



May 12, 2014

By email

Celeste Richie
Office of the Assistant Secretary for Policy
Chief Evaluation Office
U.S. Department of Labor, Room S-2312
200 Constitution Ave NW
Washington, DC 20210

RE: Information Collection Request (OMB 1210-NEW) "Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements"

Dear Ms. Richie:

The undersigned organizations write to express our concern about the above-referenced proposed information collection request. The request suggests that the information collection is necessary to evaluate the effectiveness of the Department of Labor's 408(b)(2) disclosure requirements by conducting focus groups. We believe this review of the 408(b)(2) regulation is premature and based on unidentified anecdotal evidence of small businesses that is contrary to the actual experience of our members. In particular, it is our view that:

- It is premature and imprudent to propose to amend the section 408(b)(2) regulation to add more disclosure rules *before* determining whether any changes are needed (and whether the costs of those changes justify whatever benefits the Department identifies).
- The proposed focus groups are not properly constructed because (1) they ignore large-plan fiduciaries, and (2) they rely upon recollection of disclosures that plan fiduciaries received almost two years ago.
- The focus group "script" contains a number of biases that could prevent the results from being reliable and valid.

Collectively, our organizations represent the interests of the vast majority of retirement plan service providers – including record keepers, banks, mutual fund companies, insurance

companies and advisors of defined contribution retirement plans. Our organizations support effective disclosure to plan fiduciaries and retirement plan participants. In fact, we believe the Department should undertake more real-world testing of its rules, including properly designed focus-group testing. Properly designed focus-group testing could provide the Department and the regulated community meaningful information. Before the Department embarks on a change to the regulation that will be costly to implement, we believe it should first undertake this kind of testing together with other appropriate research to determine if a change is even necessary.

Background.

In 2012, the Department issued rules under ERISA section 408(b)(2) imposing a new disclosure regime on service providers to retirement plans.¹ Service providers spent millions of dollars and thousands of hours drafting the notice and building and testing systems to deliver them to hundreds of thousands of plans, with collectively millions of participants. But only two years later, the Department is now proposing to amend the 408(b)(2) regulation so as to require service providers to create and provide a “Guide” to plan fiduciaries.² We note that the Department has stated it has no data on the potential *cost* of the regulation.³ And yet, simultaneous with releasing the proposal for a mandated Guide, the Department announced its intention to conduct focus-group testing regarding the 408(b)(2) disclosure. The Department states that this testing is to “gather information about the need for a guide, summary or similar tool to help [responsible plan fiduciaries] navigate and understand the disclosures.”⁴

In this letter we refer to the proposal as the “Guide” proposal, but we would point out that the proposal is not simply for a guide in the ordinary sense of the word (*i.e.*, a summary). Rather, it would be a specific cross reference disclosure that, as proposed, would be required in a “separate document.” (Many providers already include a summary of the 408(b)(2) information in their disclosure.)

The Proposed Regulation is Premature.

Plan service providers have made sizeable investments to comply with the 408(b)(2) disclosure requirements – including undertaking significant conversations and outreach to clients to ensure that plan fiduciaries are satisfied with the experience. Members spent considerable time and resources – millions of dollars – to create the disclosures in a responsible and clear manner. When the disclosures were provided in mid-2012, service providers received only an insignificant number of calls from plan fiduciaries about the disclosure. Members report receiving no calls from fiduciaries saying the information was hidden, buried, or hard to find. Service providers actively reached out to and worked with plan fiduciaries that did have questions and, collectively, our perspective is that the disclosures served their intended purpose.

¹ 77 Fed. Reg. 5632 (Feb. 3, 2012) (effective July 1, 2012).

² 79 Fed. Reg. 13949 (Mar. 12, 2014).

³ *Id.* at 13957 (describing “informal study” of Department’s own staff); *id.* at 13958 (“The Department lacks information on the time required by covered service providers to create a guide.”).

⁴ 79 Fed. Reg. 14085, 14086 (Mar 12, 2014).

In other words, service providers saw no evidence that plan fiduciaries were unable to locate information within the disclosures.

We appreciate that this focus-group effort is in direct response to concerns repeatedly expressed by our groups and others that the Department does not have the information to justify the need for (or cost of) a new Guide requirement. In fact, when it finalized the 408(b)(2) regulation in 2012 (but declined to impose a Guide requirement) the Department itself said that it lacked “specific suggestions or data on how best to structure” a Guide requirement and data regarding “what the real costs of such a requirement would be.”⁵ In other words, this focus-group testing is apparently intended to justify the need for a proposal in the first instance.

