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June 2, 2014

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

ATTN: RIN 1210–AB08; 408(b)(2) Guide

Re: **Proposed Amendment to 408(b)(2) Regulation to Add A Guide Requirement**

Dear Sir or Madam:

These comments relate to the Department's proposed regulation (the "Proposal") to require covered service providers to furnish responsible plan fiduciaries with a separate guide to the providers' 408(b)(2) disclosures (a "Guide") where the disclosures are contained in multiple or lengthy documents.[1]

Our comments are provided in order to seek clarification on technical issues related to the Guide. We express no opinion as to policy issues, and we neither endorse nor oppose the Proposal. These comments reflect the views of the signatories of this letter (Fred Reish, Bruce Ashton, Brad Campbell, Joan Neri and Josh Waldbeser) and are not necessarily the views of this law firm or of any of its clients.

We serve a wide array of pension plan clients that receive or provide disclosures subject to the current regulation under ERISA §408(b)(2).[2] Our clients include plan sponsors and their fiduciaries and service providers of all types, including investment advisors and managers, broker-dealers, recordkeepers, TPAs, mutual fund complexes and insurance companies. All of these entities would be affected by the Proposal, and we anticipate having to advise all of them on compliance with the final amendment the Department promulgates, including whether a Guide is required of a particular covered service provider and what and how the mandated information would be disclosed.

These comments are based on the assumption that the final amendment to the 408b-2 regulation will require a Guide in certain circumstances. Our comments relate to issues in the Proposal that, in our view, are incomplete, unclear or otherwise susceptible to misinterpretation. Our goal is to obtain further clarity so that we may better advise our

[1] 79 Fed. Reg. 13949-13962 (March 12, 2014).

[2] 29 CFR 2550.408b-2(c)(1).

clients on how to comply with a Guide requirement. Inasmuch as the consequence of a disclosure failure under the 408b-2 regulation is a potentially non-exempt prohibited transaction, we believe that the final amendment must clearly identify objective standards that permit covered service providers and responsible plan fiduciaries to know they have complied with reasonable certainty. We are concerned that the Proposal as written does not achieve this essential requirement in certain respects discussed below.

We respectfully request further clarification on the following seven specific aspects of the rule:

- Objective parameters for defining multiple or lengthy documents;
- Objective parameters for defining a sufficiently specific locator;
- The relationship between the Guide requirement and the change notices mandated under the 408b-2 regulation;
- Whether the Guide requirement will apply only prospectively or also retroactively following the amendment's effective date;
- Availability of relief for inadvertent errors or omissions within the Guide;
- Clarification as to the requirement that the Guide be provided as a separate document; and
- Clarification of the requirement to "furnish" the Guide and "disclose" changes to the Guide.

Where possible, we suggest that the final regulation provide guidelines for compliance that are sufficiently specific to provide clarity but leave some room for the service provider community to develop appropriate alternatives. At the same time, we believe it would be helpful if the final regulation were to provide detailed "safe harbors" that service providers may follow to ensure that they comply.

1. Multiple or Lengthy Documents

Under the proposal, the Guide requirement will only apply if a covered service provider has furnished its disclosures through multiple or "lengthy" documents.

The number of pages that will cause a document to be deemed "lengthy" has been reserved by the Department, and it has sought comment on the number of pages, as well as on issues related to what constitutes a page (*i.e.*, font size and other manipulation of the amount of content each page contains). We express no view on the proper number of pages or the issue of what constitutes a page with respect to the "length" issue. But we do urge the Department to provide sufficiently specific details on what constitutes a "page" so that a covered service provider (as well as responsible plan fiduciaries and

EBSA investigators) can easily determine whether the Guide is required. Specific guidance on such matters as font size, margins or other formatting characteristics that would be considered an "impermissible manipulation" of the page number requirement is essential.

We believe the Department should be able to address the issue of document length in concrete, numeric terms that leave no room for interpretation (e.g., number of pages, maximum font and margin size, etc.)

