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June 10, 2014

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

Re: RIN 1210-AB53: Amendment Relating to Reasonable Contract or
Arrangement Under Section 408(b)(2) – Fee Disclosure

Dear Sir/Madam:

The Investment Company Institute¹ appreciates the opportunity to comment on the proposed amendment to the final 408(b)(2) service provider disclosure regulation (the “Regulation”),² *Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure* (the “Proposed Rule”).³ The Proposed Rule would amend the Regulation under the Employee Retirement Income Security Act of 1974 (“ERISA”) to require covered service providers to furnish a guide that enables plan fiduciaries to “quickly and easily find” the required disclosures provided pursuant to 408(b)(2). The guide would be required unless the covered service provider furnishes the required disclosures in a single summary document that does not exceed a yet-to-be-determined number of pages. The Institute strongly supported the Department’s service provider disclosure initiative,⁴ and has long supported effective disclosure to plan fiduciaries that enables them to fulfill their duties under ERISA.⁵ Many of our members are “covered service providers” as that term is

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$16.8 trillion and serve more than 90 million shareholders.

² 77 Fed. Reg. 5632 (Feb. 3, 2012).

³ 79 Fed. Reg. 13949 (March 12, 2014).

⁴ See, e.g., Letter from Mary Podesta, Senior Counsel – Pension Regulation, Investment Company Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated August 30, 2010, available at www.dol.gov/ebsa/pdf/1210-AB08-0027.pdf.

⁵ In 2004, the Institute recommended that the Department adopt rules calling for disclosure of both direct and indirect compensation of plan service providers. See Testimony of Elizabeth Krentzman, General Counsel, Investment Company Institute, on Disclosure to Plan Sponsors and Participants Before the ERISA Advisory Council Working Groups on Disclosure (September 21, 2004), available at www.ici.org/policy/ici_testimony/04_dol_krentzman_tmny. For more

defined in Section 2550.408b-2-(c)(1)(iii) of the Regulation and, therefore, will not only be the entities responsible for furnishing the guide contemplated by the Proposed Rule, but have already invested tens of millions of dollars in the design and distribution of disclosure materials associated with the recently effective Regulation.

While our members have a vested interest in ensuring that their clients have the information they need to assess the reasonableness of the compensation to be paid for plan services,⁶ they have significant concerns that the guide requirement described in the Proposed Rule represents a “one-size-fits-all” standard that ignores the reality that disclosure materials can vary significantly for each service provider by product lines, investment products, plan design and plan sponsors’ needs and preferences. We discuss this and other related concerns in greater detail in Part II of the letter below in connection with our responses to the specific questions raised in the preamble to the Proposed Rule. Before responding to the specific questions, however, we describe in Part I of the letter our concern that, in proposing the guide requirement, the Department failed to follow widely established procedural standards applicable to the publication of agency rules. We believe that the failure to follow a proper rulemaking process has led to a proposal that lacks necessary specificity and completeness to frame meaningful comments on either the benefit implications of the proposal or its costs as requested by the Department. Moreover, using the Department’s own cost and time elements, we have calculated that the overall cost to covered service providers to prepare the guide contemplated by the Proposed Rule would be greater than \$447 million, or more than ten times the \$40.3 million benefit the Department estimates would be derived from the provision of a guide to the disclosures.⁷ For these reasons, discussed in greater detail below, we request that the Department withdraw the Proposed Rule and determine whether to reissue it after conducting a statistically valid survey and review of disclosure materials obtained as part of its audits/investigations of service providers and plans and publishing a Request for Information, to identify what, if any, difficulties plan fiduciaries may be encountering in connection with the receipt of 408(b)(2) disclosures as well as cost-effective solutions to address those specific problems.

information on the Institute’s long support of effective disclosure to both fiduciaries and participants, see www.ici.org/pdf/ppr_07_ret_disclosure_stmt.pdf.

