



FIDUCIARY PLAN GOVERNANCE, LLC™

VIA EMAIL ONLY: e-ORI@dol.gov

June 10, 2014

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

Attn: RIN 1210-AB08: 408(b)(2) Guide

Dear Sir or Madam:

Fiduciary Plan Governance, LLC and its affiliates (collectively “FPG”) appreciate the opportunity to respond to the request for comment with respect to the proposal to amend Final Regulation §2550.408b-2(c) (“Final Regulation”) to require covered service providers to provide a guide to assist plan fiduciaries in reviewing disclosures required to be provided under the final rule. The appropriate disclosure of service provider services and fees is of great interest to FPG and to the plan sponsor fiduciaries we provide consultative services to.

FPG is an ERISA plan fiduciary risk and consulting firm with offices and affiliates in New England, greater-Philadelphia, Atlanta, Nashville, and the Great Lakes region. Our staff is comprised of attorneys, accountants, and investment advisers and consultants with many years employee benefits experience. Our client mission is to improve plan management and governance, reduce exposure to fiduciary risk, and to reduce plan fees for our clients.

We have reviewed dozens of fee and service disclosures since the fee disclosure rules first became effective in 2012. We have observed firsthand the flaws the Labor Department has identified in the lengthy and multiple document disclosures provided by many providers. We therefore applaud the Department’s efforts to bring transparency, integrity, clarity, and concision to service provider disclosures.

I. Comments

A. *Support of Department Effort.* We believe that the Final Regulation has already sparked a new era of reduced fees and improved services for larger plans with strong

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*“The first rule for fiduciaries is to put their interests last.”*

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professional support structures. For many smaller employers and even for some larger ones these results have not been so apparent. We agree with the Department that fuller disclosure will not result in increased transparency if the information remains obscure in lengthy, technical documents.

B. *Drop Proposed Guide from Amendment.* FPG does not believe the proposed guide will have the beneficial effect intended by the Department or resolve the problem at hand. Plan sponsors already have too much to read now. Many sponsors are challenged by their existing benefit plan duties, responsibilities and obligations. If multiple documents are an obstacle to fee comprehension, adding another piece of paper to an already unread stack of papers is not the answer, even if the guide provides pinpoint direction to the information required to be disclosed. The guide likely will be ignored or will be another source of confusion for these sponsors. FPG suggests the Department drop the requirement of a guide from its proposal and consider solving the problem by other means, described below, that we believe will likely be more effective.

C. *Apply Principles Based Standards.* The Department has identified the root of the problem as lengthy and multiple document disclosures. We believe this problem can be attacked more directly than by the requirement of a guide. FPG believes that the quality of the disclosures must be improved. We suggest this can be best accomplished by requiring the following:

1. Each of the required elements of a full disclosure is present;
2. The information is communicated in a manner understandable to the average business person and assuming the recipient has no knowledge or understanding of financial industry fee structures;
3. The disclosure is only as long as is necessary to convey the required information consistent with the first two principles.
4. A disclosure will be presumed to satisfy the first three conditions if it is in the form of the "Sample Guide to Initial Disclosures" found in the Appendix to the Final Regulations.

These *principles-based conditions* (emphasis added) are designed to put the burden on the service provider to provide disclosures that are within the purpose and spirit of the Final Regulation. There is no numerical limit on the number of pages allowed or specification of font size or type.

The covered service provider will determine the length of the disclosure based on the principles-based standards described above. This is desirable for two reasons: (i) it avoids having to arbitrarily choose a specified number of pages (two, three, four, etc.) for a compliant disclosure that may not be appropriate in all circumstances and for all arrangements and (ii) it requires covered service providers to provide plan sponsor fiduciaries disclosures that will be easier to use and comprehensible to them. As to the latter benefit, the provider will want to err on the side of full and effective disclosure. The question for the covered service provider will be "Is it easy for the reader to understand my services and fees?" This approach is flexible, practical, effective and fair.

There will be some in the covered service provider community that will complain this principles-based structure offers them no certainty their disclosures are compliant. This is true but it is also true that under current Final Regulation they do not have certainty either. Currently plan sponsors have both the right and the obligation to challenge disclosures that in their opinion are neither adequate content-wise or clear. The recommended amendment simply adds additional common sense conditions to what they are already required to do. As the Labor Department and other commentators have pointed out in the process leading up to the promulgation of the Final Regulation, plan sponsors and service providers exist in a one-sided or asymmetrical relationship in which service providers have all the industry knowledge and expertise and plan sponsors have little or none. It will not be a burden on these “expert” providers to use that knowledge to build disclosures that they can themselves reasonably conclude are compliant.