We also believe the Department needs to clarify the reference to "single document". The 408(b)(2) disclosures of covered service providers are often contained in documents that cross-reference other documents or refer to attached exhibits or appendices. In some cases, the referenced documents are not relevant to 408(b)(2) disclosure requirements, such as references to privacy policies, electronic authorization documents, etc. We expect that the Department would not view the references to documents unrelated to 408(b)(2) required disclosures as sufficient to cause the 408(b)(2) disclosure to be a multiple document disclosure triggering the Guide requirement. Similarly, references to certain documents required by other regulatory agencies, such as the SEC's Form ADV, should not trigger multiple document status. The information required under §408(b)(2) regarding indirect compensation is significantly more detailed than information in these forms, and would be disclosed elsewhere.

In other cases, we note that the issue of whether a "single document" exists may be as much a question of style as substance.

For example, consider a service agreement and fee schedule – in terms of substance, both components relate to the same general matter, may contain the same defined terms and otherwise incorporate one another by reference. Thus, they might be fairly characterized as a single document. In theory, the issue of whether they in fact constitute a single document could be defined in terms of their relationship or degree of subject matter "overlap." In practice, however, such a standard may be so subjective as to be unworkable. And, of course, we expect that the Department would not intend that this question hinge on whether the documents "appear" to be unified or not, such as through continuous versus separate pagination, or describing the fee disclosures as the final "section" of the agreement rather than a "schedule."

On resolving the "single document" question, noting again our concern about the malleability of that term, the following are among the possibilities we believe the Department may wish to consider:

- Providing that disclosures will be deemed a single document so long as, in the aggregate, the page number limitation is not exceeded; or

- Defining "single document" in concrete terms according to what it is not, such as documents unrelated to 408(b)(2) disclosure requirements, documents not provided contemporaneously or other appendices to the agreement.

2. Specific Locator

Our second concern is that the Proposal does not address the issue of how lengthy a document "section" could be while still constituting a "sufficiently specific locator" for key terms within the disclosures. Preserving flexibility to permit the Guide to make reference to other than page numbers may be beneficial, but this flexibility needs to be provided with more objective criteria. The Department's purpose, of course, would be frustrated if the Guide's "locators" for key terms within the disclosures referred to sections of the disclosure documents that are themselves lengthy or difficult to navigate.

Similar to the issue of document length, we believe the Department should be able to address this issue in concrete terms that leave no room for interpretation (e.g., number of pages, within specific constraints as to font size, margins and other formatting characteristics).

3. Change Notice Requirements

We also request clarification as to whether the "60 day" change notices required to be furnished under paragraph (c)(1)(v)(B)(1) of the current final regulation, as well as the annual change notices mandated under paragraph (c)(1)(v)(B)(2),[3] could create a "multiple document" or "lengthy document" situation. That is, if a covered service provider's initial disclosures are provided in a single, sufficiently short document so as to avoid having to provide a Guide, will the subsequent issuance of change notices cause its disclosures to fall under the multiple document/lengthy document requirement for purposes of whether the covered service provider is required to provide a Guide? We assume not, but request that this be clarified.

We note that paragraph (c)(1)(iv)(H)(1) in the Proposal defines the disclosures to which the Guide requirement may apply as those in "*paragraph (c)(1)(iv)(A) through (G)*" (certain initial disclosures, but not the change notices). We therefore suspect that the Department does not intend that furnishing change notices would trigger a requirement to furnish a Guide where it does not otherwise exist. If this were not the case, the provision of change notices would ensure that virtually all covered service providers would need to

[3] I.e., those describing changes to the investment disclosures required from providers furnishing fiduciary services, and recordkeeping or brokerage services, respectively.

furnish Guides, regardless of their efforts to provide short and cohesive initial disclosures. Clarification on this issue would be helpful.

As described in paragraph (c)(1)(v)(B)(2) of the Proposal, changes to the information disclosed in the Guide itself ("Guide Change Notices") must also be furnished "*at least annually.*" This leads to another consideration upon which we would appreciate the Department's guidance:

The information in the Guide is designed to assist plan fiduciaries in locating the key terms of the service arrangement. When those key terms change, the covered service provider is required to provide notification, for example through "60 day" change notices. In our experience, providers generally furnish these change notices as discrete, stand-alone documents (i.e., addressing only the change, rather than an amended set of across-the-board disclosures).