⁶ It is generally understood that covered service providers have the burden of proving that they meet the exemption requirements associated with 408(b)(2). See *Class Exemption for the Release of Claims and Extensions of Credit in Connection with Litigation* 68 Fed. Reg. 75632 (Dec. 31, 2003), wherein the Department confirmed that any party seeking to take advantage of any administrative exemption granted by the Department has the burden of proving that it met each condition of the exemption. See also *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009) (the exemption for reasonable compensation is a separate section of the statute and it is a general rule of statutory construction that the burden of proving satisfaction of a special exemption to the prohibitions of a statute generally rests on one who claims its benefits).

⁷ See *infra* text accompanying notes 41-44.

Summary of the Institute's Major Comments on the Proposed Rule

A summary of our major comments in response to the Proposed Rule is provided below.

- The Department is proposing a rule to require a guide to the disclosures without having first demonstrated a compelling public need for a guide requirement. The Department has not provided factual evidence or data to support the need for a guide. Further, we are not aware that plan sponsors or plan fiduciaries have complained or expressed concerns regarding the required disclosures or the ability to find information within the disclosures.
- The Department does not properly address or understand the complexity or time necessary to construct a guide to the disclosures. A guide requiring references to specific section or page numbers will generally have to be customized on a client-by-client basis. Moreover, there are no currently available data sources to obtain the types of information that would be required for page and section numbers as contemplated by the Proposed Rule. As such, service providers will be required to manually build and maintain systems necessary to construct a guide with specific section or page number references.
- The Department has vastly underestimated the cost to service providers associated with the proposed guide requirement. The Department's cost analysis ignores the fact that the relevant disclosures required by the Proposed Rule include information contained in documents beyond mutual fund prospectuses, including documents generated by other covered service providers.
- The Department's proposed "one-size-fits-all" format requirement ignores the fact that covered service providers seek to tailor the format of their disclosures based on the specific details of their relationship with their client. The Department's proposal will likely have a negative impact on service provider innovation and client tailoring associated with the required disclosures.
- Given the absence of technological solutions to automate compliance with the proposed guide requirement, an effective date of 12 months after publication of a final amendment in the *Federal Register* will not provide covered service providers with sufficient time to develop and implement systems required to prepare the guide. A period considerably longer than 12 months will be necessary to establish the processes and procedures necessary to ensure compliance with the Proposed Rule.

I. The Department Has Not Demonstrated a Compelling Public Need for the Guide Requirement Contained in the Proposed Rule

As noted above, the Institute is concerned that the Department, in connection with its publication of the Proposed Rule, did not satisfy the procedural requirements applicable to agency rulemaking. More specifically, Executive Order 12866,⁸ as reaffirmed by this Administration in January 2011,⁹ is well understood to govern the rulemaking process. Executive Order 12866 provides that Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need. Executive Order 12866 further provides that each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of the problem. Clearly, the Proposed Rule is neither required by law nor necessary to interpret the law. Pursuant to Executive Order 12866 then, the Department must illustrate that the Proposed Rule is made necessary by “compelling public need.” As discussed below, we do not believe that the Department has provided support or evidence that the Proposed Rule is made necessary by “compelling public need” and, therefore, we believe that the Department has, in issuing the Proposed Rule, acted in a manner that is inconsistent with the requirements of Executive Order 12866.

A. The Department Has Not Provided Factual Evidence or Data to Support the Need for a Guide Requirement

The Department states in the preamble to the Proposed Rule that it believes that plan fiduciaries, especially in the case of small plans, need a tool to effectively make use of the required disclosures.¹⁰ The sole basis for the Department’s position is that “anecdotal evidence suggests that small plan fiduciaries often have difficulty obtaining required information in an understandable format, because such plans lack the bargaining power and expertise possessed by large plan fiduciaries.”¹¹ The Department provides no data or factual evidence to support this statement or otherwise demonstrate any grounds for its belief. For example, the Department does not identify complaints received or concerns expressed by plan sponsors with regard to the disclosures and does not cite to any published source or otherwise support its position that plan fiduciaries currently have problems accessing information within the disclosures currently provided. Nor does the Department provide any

⁸ 58 Fed. Reg. 51735 (Oct. 4, 1993).