D. *Recommendations if Amendment Contains Guide Requirement –Special Rule for Small Employer Plans.* If the Department determines that a guide is the appropriate vehicle for addressing lengthy and multiple document concerns, FPG recommends that service providers to small employer plans should be under a separate rule. As stated earlier, FPG believes the guide may prove unduly confusing for small employers or is not likely to be read. We propose therefore that service providers to plans with fewer than 100 participants should be required to make their disclosures in the format of the “Sample Guide to Initial Disclosures” found at Appendix of the Final Regulations. We believe that the grid in the sample guide to initial disclosures has at least the advantage of focusing plan fiduciaries on the key elements of these disclosures.

## II. Department Requested Comments on Trigger for Distribution of Guide.

A. *Is page number requirement the Appropriate Standard?* As we stated earlier in this comment letter FPG believes that a fixed number of pages standard may not be flexible enough to encompass longer yet still comprehensible, accessible and easy to read disclosures. Such a standard might also allow service providers to issue disclosures that are too long for the nature of the services and fees they are intended to describe and obscure the nature of the services and fees while escaping the requirement that a guide be provided. Neither result seems desirable. We think the best approach is to put the burden on the service provider to make the determination of whether it is subject to the guide requirement under consideration of the following factors:

- (1) Is the disclosure drafted in a manner understandable to the average person, and assuming the recipient has no knowledge or understanding of financial industry fee structures?
- (2) Is the disclosure only as long as is necessary to convey the required information consistent with the first factor?

If the service provider cannot answer both questions in the affirmative, they would be subject to the guide requirement.

B. *What is the best way to structure “locator references?”* Service provider agreements can be long and confusing to plan sponsor fiduciaries. Sometimes a reference to a section can be next to useless for a non-lawyer because the referenced section is lengthy or the section itself cross-references another provision. The Department states a locator must be specific enough “for the plan fiduciary to quickly and easily find the specified information.” FPG thinks this is best accomplished by a requirement that the “locator” consist of a reference to the page number on which the information may be found and to the specific section in which the information is contained. We further believe that the industry has the technology to do this and that while there might be short-term initial costs, this expense will not be significant over time.

C. *Are web-based approaches an effective alternative in meeting the Department’s objective in proposing the guide?* Virtually every service provider and plan fiduciary sponsor now works in an electronically-based environment. This is becoming the norm and paper-based documentation is fast becoming a thing of the past. In fact, this is the way most now prefer to work. Thus the use of hyperlinks in the guide to move the reader to critical information would be most welcome and beneficial to plan fiduciaries that are now struggling with existing disclosures. It would make the information easy to find and greatly assist them in comprehending and evaluating pertinent information that is critical to doing their jobs as plan fiduciaries. We believe the Department should encourage service providers, at least initially, to use the hyperlinking approach. Perhaps the Department might favor hyperlinking by stating a presumption that use of it in a guide is an indication that the guide satisfies Department requirements for the guide.

D. *Should the guide exist as a separate document?* As mentioned previously in this letter, FPG does not believe that a separate guide is likely to insure that plan fiduciaries will focus on the guide and use it effectively. For many plan fiduciaries the guide is likely to just be another piece of paper. A more fruitful approach is to incorporate elements of the guide and required disclosures in service agreements. We have seen many outstanding examples of this type of service provider agreement under the Final Regulations. These agreements are clear, concise, and easy to understand. FPG thinks the preferable approach is to incorporate the guide in existing disclosures or to incorporate the guide, relevant disclosures in existing service provider agreements.

E. *Would the guide be improved by adding introductory language?* FPG believes that introductory language stating the purpose of the guide and also how it may be used by the plan fiduciary is important. This introduction should be improved by further stating (i) that the plan fiduciary is entitled to the disclosure; (ii) the fiduciary must take a reasonable amount of time before entering into any agreement to review the adequacy of the disclosure and consider the reasonableness of plan fees; and (iii) the plan fiduciary has a duty under the plan and federal law to review the adequacy of the disclosure and the reasonableness of the fees and services described. This language might be bolded or set apart in a box so as to draw attention to it.

F. *If the guide is provided electronically, for example, as an attachment to an email, should the service provider be required to distribute type of participant notice required*

*under 28 CFR 2520.104b-1(c)(iii)?* We do not think that plan fiduciaries are in quite the same position as plan fiduciaries *vis-à-vis* their service provider and that such a notice is necessary.

G. *Is it more effective to require the entire guide (rather than only changes in the information to the guide) if changes have been made in the previous year?* FPG believes it may be more effective and economic if only the changes are provided. We therefore recommend that the Department not require the provision of the entire guide when there is such a change.

Thank you for consideration of our comments.

Sincerely,



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