American Bankers Association
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Timothy E. Keehan
VP, Senior Counsel
Center for Securities Trusts & Investments
202-663-5479
tkeehan@aba.com

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

Re: Proposed Amendment to Section 408(b)(2) Disclosure Regulation – RIN 1210-AB08; 408(b)(2) Guide

Dear Mr. Canary:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments on the proposed amendment (Proposal) to the final regulation (Section 408(b)(2) Regulation or Regulation) that requires certain service providers to pension plans to describe the services provided to, and compensation received from, such pension plans. If adopted, the Proposal would amend the Section 408(b)(2) Regulation to require covered service providers to furnish a guide (Guide) that would assist plan fiduciaries in reviewing the disclosures required by the Regulation, if the disclosures are contained in multiple or lengthy documents.[2] The Guide would specifically identify the document and page (or other sufficiently specific locator, such as a section) that enables the responsible plan fiduciary to find quickly and easily the information required under the Section 408(b)(2) Regulation.[3]

As we have stated in the past, ABA supports disclosures that enable plan sponsors, fiduciaries, administrators, and plan participants and beneficiaries to understand better the services and costs associated with their respective pension plan. ABA likewise supports the goal of providing sufficient disclosure of service provider services and fees so that plan fiduciaries may make informed decisions on the hiring and retention of service providers. We believe that the disclosure requirements of the Section 408(b)(2) Regulation are generally consistent with furthering this important policy objective. Given that the Regulation is functioning well, it appears that the Department of Labor (DOL) has issued a proposed rule without first having

[1] The American Bankers Association is the voice of the nation's $14 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits, and extend nearly $8 trillion in loans. Many of these banks are plan service providers, providing trust, custody, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA). Learn more at www.aba.com.

[2] *See* EBSA, Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure, 79 Fed. Reg. 13,949 (Mar. 12, 2014) (Proposal).

[3] *See id.* at 13,961-62.

undertaken and completed the groundwork that would determine whether the Proposal is necessary.

We request, therefore, that the DOL withdraw the Proposal until sufficient studies and data gathering have been initiated, completed, and evaluated to determine whether the Proposal is required or justified. Thereafter, DOL should proceed with an Advance Notice of Proposed Rulemaking (ANPR) so that the public will have the opportunity to assess and respond to the need and efficacy of any proposed rulemaking. While we believe that the Proposal would be unnecessary and counterproductive to the Regulation's requirements, we are pleased to provide comments on particular issues raised by the Proposal. Our comments are divided into three sections: (i) the need for the Proposal; (ii) the costs of the Proposal; and (iii) the language and requirements of the Proposal.

I. There Are No Published Data or Other Basis that Shows a Need for the Proposal.

A. Proposal Cites Unidentified, Anecdotal Evidence While Ignoring the Absence of Complaints.

In the Proposal, DOL states that "plan fiduciaries, especially in the case of small plans, need a tool to effectively make use of the required disclosures [in the Regulation.]"[4] DOL, however, does not cite or refer to any evidence that the Proposal is in fact needed or justified. Instead, DOL merely points to "*anecdotal evidence* [which] *suggests* that small plan fiduciaries in particular often have difficulty obtaining required information in an understandable format."[5] Nowhere in the Proposal is this anecdotal evidence identified or explained or the source(s) revealed, nor is the number of affected plans indicated.

In contrast, ABA is not aware of any complaints brought to any of its members by any plan – regardless of size – regarding either obtaining or understanding the disclosures required by the Section 408(b)(2) Regulation. These service provider institutions distribute thousands of Section 408(b)(2) disclosures packages, many to small plans (*i.e.*, plans with fewer than 100 participants). While these service providers have received inquiries from plans related to such matters as revenue calculations and requests for prior reports, ABA is not aware of any inquiries concerning the format of disclosures, where to find information, or about the ability to access necessary information. Members have informed ABA that plan fiduciaries are neither confused nor having any difficulty locating the disclosures. The absence of complaints from plans regarding disclosures appears consistent with the experience of the broader retirement services industry.[6]

[4] *Id.* at 13,950.
[5] *Id.* at 13,951. [Emphasis added.]
[6] On-going, informal conversations with staff at other trade organizations have likewise found that such organizations have not been informed of any complaints or concerns voiced to their members regarding the Section 408(b)(2) disclosures.