In this scenario, the provider would furnish the responsible plan fiduciary with the change notices required by the current final 408(b)(2) regulation, and then provide an annual Guide Change Notice that merely directs the fiduciary to refer to the "initial" change notices previously received during the year. This is a strange result, and one that is arguably inconsistent with the concern expressed by the Department in the preamble regarding "ongoing and sporadic" disclosures of changes.

In light of this, we encourage the Department to provide more clarity regarding the proposed "Guide Change Notice" mandate. For example, is the Department's intent that Guide Change Notices must be furnished only in situations where the underlying change is disclosed as an amended version of a large document (or documents), rather than a discrete, stand-alone disclosure?[4] If the Department concludes that such an approach would further its goal of helping plan fiduciaries navigate complex disclosures, we ask that this be explained in clearer terms.

Clarification on permissible timing for the annual Guide Change Notices would also be helpful. In particular, it is not clear to us whether the *"at least annually"* requirement should be construed as allowing service providers to either furnish Guide Change Notices (i) once per calendar year, (ii) no later than the 12-month anniversary following the date the Guide is furnished (and each anniversary thereafter), or (iii) otherwise. There appear to be a number of competing factors with respect to this issue. For example, permitting flexibility for service providers to provide all Guide Change Notices at once (calendar year) may be a means of achieving efficiency and reducing costs. On the other hand, if the cost difference is not significant, providing the Guide Changes Notices on a plan-by-

[4] A "discrete" change notice could be defined according to a page number limit and the font and margin requirements discussed previously.

plan "anniversary" basis would ensure that no plan receives the initial Guide and a Guide Change Notice within a short period. Once again, we do not intend to advocate one position over another, but rather, to point out the need for further clarification regardless of the answer.[5]

4. Effective Date

With respect to the effective date of the Guide requirement, the preamble to the Proposal states:

> *The Department proposes that the amendment to the final rule contained in this notice will be effective 12 months after publication of a final amendment in the Federal Register. The Department invites comments on whether the amendment, as finalized, should be effective on a different date.*

Covered service providers will need significant "lead time" to modify or develop the systems and process for delivering the Guides, once the requirements are finalized. This will be a substantial undertaking, and it appears that the Department has taken this concern under advisement. However, a key issue that is not clearly addressed in the Proposal is whether the Guide requirement will be prospective only, or retroactive as well. That is, it is not clear whether it will apply only to new contracts or arrangements, and extensions or renewals of existing arrangements, entered into after the effective date of the final amendment, or if it will apply equally to all existing contracts and arrangements.

When the Department promulgated the final 408(b)(2) regulation, it was applied both prospectively and to existing relationships as of July 1, 2012. In that case, the retroactive application was designed to ensure that plan fiduciaries received information that may not have been previously apparent, such as indirect compensation (and sources thereof), compensation paid among related entities and providers' fiduciary status.

By contrast, application of the Guide requirement to contracts and arrangements already in existence on the effective date of the amendment involves a different set of considerations. For such relationships, 408(b)(2) disclosures have (presumably) been

[5] We note that in the context of furnishing the investment comparative charts required under 29 CFR §2550.404a-5, the general timing approach contemplates an "anniversary" basis. However, the Department adopted a temporary enforcement policy in Field Assistance Bulletin 2013-02 which provides an 18-month window for plan administrators to provide the "second round" of the charts. This relief was issued by the Department to better allow plan administrators to sync the disclosure timing up with that of other important notices by "resetting" the annual cycle, while avoiding the costs of furnishing two rounds of charts within a short time frame. These are the same competing factors at play with respect to the timing of the Guide Change Notices.

provided to responsible plan fiduciaries, in some cases years earlier. Requiring that these fiduciaries be furnished with a Guide to locate key terms within disclosures that were previously reviewed and evaluated involves a different cost/benefit analysis. For covered service providers whose fiduciary status, services and compensation were disclosed within their service contracts (rather than through separate disclosures), the costs of furnishing Guides could be particularly high (costs which may be passed through to plans), if the page and/or section numbers that describe those disclosures vary across multiple iterations of their contracts used over the years.

For these reasons, we ask that the Department provide clarification as to whether the requirement to furnish a 408(b)(2) Guide will be applied prospectively only, or retroactively as well.