⁹ The current administration reaffirmed the principle and structures that were established in Executive Order 12866 in Executive Order 13563. *See* 76 Fed. Reg. 3821 (Jan. 21, 2011).

¹⁰ 79 Fed. Reg. at 13950.

¹¹ *Id.* at 13951.

investigative findings to support its conclusion.¹² Moreover, the Department does not state the basis on which it believes that the Proposed Rule will resolve any purported problems plan fiduciaries may have accessing or better understanding information contained within the disclosures. Indeed, pursuant to the Proposed Rule, the Department seeks public comment on the likely benefits of requiring that covered service providers furnish *any* required tool (whether a guide, summary, or other tool) in a specified format.

Perhaps the most glaring evidence of the Department's failure to demonstrate a compelling public need for the Proposed Rule is the Department's proposed Information Collection Request ("ICR")¹³ regarding the conduct of focus groups to explore current practices and effects of the Regulation and to gather information about the need for a guide, summary, or tool to help plan fiduciaries navigate and understand the disclosures.¹⁴ According to the ICR (which was published in the *Federal Register* on the same day as the Proposed Rule), the Department intends to use information collected from the focus groups to (1) assess plan fiduciaries' experience in receiving the 408(b)(2) disclosures; (2) assess the effectiveness of these disclosures in helping plan fiduciaries make decisions; (3) determine how well plan fiduciaries understood the disclosures, especially in the small plan marketplace; and (4) evaluate whether, and how, a guide, summary, or similar tool would help fiduciaries understand the disclosures.¹⁵

The focus groups are purportedly designed to provide the Department with information as to the necessity of a guide requirement. While we believe it appropriate, as part of a prudent regulatory process, for the Department to collect information to evaluate whether, and how, a guide, summary, or other tool would help fiduciaries understand the disclosures, we believe that the Department should

¹² We understand that the Employee Benefits Security Administration's Office of Enforcement has been collecting and reviewing 408(b)(2) disclosure materials as part of its audits/investigations of plans and service providers. If our understanding is correct, as part of its rulemaking process, the Department should provide the public with the results of these examinations.

¹³ 79 Fed. Reg. at 14085 (March 12, 2014).

¹⁴ For the Institute's comment letter on the ICR, *see* Letter from David M. Abbey, Senior Counsel – Pension Regulation and Sarah Holden, Senior Director – Retirement and Investor Research, Investment Company Institute, to Office of the Assistant Secretary for Policy/Chief Evaluation Office, dated May 12, 2014, available at www.ici.org/pdf/28119.pdf. As noted in the letter, we believe that the use of focus groups contemplated by the ICR are completely inadequate to judge the need for a guide.

¹⁵ *See* "Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements Focus Group", Supporting Statement for the Paperwork Reduction Act of 1995 - Submission for Clearance on Proposed Collection Comment Request; Proposed Information Collection Activity; Comment Request; Proposed Project, prepared by U.S. Department of Labor, Employee Benefits Security Administration and Office of the Assistant Secretary for Policy/Chief Evaluation Officer, (OMB Control No. 1210-New, Feb. 2014).

have collected such information prior to issuing a proposed rule requiring a guide to the disclosures. Consistent with proper rulemaking processes, the results of the focus groups should also be published for public consumption and consideration by those providing comments on any subsequent regulatory proposal. The Department is putting the proverbial “cart before the horse” in soliciting comment on the value of a guide and conducting focus groups to determine if a guide will have practical utility – concurrent with the issuance of a proposed rule that would require covered service providers to furnish the guide.¹⁶

