

## VIA ELECTRONIC MAIL

June 10, 2014

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW, Room N-5655  
Washington, DC 20210

Attn: RIN 1210-AB08

Re: Proposed §408(b)(2) Disclosure “Guide”

Ladies and Gentlemen:

On March 12, 2014, the Department of Labor (the Department) proposed an amendment to its regulations under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to require that the requisite disclosures provided by covered service providers to certain retirement plans be accompanied by a “guide” if those disclosures are contained in multiple or lengthy documents.

The Financial Services Institute (FSI)<sup>1</sup> appreciates the opportunity to comment on this proposal. We support the Department’s initiative to assure that responsible retirement plan fiduciaries uniformly receive important information about the covered services received by their plans and the costs of those services. With respect to the proposed guide, however, and for the reasons discussed below:

1. The Department should reevaluate the underpinnings of the “guide” proposal;
2. Any proposal that proceeds should be tailored to the circumstances where the mandate of a guide is justified; and
3. While we can on behalf of our members offer at this time limited observations on the proposal, the Department should republish the proposal, once its particulars are developed, to receive meaningful public comment.

### **Background on FSI’s Members**

The independent broker-dealer (IBD) community has been an important and active part of the retirement community for more than 30 years. The IBD business model focuses on comprehensive

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<sup>1</sup> The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 100 Broker-Dealer member firms that have more than 138,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 37,000 Financial Advisor members.

financial planning services and unbiased investment services. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products to individual investors and retirement plans; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBD firms and their affiliated representatives are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their retirement security and other financial goals and objectives.

In the U.S., approximately 201,000 registered representatives – or 64% percent of all practicing registered representatives – operate as self-employed independent contractors of IBD firms, rather than employees of the IBD firm. These financial advisers provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisers are typically “main street America” – it is, in fact, almost part of the “charter” of the IBD channel. The core market for representatives affiliated with IBD's is clients, including retirement plans, that have tens and hundreds of thousands, as opposed to millions, of dollars to invest. Independent financial advisers are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients, or professional or other trusted advisers in the community. Independent financial advisers get to know their clients personally and provide them services in face-to-face meetings. Due to their close ties to the communities they serve, we believe these financial advisers have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisers. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisers play in helping Americans plan for and achieve their financial goals. FSI's primary goal is to ensure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

## **Comments**

- 1. The Department should reevaluate the underpinnings of the “guide” proposal.** FSI's members support in principle the purposes of the section 408(b)(2) disclosure requirement. By definition, IBD's and their financial advisers are accustomed to a highly regulated securities industry where disclosure is fundamental to that regulation. We appreciate that, under ERISA, responsible plan fiduciaries have the obligation to make for the plan determinations as to the services received for the plan and the fees paid for those services, and we support the Department's objective that those fiduciaries be appropriately advised of those direct and indirect fees.

The countervailing factor, of course, is that disclosures come at a cost. Our members have a business interest in the cost of regulatory compliance including disclosures. Plans and

participants also have an interest; as the Department has regularly recognized, including in the preamble to this proposal, ERISA regulatory compliance costs ultimately are borne one way or another by plan participants and incrementally reduce the retirement benefits available to them. Accordingly, a clear-headed weighing of the costs and benefits of any change to the section 408(b)(2) disclosure regime is essential, not just because administrative law requires it but also because it is fundamental to the Department's mission.

In connection with the preparation of this comment letter, we polled FSI's IBD members with respect to their experience with section 408(b)(2) disclosures to date. Those disclosures, permissibly, take a wide variety of forms, including the following:

- Disclosures embedded in the operative agreement for the service arrangement;
- A custom, stand-alone disclosure for each plan;
- A standardized, stand-alone disclosure for a particular service, which is distributed to all plans utilizing that service;
- A standardized, stand-alone disclosure of all the services made available to retirement plans, which is distributed to all plans utilizing any of those services;
- A standardized disclosure for a particular service, embedded in a Form ADV brochure<sup>2</sup> or another document otherwise provided to all plans utilizing that service;
- A standardized disclosure of all the services made available to retirement plans, embedded in the Form ADV or another document otherwise provided to all plans; and
- Disclosures distributed in various ways that incorporate by reference content from other materials. At least in our industry, this approach to disclosure usually does not take the form of the model guide published by the Department along with the amended regulation in February 2012.

Our members that responded to our poll also report that their aggregate cost through March 2014 of meeting the section 408(b)(2) disclosure requirement, as determined under each member's standard cost accounting methodology, ranged from approximately \$500,000 to \$3 million per firm.