5. Relief for Inadvertent Errors and Omissions

The Proposal does not specifically describe the availability of any relief for a covered service provider that discovers and corrects an error or omission in a Guide previously furnished to a responsible plan fiduciary (or a Guide Change Notice). However, paragraph (c)(1)(vii) of the final 408(b)(2) regulation provides that:

> *No contract or arrangement will fail to be reasonable under this paragraph (c)(1) solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to paragraph (c)(1)(iv) of this section (or a change to such information disclosed pursuant to paragraph (c)(1)(v)(B) of this section) or paragraph (c)(1)(vi) of this section, provided that the covered service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.*

This provision applies currently to initial disclosures, change notices and information requested by the responsible plan fiduciary for reporting and disclosure purposes, respectively. Noting that the Guide would be described in paragraph (c)(1)(iv)(H) (as part of the "initial disclosure requirements" set forth in subsection (c)(1)(iv), referred to in the above passage), it appears that the Department intends that this relief would extend naturally to the Guide and Guide Change Notices as well. That is, a covered service provider who discovers an error or omission in a Guide or Guide Change Notice could avail itself of the relief described by disclosing the correct information as soon as practicable, but not later than 30 days after learning of the error or omission, so long as the error or omission was not caused by a failure to act in good faith or with reasonable diligence. Clarification on this issue would be beneficial.

6. Separate Document Requirement

Paragraph (c)(1)(iv)(H)(3) of the Proposal requires that *"(t)he covered service provider shall furnish the guide...in a separate document."* The Department's intention with respect to this requirement is described in the preamble as follows:

> *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.*

With respect to new contracts and arrangements (and extensions or renewals of existing arrangements) entered into after the effective date of the final amendment, the Department is clearly concerned that if the Guide were inconspicuously incorporated into already lengthy or numerous disclosures,[6] this would frustrate its purpose. However, the mere requirement that the Guide be a "separate document" does not necessarily address this concern.

This issue might be addressed by requiring that the Guide be separately delivered, but it is not clear to us whether this is the Department's intent, nor what the specific requirements for separate delivery would be. Further, it not clear to us whether the Department has considered whether contemporaneous delivery might, in some cases, be beneficial. For example, we would encourage the Department to consider and provide further clarification on issues such as:

- If the "separate document" requirement means that separate delivery is required, and the Guide is mailed, must the covered service provider send the initial disclosures and Guide in separate envelopes (at double the postage costs)? If delivered electronically, would separate e-mails be required, or would separate attachments be sufficient?

- If a covered service provider furnishes the Guide in a prominent position contemporaneously with the initial disclosures (for example, as a "cover" placed on top of the initial disclosures), such as to highlight the Guide's purpose and relationship to the other disclosure documents, would this be permitted? If so, what are the specific parameters for determining that the Guide is prominently featured?

[6] If the Guide requirement were applied retroactively, all Guides furnished with respect to previously-existing contracts and arrangements would necessarily be separate from the initial disclosures.

7. The "Furnish"/"Disclose" Requirement

The Proposal states that a covered service provider "shall furnish" a guide if the conditions of the Proposal are met. It also states that the covered service provider must "disclose" changes at least annually.

We are concerned that the manner of "furnishing" and "disclosing" is not clear in the Proposal. We urge the Department to take the opportunity in the final regulation to clarify if these terms mean actual delivery – for example, by mail, courier or email -- or something else – for example, would it be sufficient to post the information on a website, with or without the actual delivery of a notice that the information had been posted? An example of this might be if the covered service provider maintains a client-specific website that, by agreement between the parties, the client is expected to visit periodically without being told that new material has been posted by the covered service provider. The question is whether this would be sufficient to satisfy the "furnish" and/or "disclose" requirement.

We are not asking that the Department necessarily address whether electronic delivery versus other means of delivery is acceptable, only that it clarify whether "furnishing" and "disclosing" require the actual delivery of the information by whatever means or whether mere posting of information is sufficient.

Conclusion:

To reiterate, our purpose is not to express an opinion as to the specific resolution of these matters. Rather, it is simply to point out items upon which further guidance is needed. When we advise our clients as to their responsibilities under the amended rule, we need to be able to do so with confidence. We regard the issues discussed above as being among the most likely to cause inadvertent compliance failures.

Please contact us with any questions regarding the matters discussed in this letter.

Very truly yours,

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