Additionally, the Department states in the preamble that a guide requirement will assist responsible plan fiduciaries in finding information that ERISA requires them to assess in evaluating both the reasonableness of the compensation to be paid for plan services and potential conflicts of interest that may affect the performance of those services, and that a guide will reduce the costs plan fiduciaries would have incurred searching for such information.¹⁷ The Department provides no external data or evidence to support this proposition. Indeed, elsewhere in the preamble the Department states that it is “not aware of any information that currently exists that could be used to measure the time savings that would result from the guide in circumstances where a guide would be required.”¹⁸

Apparently in an effort to justify the potential time savings associated with a guide requirement, the Department conducted an informal study with two groups of internal staff to estimate the potential time savings associated with a guide requirement.¹⁹ One group searched for specified information in plan and investment documents using a guide-like document while the other group searched for the specified information in the same documents using a list of the documents in which the information could be found. Based on this “informal” study, the Department concluded that the group that used a guide-like document, on average, saved 30 minutes compared with the group that used the list. The Department provides no specifics regarding the type or amount of documents used in the study, only that the documents were “plan and investment documents.” Thus, we do not know if the “plan and investment documents” used in the informal study bore any actual similarity to the types of documents that may have been provided to a plan fiduciary in connection with the 408(b)(2) disclosure requirement.²⁰ Yet, incredibly, this “informal study” involving two groups of *internal* Departmental

¹⁶ The Department acknowledges in the preamble that it may decide to reopen the comment period on the Proposed Rule to solicit comments on the focus group results.

¹⁷ 79 Fed. Reg. at 13951.

¹⁸ *Id.* at 13956.

¹⁹ *Id.* at 13957.

²⁰ Further, as discussed below, many of our members provide a summary-type document with the required disclosures, yet the Department appears to have ignored this fact in its “informal study.”

staff forms the entire basis for the Department's monetary estimate of the benefits associated with the Proposed Rule.

It comes as no surprise that the Department is unable to support a "compelling public need" given that, based on the experience of the Institute's members in implementing the disclosure requirements pursuant to the Regulation, there has been no indication that a problem exists. In this regard, it has been almost two years since covered service providers first provided the disclosures pursuant to the Regulation. In that time, service providers have received very few questions from plan sponsors about where to find information within the disclosures or about the ability to access needed information.²¹ The Institute is also not aware that groups representing plan sponsors or plan fiduciaries have raised issues or concerns about the inability to find information within the disclosures. Further, we believe that any questions received by service providers have been responded to appropriately and to the satisfaction of their plan fiduciary clients. The absence of concerns raised by plan fiduciaries with respect to the disclosures is not surprising. Our members invested tens of millions of dollars to design and distribute disclosures required by the Regulation. The inquiries that providers have received are in regard to specific components of a plan's information and support the understanding that fiduciaries are actively receiving and analyzing the required disclosures.

In the preamble to the interim final regulation, the Department – in discussing the imposition of a format requirement – specifically stated that it "does not want to unnecessarily increase the cost and burden for service providers to furnish required information, especially to the extent such cost may be passed along to plan participants and beneficiaries, unless it is clear that the benefit to plan fiduciaries outweighs such cost and burden."²² Based on the Department's lack of evidence that a guide is needed, as well as the lack of inquiries received regarding the location of information within the disclosures, we do not believe the Department has shown that there is clear need for a guide to the disclosures. In any event, as discussed in greater detail below, it is clear that any benefit of the guide does not outweigh the cost and burden that it presents to covered service providers.

²¹ The Institute conducted a survey of a cross-section of the Institute's members to learn more about inquiries received from plan fiduciaries resulting from the required disclosures since the effective date of the Regulation. The survey respondents include service providers with total assets under administration of nearly \$3 trillion and who distributed disclosures pursuant to the Regulation to more than 200,000 plans. Our survey found that less than 1 percent of plan fiduciaries who received such disclosures requested information or guidance regarding the location of specific information within the disclosures.

²² 75 Fed. Reg. 41600, at 41607.