- As you will recall, the total cost *to all covered service providers* projected by the Department in February 2012 for the first two years of compliance with this disclosure requirement was \$204.6 million.
- In the March 12 proposal, the Department estimated that 12,000 covered service providers are providing section 408(b)(2) disclosures.
- The Department's cost estimate thus works out to an average compliance cost for the first two years of about \$17,000 per covered service provider.
- While our member firms constitute less than one percent of that covered service provider population and the compliance costs for our industry can reasonably be

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<sup>2</sup> As noted above, many of our IBD member firms are dually registered as or affiliated with a registered investment adviser. The Form ADV is a form used by investment advisers to register with the Securities and Exchange Commission (SEC) and state securities authorities. Form ADV contains information about the adviser's business practices, services, and fees. Form ADV is publicly available, and a portion of the form including fee information is provided directly to clients.

expected to be above average, our polling data show an orders of magnitude disparity between projected and actual costs.

- In fact, our polling data suggest that the cost of section 408(b)(2) disclosure compliance to date for our 100 member firms alone has been at least \$50 million, and potentially a multiple of that amount that could approach the total estimated by the Department for all covered service providers.

Thus, our experience in initial compliance with the section 408(b)(2) disclosure mandate suggests that the cost methodology required of the Department in developing regulations materially underestimated the actual costs to covered service providers.<sup>3</sup> Consequently, we have grave concerns that the Department's \$13.4 million primary projection of the cost of providing a guide also materially understates the actual cost to covered service providers of providing a guide, and that those actual compliance costs will exceed the Department's \$40.3 million primary projection of benefits to plans resulting from the guide.

- The Department's cost projection for the guide averages to about \$1,100 per covered service provider.
- If out of the 12,000 covered service providers, there are only 400 for which the compliance cost is actually \$100,000 or more, that alone would reach the projected benefit to all plans.
- Given the costs for design, IT services, preparation, validation and distribution that many covered service providers will necessarily incur if a guide is required, it is a certainty that at least 400 covered service providers including IBD firms will have incremental compliance costs of \$100,000 or more.

Finally, we inquired about our members' experience with responsible plan fiduciaries being unable to locate information in the section 408(b)(2) disclosures provided to them. This of course is the basis on which the Department proposes to require a guide. The March 12 preamble states that the Department has anecdotal reports of fiduciaries having difficulty finding such information, particularly in the micro and small plan market. There is some further anecdotal reporting to similar effect in the comments on the proposal received by the Department and posted on its website as of the date of this letter. In developing the proposal, the Department also conducted a limited self-sampling of disclosures for this purpose.

Our members are in a position to provide empirical information on this point.

- IBD firms serve thousands of private-sector retirement plans, primarily in the micro and small plan market for which the Department most expressed concern in its proposal.
- IBD firms routinely include in their section 408(b)(2) disclosures a contact for further information and track the inquiries received by that contact.
- The member firms responding to our poll report that, through March 2014, there was exactly one instance of an inquiry to any member's designated contact from a

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<sup>3</sup> Stated another way, if \$50 million is a conservative accounting of the compliance cost to our member firms to date, the average compliance cost for the other 11,900 covered service providers would have to average \$13,000 for the Department's cost projections to hold up, which seems improbable.

responsible plan fiduciary requesting assistance in finding information in section 408(b)(2) disclosures.

That is, at least in their interactions with our member firms, the incidence of micro and small plan fiduciaries reporting difficulty in finding information in section 408(b)(2) disclosures is negligible.

In sum, based on the above experience of our member firms with section 408(b)(2) disclosures for primarily micro and small plans:

- The empirical evidence shows no need to require a guide to section 408(b)(2) disclosures;
- If the experience of our industry provides a basis for prediction, the projected costs of requiring a guide materially understate the actual costs, which will exceed the benefits projected in the March 12 proposal; and
- The Department should therefore reevaluate the underpinnings of its proposal.

Our view is that it is premature for the Department to issue additional mandates on this point. The section 408(b)(2) disclosure requirement obviously is very young; plan fiduciaries, covered service providers, and the Department are all still in the process of coming to terms with it. We expect that, over time, the evolving practice for these disclosures will follow the normal course – that best practices will emerge and that covered service providers will for the usual reasons gravitate to those best practices. The appropriate time for additional regulation would be after that disclosure practice is more mature, when evolving practice and the need for further regulation can better be judged. The Department is in the best position to accelerate that process, by reason of its bully pulpit and the range of section 408(b)(2) disclosures it has reviewed in its audit program or otherwise. Should the Department choose to promote the best disclosure practices it has encountered (without of course endorsing any particular provider), we have every confidence that many in the regulated community would follow that lead.