The supporting materials for the proposed focus-group testing note that they were developed in early 2014, many months after the proposed regulation regarding the Guide was sent to the Office of Management and Budget for review. This sequence is backwards – the Department should first gather information needed to determine whether there is a fundamental problem with the 408(b)(2) requirements, determine if the costs of a Guide justify the benefits, and only then, *if* both predicates demonstrate the need, propose a new Guide requirement. Interested parties cannot meaningfully comment on the Department’s regulatory impact analysis without the information the Department will use to justify the benefits of the rule. Yet the Department admits that the results of the focus-group testing will not be available until after the comment period has closed on the proposal.⁶

The Focus Groups are Not Properly Constructed.

Beyond our concerns about the sequencing, we believe that the proposed composition of the focus groups needs further consideration. The Department proposes to gather 70-100 plan fiduciaries of small pension plans (*i.e.*, those with less than 100 participants) and ask a series of questions about the 408(b)(2) disclosure that these fiduciaries received nearly two years ago. We believe that this will not result in data that will be meaningful or useful in evaluating the disclosure’s effectiveness – not to mention the need for more disclosure in the form of a Guide.

First, the focus groups improperly exclude large plan fiduciaries. The vast majority of plan participants are in large plans with more than 100 participants. Of the 130 million participants in pension plans in 2011 (the last year of published Department data), 118 million were in plans with over 100 participants. Only 12 million, or 9%, were in plans with fewer than 100 participants.⁷ Thus, even if a sample of 70-100 plans out of the nearly 600,000 small plans is a statistically significant sample for small plans, it misses *more than 90% of the participant experience*. The kinds of products and services used by and provided to small plans, and the ways that plan fiduciaries evaluate them, are very different from large plans. In addition, because many small employers do not have in-house expertise, small-plan fiduciaries often have

⁵ 77 Fed. Reg. at 5642

⁶ 79 Fed. Reg. at 13953.

⁷ U.S. Department of Labor, Private Pension Plan Bulletin, Abstract of 2011 Form 5500 Annual Reports, Tables A1, A1(a), A1(b) (June 2013).

the assistance of a registered investment adviser or consultant. For that reason, focusing on small plans – and not allowing their fiduciaries to answer the questions with help from their advisor or consultant – could improperly suggest a lack of knowledge that is not representative of plan fiduciaries, especially those overseeing the vast majority of participants.

In addition, we would point out that the focus groups do not pre-qualify the group participants as the individuals who actually received, reviewed, and evaluated the disclosure.

Second, the questions involve disclosures provided nearly two years ago. The script for the focus group includes detailed questions about disclosures, asking questions such as “did the disclosure make clear who was receiving the compensation” and “how long did you spend reviewing the disclosures.” It is unlikely that any plan fiduciary, particularly a small plan’s fiduciary who has many responsibilities beyond administering the plan, could recall this detailed and complex information accurately.

Suggestions to Improve the Focus Group Script and Remove Bias.

We share the Department’s goal to have any effort result in clear and unbiased results. We have some concerns that the design of the testing could introduce unwanted bias suggesting a series of problems that do not exist outside the focus group room. Accordingly, we respectfully request that the Department consider the following comments regarding the focus group script. We have pointed out below issues raised by our members, but we think the entire set of questions should be reviewed with an eye to removing potential bias and to elicit more free form responses that will not steer focus group participants to agree that the Guide is needed. *(To assist in understanding our comments, we have attached the script of the focus group.)*

- We object to the use of the term “hidden fees” being used to introduce the session, particularly because the immediately prior sentence in the script states that the Department requires fees to be disclosed. This suggests an expectation that the current 408(b)(2) disclosure leaves information hidden, which could bias the focus group participants’ answers.
- Question 8 asks whether the 408(b)(2) disclosures were “easy to understand.” This question is likely to elicit a “No” answer – even experts find the service arrangements designed to meet all ERISA and tax code regulations complex. Rather, the question should be restated to ask whether the individual was able to understand the information. (Even this question will be hard to answer given the time that has elapsed since the disclosure was provided.) If the information is difficult to understand, open-ended follow-up questions should elicit what made them difficult to understand.
- Generally, the Department should reevaluate whether the questions set up a test for simplicity that the 408(b)(2) disclosure cannot possibly meet. Although service providers work hard to make these disclosures user-friendly, the disclosures are often complex because the services and regulatory structures are complex. After all, if the Department

were to hand a small plan fiduciary the text of the 408(b)(2) regulation – or any other regulation – and ask if it is “easy” to understand and can be recalled two years later, we imagine the answer would be a clear “No.”⁸