B. The Department Does Not Properly Address or Understand the Complexity or Time Necessary to Construct a Guide to the Disclosures

The Department also states in the preamble that it believes that “covered service providers are best positioned to provide the guide in a cost-effective manner, because they have the 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 guide for large numbers of clients, each of whom would have to locate the information separately in the underlying disclosures.”²³ As discussed below, we believe the Department’s suppositions are incorrect for several reasons.

First, we are concerned that the Department continues to believe that the vast majority of client service agreements are “master” agreements with no variation by client. Although the Department does not include a model guide as part of the Proposed Rule, it references the sample guide the Department previously posted on its website as “an example of what the Department believes guides to initial disclosures may look like in practice.”²⁴ The sample guide posted on the Department’s website includes references to specific pages and paragraphs in a “master service agreement.” As we have previously discussed with the Department,²⁵ plan agreements and disclosure materials can vary significantly for each service provider by product line, investment product, plan design and plan sponsor’s preferences and needs. Plan service agreements also change over time to reflect changes to currently available services. While model contracts may be used as a starting point, they are often customized and individualized due to changes requested by the plan sponsor, plan fiduciary, and/or legal counsel, among others. Therefore, we believe a guide that references section or page numbers likely would have to be customized on a client-by-client basis.

Second, the Department’s assumption that a covered service provider has “specialized knowledge” regarding the location of the required disclosure elements is flawed. As the Department acknowledges in the preamble, covered service providers can use separate documents from separate sources to meet their disclosure obligations under the Regulation, as long as all of the documents, collectively, contain the required information. Therefore, for example, a recordkeeper may have thousands of plan clients,²⁶ each with investment alternatives and associated documents generated by

²³ 79 Fed. Reg. at 13951.

²⁴ *Id.* at 13952.

²⁵ ICI staff discussed this issue with the Department during a November 14, 2013 meeting with representatives from the Department and the Office of Management and Budget.

²⁶ In the preamble, the Department notes that the Proposed Rule applies to contracts or arrangements between covered plans and covered service providers and stated that a familiar example of such an arrangement is a contract between a

the third-party issuer of the investment (such as mutual fund prospectuses) that are relevant to meeting its disclosure obligations.²⁷ It is unclear under such circumstances how a recordkeeper would have “specialized knowledge” of the location of specific required disclosure elements in such documents,²⁸ or specialized knowledge of the location of the required disclosure elements within other third-party created documents, such as custody and trust documents, brokerage documents, investment management agreements, or insurance contracts.

Third, we believe it will take a covered service provider more time than the one-half hour suggested by the Department to locate the required information necessary to construct the guide. The Department’s time estimate appears to be based upon the covered service provider’s ability to locate the disclosure elements “in its own document.”²⁹ As discussed above, many covered service providers must rely on third-party documents to meet their disclosure obligations and would, therefore, be required to locate the required information in documents created by others. Again, in the case of a recordkeeper with a platform of investment alternatives, the individual preparing the guide would be required to locate the required information within the offering documents (*e.g.*, prospectus and/or offering circular) related to the particular investment options offered by each plan to which recordkeeping services are provided.

Finally, if the guide requirement is adopted, failure to fully comply with the guide requirement would result in the loss of the exemptive relief provided under ERISA Section 408(b)(2). In such circumstances, the provision of services and receipt of fees for such services would result in a prohibited transaction. In this respect, a simple mistake like transposing page references or any other locator used could void the contract with the plan sponsor client and subject the service provider to substantial excise tax liability.³⁰ Given the significant liability associated with a failure to be in full compliance with

recordkeeper and a covered individual account plan under which the recordkeeper will make available a platform of investments consisting of mutual funds. *See* 79 Fed. Reg. at 13956.

²⁷ Surveys of plan sponsors found 401(k) plans offered 19 to 20 investment options, on average, in 2012. *See* Aon Hewitt, *2013 Universe Benchmarks*, Lincolnshire, IL: Aon Hewitt (2013); Deloitte Consulting LLP, International Foundation of Employee Benefit Plans, and the International Society of Certified Employee Benefit Specialists, *Annual 401(k) Benchmarking Survey: 2012 Edition*, New York, NY: Deloitte Consulting LLP (2013), available at www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Consulting/us_cons_hc_401ksbecnchmarkingsurvey2012.pdf; and Plan Sponsor Council of America, *56th Annual Survey of Profit Sharing and 401(k) Plans: Reflecting 2012 Plan Experience*, Chicago, IL: Plan Sponsor Council of America (2013).