B. DOL's Intention for Small Plan Focus Group Testing Confirms that the Regulation Is Unnecessary and Premature.

The Proposal states that DOL intends to conduct eight to ten focus group sessions with approximately 70-100 fiduciaries to small plans. The purpose of focus group testing is reportedly to "explore current practices and effect of EBSA's final regulation," which "may provide information about the need for a guide, summary, or similar tool to help responsible plan fiduciaries navigate and understand the required disclosures."[7] This indicates that the Proposal was drafted prior to DOL engaging plan fiduciaries in substantive discussions that might have indicated whether there is any need for the Proposal. Accordingly, until such discussions occur, the Proposal's issuance, at best, would seem incomplete and premature.

C. Despite Its Purported Focus on Small Plans, the Proposal Applies to All Plans Regardless of Size.

DOL implies that the primary thrust of the Proposal is to benefit small- and medium-sized plans, particularly the former.[8] The Proposal as drafted, however, applies to *all* plans, regardless of size. This result significantly drives up the cost of compliance for service providers, with no corresponding benefit to large plans. It is not clear why DOL chose not to circumscribe the universe of plans required to receive the Guide, particularly where DOL attempts to weigh accurately the costs of the Proposal against its purported benefits. Among the questions that focus group participants will be asked is "whether a guide to the required disclosures would be beneficial to them, and if so, how much they would be willing to pay to receive a guide."[9] Again, this begs the question, why is the Proposal being issued at this time, without sufficient data to support its necessity?

D. Proposal Improperly Imputes "Specialized Knowledge" to Service Providers.

In placing on service providers the burden of generating a Guide, the Proposal states that:

> service providers are best positioned to provide the [G]uide in a cost-effective manner, because *they have 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.[10] [Emphasis added.]

DOL does not describe what this "specialized knowledge" entails. It appears to assume that a service provider's familiarity with multiple plan documents permits it to find pertinent information more readily than the plan. Under ERISA, however, plan fiduciaries have a responsibility to read and review the plan documents and contracts with service providers.

[7] 79 Fed. Reg. at 13,953.
[8] *See* 79 Fed. Reg. at 13,951.
[9] *Id.*
[10] *Id.* at 13,950.

This assumption of "specialized knowledge," furthermore, does not take into account that a service relationship routinely involves multiple contracts on each side (the plan's model contract, the provider's model contract), negotiated terms not found in model contracts, correspondence (such as e-mails and texts), and third-party documents (such as mutual fund and ETF prospectuses). These often lead to customized, individualized contracts and not mass-produced or generic templates.[11] Moreover, many banks and other service providers have a variety of pension plan clients (large, medium, small) and perform differing levels of services for these clients (*e.g.*, custody, investment management, and/or trustee services). Disclosures routinely are tailored to their specific client bases and individual client needs, not to a "one-size-fits-all" approach.

Attributing "specialized knowledge" to service providers as the basis for requiring a Guide is both false and a red herring – the real issue is which party should be responsible for accessing, reading, and understanding the Section 408(b)(2) disclosures. Plan administrators, which have this responsibility under ERISA, have not voiced concerns or complaints to service providers.

II. The Proposal Does Not Adequately Take into Account the Proposal's Costs.

A. The Proposal Significantly Underestimates the Compliance Costs While Overestimating Cost Savings.

We believe that the Proposal does not provide realistic assessments of the costs of compliance. Contrary to our members' business practices and experience, DOL apparently has concluded that covered service providers are capable of producing a one-size-fits-all Guide for a "large number" of its clients.[12] Although the Guide's *format* will be similar across all clients, the Guide's requirement to refer specifically to specific page numbers (or other specific locators) ensure that there will be a great many versions of Guides, based on the customized contracts negotiated with individual plan clients, which in most cases will require an overly burdensome, manual effort to produce. Moreover, the range of documents describing the services and fees, with periodic and annual reports and addenda, may significantly add to the cost of tracking down and reviewing the Guide information to ensure its accuracy.