- While we appreciate the Department’s attempt to try to evaluate whether the Guide is worth the cost that plans (and participants) will ultimately pay, we believe question 22 should be carefully considered to ensure the results are valid. For example, it is likely that participants would pay the cost for this in many plans (and it could be a cost incurred every year) but the question does not reflect the fees charged directly or indirectly against a participant’s retirement savings. The question also does not reflect that the Guide could reduce the *availability of services and investments* as service providers reduce unique offerings which involve undue costs to comply with a Guide requirement. Finally, we have no idea where the Department determined that the dollar figures that will be used reflect the actual cost of the Guide (since the Department admits it has no data on the cost). If a Guide requires manual work by a provider these numbers are significantly understated.

* * * *

Given the importance of this effort, we respectfully recommend that the Department redesign its focus-group test. We also recommend that the Department put the proposed regulation concerning a Guide *on hold* until the testing has been completed and its results made available for public comment and consideration. The Department should not move forward proposing changes to the section 408(b)(2) regulation without real evidence of a need for changes.

We appreciate your consideration of these comments. We are available to meet with you to discuss our comments or to provide additional information or clarification.

American Bankers Association
American Council of Life Insurers
Securities Industry and Financial Markets Association
The Spark Institute, Inc.

ATTACHMENT (Department Proposed Focus Group Script)

⁸ That the 408(b)(2) regulation is hard to understand to non-experts is demonstrated by the fact that the Department itself has made errors in describing the 408(b)(2) regulation in the focus group script. Question 2 states that “a mutual fund company or insurance company that provides your plan with investment options for participants” is a covered service provider, which is not correct. A mutual fund or insurance product that is simply an investment option in a plan would not be required to provide a 408(b)(2) disclosure.

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cc: Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, OMB
Timothy Hauser, Deputy Assistant Secretary for Program Operations, EBSA
Joe Piacentini, Director, Office of Policy and Research, EBSA
Joe Canary, Director, Office of Regulations and Interpretations, EBSA

Script for 408(b)(2) Disclosure Focus Groups

Introduction

Thank you for coming and agreeing to participate in this discussion. What we are doing here today is called a focus group. My name is [insert moderator's name] and I will be moderating the discussion. I am a consultant with the firm ICF International; we have been supporting the U.S. Department of Labor for several years in a variety of projects. I want you to understand that I have nothing to sell to you; I am only interested in hearing what you have to say. In this discussion, we will talk about your experience receiving disclosures from your retirement plan's service providers. New Department of Labor rules require pension plan service providers to be more transparent about the fees they are receiving for their services. Some people refer to these fees as "hidden fees."

As mentioned in the form that you just signed, our discussion today is being audio-taped. This helps me so that I can talk to you and listen to responses without having to frantically write down what is being said. We are conducting this focus group for the U.S. Department of Labor to gather information for its rulemaking functions. However, the information we share with the Department of Labor will not include your name or your employer's name. No information shared with this group today will be used by the Department of Labor for enforcement purposes. One of my team members, [insert name of staff], is in the back of the room. [He or she] will be observing our discussion and taking notes.

Now, there is something important I want you to know about focus groups. There are only right answers. There is no definite answer I am looking for in anything we discuss today. You all have had different experiences and have different opinions, and all opinions are truly important. We are looking for different opinions, so please do not be influenced by others in the group if you might feel differently about something we are discussing. I want you to understand that nothing you have to say is going to get you or me in trouble, so please speak what is on your mind.

I ask that you please talk one at a time so that everyone gets a chance to share their opinions and that we do not miss anything. Also, please speak up so that we can all hear what you have to say and get it on tape. Feel free to address others at the table; you do not need to address all of your comments to me, but please avoid side conversations while others are talking.