- 2. Any proposal that proceeds should be tailored to the circumstances where the mandate of a guide is justified.** To the extent the experience of our member firms proves not to be representative and a cost/benefit-justified basis for a mandated guide emerges from this regulatory process, we urge that the requirement of a mandate be limited to the circumstances where that justification applies.

We respectfully submit that neither the length nor multiplicity of documents in a section 408(b)(2) disclosure is a proxy for a plan's need for further assistance, such as a guide, in assimilating the contents of that disclosure. For example:

- Leading representatives of larger retirement plans have expressed to the Department their view that, in their circumstances, those plans have appropriate resources to review the section 408(b)(2) disclosures they receive, and a mandated guide is neither necessary nor desirable. We credit that view; and
- The section 408(b)(2) disclosures provided by IBD firms primarily to micro and small plans are in some instances more than 10 pages long or contained in multiple documents but, as discussed above, responsible plan fiduciaries almost never contact the firm for help in navigating the disclosure. We expect that is because,

in the circumstances of our industry, the responsible plan fiduciary always has access to an independent financial adviser who stands ready to assist should any questions arise. Contacting the financial adviser would be the ordinary, cost-efficient way a responsible plan fiduciary would deal with any such question.

That is to say, the resources available to responsible plan fiduciaries to review the disclosure, rather than the complexity of the disclosure itself, determine the need for a guide or other tool.

Accordingly, any guide mandate should exclude, at a minimum:

- Larger plans, and
- Covered service providers that have designated individual representatives reasonably available to address questions from responsible plan fiduciaries about the location of any required information in their section 408(b)(2) disclosures.

In either case, there is no justification to duplicate existing resources with a guide and its attendant costs.

**3. While we can on behalf of our members offer at this time limited observations on the proposal, the Department should republish the proposal, once its particulars are developed, to receive meaningful public comment.** In issuing the proposal, the Department solicited comment on all its aspects, and specifically asked for comment on most of the essential elements related to the guide, such as:

- Does the proposal strike the proper balance between the need to facilitate review of the disclosure by responsible plan fiduciaries and the costs and burdens attendant to the guide?
- Are there tools other than a guide that would be more useful to plan fiduciaries and less costly to produce?
- Is a summary preferable to a guide, and how would those costs and liabilities compare?
- What number of pages should trigger the guide requirement? (There was of course no proposal on this fundamental point.)
- Should page size and similar standards be adopted to prevent manipulation of the page number trigger?
- Are there alternative standards that would be more useful to responsible plan fiduciaries in reviewing lengthy documents?
- What type of “locator” should be used to direct the responsible plan fiduciary to the relevant disclosure?
- Should a choice of “locators” be permitted?
- What are the challenges and costs of incorporating specific “locators” in guides?
- How is it that current technology does not reduce those costs?
- Could web-based approaches be cost-effective?
- Is the “separate document” requirement, by itself, likely to ensure that the responsible plan fiduciary adequately understands the existence and purpose of the guide?

- Would the guide be improved by including an introductory statement as to its purpose?
- If the guide is furnished electronically, would responsible plan fiduciaries benefit from a notice comparable to that in the Department's participant electronic disclosure regulation?
- Whether the entire guide, or just changes, should be disclosed on annual basis, if changes have occurred during the preceding year?
- How many and what types of products and services will require a guide?
- Do economies of scale exist that would permit a guide to be used for multiple clients?
- What are the estimated costs to service providers of preparing the guide?

We applaud the Department for taking this approach. While the details can be debated, the Department's fundamental approach of soliciting input before offering a fully articulated, specific proposal is plainly the right one in the circumstances. One predictable consequence of this approach, however, is that our members have found that the absence of definitive details in the proposal makes it difficult to provide meaningful comments. It is therefore essential, both to comply with administrative law and in the interest of optimal regulation, that if the Department determines to proceed with the proposal, it republish the proposal for further public comment after its specifics have been developed. The Department has already announced that it intended to publish the results of its proposed focus groups and may ask at that time for additional public comment; the Department should do the same with the specifics of any guide proposal it may ultimately determine to develop. Without that additional notice, the opportunity for meaningful public comment on the proposal will be compromised.