Any of these and other costs are offset, DOL apparently believes, by the purported savings that will be achieved by use of a Guide "one-size-fits-all" template for most clients, together with – as DOL estimates – salaried, seasoned, in-house experts at the service provider who can generate the Guide in just three hours, at a rate of $67.76 per hour.[13] Notably, DOL concedes that it lacks information on the actual time required by covered service providers to create a Guide. The estimated costs in the Proposal, however, omit time spent on manual review of the terms and a general legal/regulatory review of each service relationship, and further omits review by multiple personnel. Just a small increase in either of these costs significantly inflates the Proposal's costs. The law firm of Steptoe & Johnson LLP estimates that even if one assumes that the Guide would take a service provider's business person and lawyer, working together, three to four hours per

[11] Furthermore, some of our members have acquired clients and their agreements through acquisition or merger, and therefore, do not have "specialized knowledge" of these documents.
[12] 79 Fed. Reg. at 13,950.
[13] *Id.* at 13,958.

plan to put together, at $1,000 per plan, the cost of such a requirement would be $684 million, substantially greater than the $40 million benefit cited by DOL in its cost analysis.[14]

B. There Are Insufficient Data to Conclude the Estimated Costs of the Proposal.

As we pointed out in our earlier joint comment letter to OMB on the Proposal, the DOL has not provided specific, objective data with respect to key elements concerning the Proposal's costs. These would include: (i) the number of arrangements that would require a Guide; (ii) data on the incremental costs of pagination relative to other identifiers; (iii) how currently available technology would or would not reduce such costs; (iv) whether economies of scale exist that would allow the Guide to be used for multiple clients; (v) an estimate of the costs associated with preparing the Guide, including costs incurred for system changes and costs relating to placing page or section number references in the Guide; and (vi) the costs of requiring that covered service providers furnish the Guide in a required format.[15]

Based on the absence of data, it does not appear that DOL conducted an assessment of the cost of alternatives to the Guide requirement.[16] It further appears that DOL does not plan to conduct this assessment until after comments are received on the Proposal.[17] Consequently, DOL has not completed the threshold steps of agency rulemaking to determine whether the Guide "is made necessary by compelling public need."[18]

III. The Language and Requirements of the Proposal Do Not Provide Sufficient Clarity to Be Workable.

A. Standard for "Single Document" Unclear.

The Proposal states that a Guide is required if a service provider does not include all of the required disclosures within a "single document" limited to an as-yet-undetermined number of pages.[19] It is not clear how service providers with indirect compensation arrangements could readily satisfy this standard. Many plan-related documents (*e.g.*, mutual fund documents) contain indirect compensation figures and description of arrangements that do not fit within the "single document" scheme. For these service providers, production of the Guide will be an expensive and time-consuming manual process, which would far exceed the projections of DOL's cost analysis. Furthermore, establishing the number of pages for the single document seems arbitrary and does not take into account formatting and presentation. An approach to this kind of standard would better be served by language that would provide service providers the flexibility and discretion to decide the best approach to compliance, while still allowing DOL

[14] *See* Steptoe & Johnson LLP, ERISA Advisory, pp. 5-6.
[15] *See* Letter to OMB by American Bankers Association, American Council of Life Insurers, Investment Company Institute, Securities Industry and Financial Markets Association, and The SPARK Institute, Inc. (April 11, 2014) ("Joint Trades Letter to OMB").
[16] *See* Executive Order 12866 (Sept. 30, 1993) ("In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.").
[17] *See* Joint Trades Letter to OMB, p. 6.
[18] Executive Order 12866, *supra*.
[19] *See* 79 Fed. Reg. at 13,962.

staff to handle potential regulatory issues regarding the document's length through the supervisory process.

B. Identifying by Page or Locator Ignores Logistics and Dynamics of Negotiated Contracts.

As discussed above, it will be a labor-intensive and costly manual process to generate a Guide that is required to reference specific page numbers or other sufficiently specific locators. Because they have negotiated terms with the service provider, plan fiduciaries should be able to access and find the relevant disclosures, as part of their ERISA responsibilities and obligations, through documents that are cross-referenced, rather than being shuttled to a specific page number or other locator. If a plan fiduciary is unable to find the information, then it can contact the service provider for assistance. Thus far, experience with the Regulation shows that plan fiduciaries are finding the information they need and therefore may be disinclined to pay extra for a Guide.[20]