I may interrupt the discussion from time to time. Please forgive me if I do this. I'm not being rude, it's just that I have a lot that I'm trying to cover with you and I want to get you out of here on time. Lastly, I really encourage everyone to participate equally; I'm very interested to hear what each of you has to say. If you tend to be a very talkative person, you might want to think about talking a little less, and if you tend to be a quiet person, you might want to talk a little more.

We'll be here for about 90 minutes. Please help yourself to some food and drinks. Restrooms are located [insert location]. I would like to have no more than one person away from the table at a time, so if you want to get up for any reason, please make sure that no one else is up from the table.

So, let's begin our discussion. First, I'd like everyone to introduce themselves to the group. Why don't you tell us your first name (please, only first name), your position at your employer, and how long you've been employed there?

Issue Area #1: About your role

1. First, I've told you in general what we are going to be talking about. Can you please describe your role with respect to your employer's plan?

Possible probes:

Are you the person who selects service providers on behalf of the plan?

If you are not the person who selects service providers, what is your responsibility with respect to the plan?

Are there multiple individuals contributing to this decision, for example, a benefits committee?

Do you work with a consultant or anyone else to make provider selections?

2. How many service providers does your plan have? Service providers might include, for example, a recordkeeper or third party administrator that keeps track of participants' investments and account information, a consultant that you use to help with plan administration, an investment manager that you hire to help you manage the plan's assets, or a mutual fund or insurance company that provides your plan with investment options for participants. Brand names you might have heard of include:

- Charles Schwab
- Fidelity
- ING Financial
- Invesco
- JPMorgan
- Lincoln Financial
- Merrill Lynch
- Morgan Stanley
- New York Life
- Oppenheimer and Co.
- Pacific Life
- Safeco
- T. Rowe Price
- TD Ameritrade
- The Hartford
- Vanguard

3. How many investment options does your plan offer?
4. What kinds of investments do you offer? (Examples: mutual funds, insurance products.)

Issue Area #2: Your experience with receiving 408(b)(2) disclosures

5. Now I want you to tell me about your personal experiences with the new disclosure requirements. You should have received disclosure materials from some or all of your existing service providers because of the new rules. The materials describe services being provided and the compensation received by the service provider. Under the new law, you probably received something like I have described around July 2012, or perhaps a little earlier. Or, if you hired a

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new service provider after July 2012, you probably received the new disclosures as part of the bidding or hiring process. Could you please tell me what materials you received?

Possible probes:

Did you bring any of these materials with you today (feel free to answer about any materials you brought with you, or materials you received from other service providers)? A letter, a service contract, a summary of plan charges, or something else?

How did you receive these materials? For example, by paper in the mail, by email, a website, or a combination (e.g., a letter in the mail with a link to a website)?

Did different service providers use different methods to send you disclosures?

Which method(s) did you prefer, and why?

Did you receive one document or several documents?

Did the disclosures refer you to materials your service provider already gave you or to online materials?

6. What do you think is the purpose of these disclosure materials?

Possible probes:

Why do you think that?

How familiar were you with the 408(b)(2) disclosure requirements before you received the disclosure materials?

7. When did you receive these disclosure materials from your service providers?

Possible probes:

Did you have to ask any service providers to provide you with disclosures?

If so, how long did it take for you to receive the disclosures?

Issue Area #3: Your understanding of the disclosures

8. Were the disclosure materials easy to understand?

Possible probes:

Were there particular sections or components of the disclosure materials that were difficult to understand?

If so, what sections or components?

Did the disclosure provide any clarifying or explanatory materials?

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9. Within the disclosure information, were you able to find information about the services that would be provided and the cost of those services?

Possible probes:

Did you have to look for help in understanding the information?

If so, where did you look for assistance or whom did you contact?

Was the cost of the services presented clearly?

10. Did the disclosures clearly differentiate between money that was paid directly from the plan, as opposed to money that the service provider received from third parties, for example from other service providers that they work with, or from the companies that provide investment options for your plan (such as a mutual fund company, an insurance company, or a bank)? The Department's rule distinguishes between "direct" compensation (from the plan) and "indirect compensation" that service providers receive from other parties – you may have heard indirect compensation sometimes referred to as "revenue sharing."

Possible probes:

Did the disclosures make clear who was receiving the compensation?

Was the purpose of the compensation clear from the disclosure forms? That is, was it clearly stated what service was provided or performed in order to justify the compensation?

If you received disclosures from different service providers (for the same services), were you able to compare information across the documents?