At this time, we do have limited observations about the specifics of the proposal, as follows:<sup>4</sup>

- We strongly agree with the Department that, if there is a demonstrable need for further regulation on this point, any such need is better served by a guide to the disclosure than by a summary of the disclosure. Accurate preparation and presentation of the disclosure requires extraordinary care. Reducing that disclosure to a summary both would be most costly than preparing a guide and would inevitably compromise accuracy for the sake of brevity, creating the risk of misinforming the responsible plan fiduciary and of liability for the covered service provider.
- When the section 408(b)(2) disclosure is incorporated into a service agreement between the plan and the covered service provider, no guide should be required regardless of the length of the disclosure. It is not too much to expect plan fiduciaries to understand the terms of the agreements they execute for the plan.
- Any page length trigger should be tied to the length of the section 408(b)(2) disclosure itself. If that disclosure is included in a document that is also serving other purposes, the length of the overall document should not be the trigger.

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<sup>4</sup> In a number of respects, the following comments argue for preserving in connection with the guide the helpful flexibility provided for the disclosure requirement itself. To the extent the Department determines to be more prescriptive on any these points, that prescription should be on a safe harbor basis.

- The Department is to be commended that, for the forty years that ERISA has been in effect, it generally has stayed out of the business of regulating by reference to paper size and margins and font size.<sup>5</sup> This is not the time and place to start, particularly as disclosures are fast moving into a digital environment where those sorts of physical descriptions may not always be relevant. If the length of a disclosure is in the end determined to be pertinent, it would be preferable to measure length by reference to word count as determined through any reasonable means (e.g., the word count function in most word processing programs).
- One of the principal virtues of the Department's section 408(b)(2) disclosure regime is that it does not prescribe a particular format, but leaves that effectively to the determination of each covered service provider as influenced by the retirement plans it serves. We believe that approach has, on balance, improved the efficacy and reduced the cost of the disclosures provided to date. A guide in a prescribed format has the potential to undermine that flexibility; it is inevitable that different disclosure formats will be more or less amenable to coordination with a guide in any given format. For example, several of our members have already concluded that, if a guide in substantially the form published by the Department in February 2012 is mandated, they would effectively be obliged to rework their disclosures in their entirety – which would of course increase the cost of compliance with any guide requirement. We therefore recommend that any guide mandate be expressed not in a specific form, but on a “principles” basis, so it can be mated to the form of the disclosure itself.
- For similar reasons, the manner and means by which the relevant content of the disclosure is referenced in the guide – by page number, section number, section title, hyperlink or otherwise – should be open-ended. And while the notion of fiduciaries being able to “quickly and easily” find the pertinent disclosure may work as a regulatory objective, it does not work as a regulatory standard.
- Notwithstanding the skepticism expressed in the preamble, there are meaningful technology and other practical impediments to automating the references in a guide to the respective content in the disclosure. Getting the content of the disclosure right is hard; getting the logistics to work right is even harder. It is not the case that covered service providers can just locate the information once and “push a button,” particularly where the disclosure is not always in *exactly* the same form or is in multiple documents that are not in the same electronic format (and sometimes not in the covered service provider's control). Even where a reliable technology solution exists, the need to validate the results – and business prudence would require such a validation – is a significant undertaking, particularly for covered service providers that produce hundreds or thousands of section 408(b)(2) disclosures.
- There are a number of conceptual and mechanical questions surrounding the proposal that the guide be provided in a separate document. Those issues could be narrowed if instead the guide was required to be provided prominently.
- Guides should be required only where disclosures meeting the trigger are issued or reissued twelve months or more after publication of a final rule. It serves no useful purpose to incur the expense of repapering disclosures already received by

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<sup>5</sup> The principal counter-example is the tri-agency Summary of Benefits and Coverage (SBC) rules under the Affordable Care Act.



plan fiduciaries, in some cases in June 2012 or earlier. Also, if a “change disclosure” provided after the operative date does not itself meet the trigger, no guide should be required.

- We support the Department’s proposal that any required guide be updated, in the event of a change to the underlying disclosure, only annually; that proposal strikes the right balance between the benefits and burdens of an update for both responsible plan fiduciaries and covered service providers. We also note that, depending on how the guide is ultimately structured, a change in the content of the disclosure may not always necessitate a change in the guide.

### **Conclusion**

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you on this important initiative.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 202 379-0943.

Respectfully submitted,



Dale E. Brown, CAE  
President & CEO

cc: Phyllis Borzi, Assistant Secretary, Employee Benefits Security Administration  
Timothy Hauser, Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration  
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