C. The Terms "Quickly" and "Easily" Cannot Be Objectively Defined.

The Proposal states that the plan fiduciary must be able to find the pertinent disclosures, including fee information, "quickly and easily."[21] These are highly subjective terms that do not lend themselves to uniform interpretation. Any new duty imposed on a service provider must not rely on inherently subjective language. The consequences for a service provider's failure to comply with the Section 408(b)(2) regulation potentially includes disgorgement of fees plus interest, penalties, and IRS excise taxes.[22] To impose such draconian measures based on whether a particular plan fiduciary can "quickly and easily" locate information invites unfair and punitive regulatory overreach. Service providers should be able to provide disclosures that are tailored to their respective client bases consistent with their regulatory obligations, without fear or risk of unwarranted exposure based on the subjective capacities of plan fiduciaries to locate information within documents "quickly and easily."

Any language establishing relevant duties of the parties should better reflect the role of the parties (*e.g.*, replacing the phrase "quickly and easily" with "that enables the responsible plan fiduciary, using reasonable diligence commensurate with its fiduciary obligations, to find the following information . . . ."). This would allow for flexibility without needlessly exposing a service provider to fiduciary liability for a plan fiduciary's failure to access the disclosures, *in keeping with an undefined measure of what is meant by* "quickly and easily."

D. Contact Person/Information Requirement May Be Duplicative.

The Proposal further requires that the Guide identify a person or office (including contact information) that the responsible plan fiduciary may contact regarding the disclosures required

[20] Plan fiduciaries of large plans in particular would be unwilling to pay for the costs incurred by service providers to produce a Guide which, DOL concedes, is not primarily intended to benefit them.
[21] 79 Fed. Reg. at 13,961.
[22] *See, e.g.*, ERISA § 502(i).

under the Section 408(b)(2) Regulation.[23] In most instances, this is going to be the plan's regular client service person or office whose contact information already is in the plan's possession. Consequently, to avoid duplication, this provision should be amended to add that the requirement may be satisfied by stating that the plan may contact the plan's regular client service contact for further information.

E. Updates to Guide Should Be Made Annually.

It is unclear from the Proposal when and to whom the Guide must be furnished on the effective date of the amendment. In order to avoid an expensive and time-consuming administrative burden on service providers, we request that DOL confirm that the Guide need be updated only on an annual basis and further confirm that the most current annually updated Guide may be provided to new clients, without requiring an interim update. This is consistent with DOL's position that a periodic requirement to disclose changes to the Guide "will be more beneficial to plan fiduciaries and less burdensome to covered service providers than ongoing and sporadic disclosure each time a change to one component of the [G]uide appears."[24]

F. The Proposal Does Not Answer Substantive Questions Raised by the Guide Requirement.

Finally, the Proposal does not provide guidance on substantive questions raised by the Guide requirement, such as:

- What is meant by the "single" document requirement? Does it need to be physically separate from the disclosure document, or can it be a table of contents preceding the disclosure document? Can the Guide be delivered in the same package as the disclosure document or must it be separately delivered to the plan?

- Can substantive disclosures accompany the Guide or is it limited to cross-referencing page numbers or other locators?

- Can Guides for different programs and products be contained in the same document?

- What is the difference between the Guide and a summary? Is providing a summary with cross references to other documents permitted?

- When cross-referencing documents, how specific does the locator need to be?

These questions highlight the need for (and benefits of) an ANPR process prior to the issuance of a proposed rule.

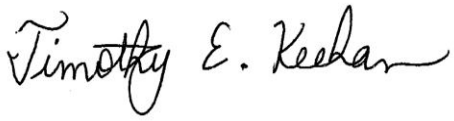
[23] *See* 79 Fed. Reg. at 13,962.
[24] *Id. at* 13,952.

III. Conclusion.

For the reasons stated above, we request that DOL withdraw the Proposal and commence research and studies that would determine whether further rulemaking (commenced via an ANPR) would be necessary and appropriate. We would be glad to work with DOL to assist its work in this area.

Thank you for your consideration of these views. If you have any questions or require any additional information, please do not hesitate to contact me at 202-663-5479.

Sincerely,



Timothy E. Keehan
Vice President & Senior Counsel