11. How long did you spend reviewing the disclosure materials?

Possible probes:

If you received disclosures from several providers, did the materials of certain service providers require significantly more effort than others?

Was the effort spent reviewing disclosure materials related to the complexity of your plans, for example, the number of investment offerings?

What characteristics made disclosures easier to review and understand?

Issue Area #4: Decision-making based on disclosures

12. Did you consult with anybody else (either within your organization or, perhaps, someone outside your organization that you hired) to assist you in reviewing the disclosures or, once you reviewed the disclosures, to help you decide what action, if any, should be taken in response to the information that you received?

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If yes, how did you identify the individual(s) you consulted?

13. Did you follow up with your service providers after receiving the disclosures – for example, to ask for more information or to request clarification?

Possible probes:

Please describe your follow up and the service providers' answers to your questions.

Were service providers forthcoming with additional information, clarification, and assistance?

Did the disclosure documents include a way for you to contact your service providers with questions?

14. Based on your review of the information you received, did you make any changes to the service providers for your plan or the investment options made available in your plan? Do you anticipate making any changes in the future?

Possible probe:

What components of the disclosures influenced your decision the most?

Issue Area #5: Usefulness of disclosures

15. Do you feel like you received new or more detailed information about your plan's service providers and the way that they are paid for services than you did before the Department of Labor required these disclosures from service providers? As mentioned earlier, you should have started receiving disclosures to comply with this rule in summer 2012.

16. Did you receive better information than what you had before?

Possible probe:

In what ways was the information better than the information you had before the required disclosures?

17. Based on the information provided, do you have a clear picture of what service providers are charging and what services they are providing?

Possible probe:

For example, if your service provider relies on other entities for services and provides them with compensation (e.g., record-keeping or administrative services, or for your plan's investment options), do you have a sense about how reasonable that compensation is?

18. Is there information you feel you need to fulfill your role as a plan fiduciary that you still are unable to obtain from your service provider?

Issue Area #6: Need for a guide, summary, or other tool

19. Think about your own disclosure experience and whether the presentation or delivery method of the information was helpful to you. If not, why not?

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Possible probes:

What specific information would you like to receive to help you understand the disclosures?

What would be your preferred format for receiving this information?

20. Did service providers include a guide or other organization tool to help you find specific information within the disclosures, or was the information summarized for you?

Possible probes:

If yes, was this helpful?

Or, if you did not receive any type of summary or guide/index that directed you to where you could find information on compensation received within the disclosure documents, do you think it would have been easier to review the disclosures if you had?

If you received summaries of the disclosures, did you also read the other, more detailed documents?

21. Now I would like to show you an organizational tool called a disclosure guide. It compares in some ways to a table of contents. Given your specific disclosure experiences, would this kind of tool have been helpful to you? Do you have any suggestions for improving this tool?

Possible probe:

What information would be most useful to include in a guide?

22. Service providers incur expenses preparing a guide or similar tool. Imagine you did not receive a guide or similar tool from your service provider; assume you had the option to purchase one from them.

On the cards that I'm passing out to you now, you will see a dollar amount. [Pass out cards to participants, each one showing one of five randomly assigned dollar values ranging from roughly \$10 to \$200, with exact values to be determined]. Imagine that this is the price your service provider would charge for a disclosure guide. At this price, please write "yes" or "no" in the first blank below the dollar amount on your card to indicate whether or not you would buy the disclosure guide at the price shown on your card.

Now, I want you to think about what would be the most you would be willing to pay your service provider to receive the disclosure guide. So, if you answered "yes" in the first blank, look at the price on your card and think about how much more you would be willing to pay before buying the disclosure guide did not feel worth it to you. Alternately, if you answered "no" in the first blank, think about how much less expensive the disclosure guide would have to

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be than the price given to you before you would buy it. In the second blank write the amount you would be willing to pay to receive the disclosure. Once you are done, please turn your cards over and pass them up to me.

Possible probes (after cards have been handed in):

What were the most important factors you considered when deciding whether or not to purchase the disclosure guide?

Is there anyone who would not be willing to pay anything to receive a disclosure guide?

If yes, why?

Are there any ways in which you think the disclosure guide could be modified to be of more value to you?

23. Does anyone have other comments about what we have been discussing or questions about this group?

Well, we are out of time. Thanks so much for coming to this group and sharing your thoughts with me. It has truly been a pleasure to get to talk with all of you.