule" as that term is defined in 5 U.S.C. 804, because it almost certainly would result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

creation of a data base would be \$33,880 + \$75,000 + \$150,000 or \$228,800. That total does not include the cost of updating it annually.

¹⁴ It concerns us that the Department admits so freely that it doesn't understand how service providers operate, how plans are constructed and what documents govern them and what those documents look like. The Proposal notes: "However, unlike pagination, we have no information on the extent to which these identifiers are used in employee benefit contracts and similar documents." 79 FR 13957. That cannot be true. The Department has investigated hundreds of service providers. It has received account opening agreements routinely from these service providers and all of its current subpoenas seek the 408(b)(2) disclosures provided to clients. The cost analysis appears to have been written by individuals totally divorced from the rest of the Department's experience. In addition, the Department knows that every prospectus and summary prospectus has a section on fees. Allowing a service provider to reference the fee section of the mutual funds that its clients invest in would be an enormous cost savings which the Department chooses to ignore. And we note, every section 408(b)(2) disclosure we have seen from SIFMA members describes its fees from mutual funds with a range and references the fee section of the mutual funds. We give this example only as a data point and emphasize that plans have many investment products that are not mutual funds and many services that the cost analysis totally ignores.

Conclusion

In sum, SIFMA urges the Department to withdraw the Proposal and set up a series of meetings with plan sponsor groups and service provider groups so that we can begin a dialogue so that the Department understands more fully the disclosure we have sent and we can understand more fully the Department's issues with that disclosure. Once we understand each other, we can be helpful in explaining the practical challenges in creating a guide and the costs. We can explore alternative methods of making these disclosures easier to understand if in fact, plan sponsors are really having difficulty. We can run some pilot programs to help plan fiduciaries understand how to look at these disclosures. We can help design web seminars. We think this process will lead to a better, more collaborative, more accurate result.

If the Department does not want to engage in this process, we urge the Department to withdraw the proposal, redo the cost analysis to reflect the fact that the rule would impose a plan by plan customized guide, compare that cost to the benefit that the Department has determined plan fiduciaries will receive, and abandon the Proposal because it simply does not meet the requirements of the Executive Orders and the Administrative Procedures Act.

We respectfully request a hearing on this Proposal. We would be pleased to meet with the Department at any time, at your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Lisa J. Bleier". The signature is written in black ink and is positioned below the word "Sincerely,".

Lisa J. Bleier
Managing Director and Associate General Counsel