²⁸ In this respect, the Department references, amount other potential investment alternatives, the existence of 16,380 mutual funds, closed end funds, exchange traded funds, and unit investment trusts. *See* 79 Fed. Reg. at 13958.

²⁹ *Id.*

³⁰ *See* 26 U.S.C. Section 4975(a). *See also supra* note 6 and accompanying text.

the Proposed Rule, covered service providers will have no option but to implement both internal and external review with respect to any guide developed, including legal review. This additional review, which the Department did not adequately account for in the Proposed Rule, will further increase the time and costs associated with the guide requirement. Accordingly, we believe the time to create the guide (including the time necessary to locate required disclosure information) will far exceed the three hours estimated by the Department.³¹

C. The Proposed Rule Does Not Include an Appropriate or Realistic Regulatory Impact Analysis

In the preamble to the Regulation, the Department states that it lacks data on what the real costs of a guide requirement would be.³² Further, the Department states that, although some covered service providers have expressed concern that it would be prohibitively expensive and unreasonably burdensome for them to comply with a guide requirement, the public record neither supports nor refutes this position and the Department is not independently aware of any research or studies bearing one way or another on this issue.³³ As a result, the Department explains that it intends to use the Proposed Rule as “the vehicle to solicit specific comments and build a robust public record on this issue.”³⁴

Despite the Department’s admitted lack of data regarding the cost of alternatives contained in the preamble to the Proposed Rule,³⁵ it included a cost analysis in the preamble to the Proposed Rule and concluded “that the cost of requiring covered service providers to create a guide is less than the estimated benefit of \$40.3 million annually.”³⁶ In arriving at this conclusion, given the Department’s uncertainty regarding the actual costs associated with a guide requirement, it inexplicably used a calculation based on the number of products and services that it surmised would be subject to the guide requirement. In doing so, the Department multiplied the number of certain products (16,380) offered

³¹ 79 Fed. Reg. at 13958.

³² 77 Fed. Reg. at 5642.

³³ We note that the Department could have retained a third party to conduct an analysis to estimate the cost to covered service providers to produce the guide but did not do so.

³⁴ Further, given the Department’s lack of data and uncertainty regarding both the benefits and costs of the Proposed Rule, we question whether the Proposed Rule is consistent with the requirements of Executive Orders 12866 and 13563, which generally require each agency to assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

³⁵ This also appears inconsistent with Executive Order 12866, which requires agencies to assess all costs and benefits of regulatory alternatives in deciding whether and how to regulate.

³⁶ 79 Fed. Reg. at 13958.

by financial firms (a number which includes only mutual funds, closed-end funds, exchange-traded funds and unit investment trusts) by three, four and five in order obtain a range of potential products and services for which service providers would have to provide a guide. Utilizing a labor rate of \$67.76 per hour, the Department included a low-range (\$6.7 million annually), a medium-range (\$13.3 million annually), and a high-range (\$22.2 million annually), as its estimated cost to covered service providers to create the guide.³⁷ The Department noted that, even assuming that an individual with a \$67.76 wage rate takes 7.4 hours to create the guide for each product or service, the cost to create the guide would equal the Department's estimated \$40.3 million benefit (the amount of time saved by plan fiduciaries as a result of the guide requirement).³⁸

We believe there are several flaws with the Department's cost analysis methodology. First, the cost analysis ignores the fact that the disclosures required by the Regulation include information contained in documents beyond mutual fund prospectuses, including documents generated by other covered service providers, such as recordkeepers, banks, consultants, custodians, advisors, investment managers and insurance companies. Thus, the Department's cost analysis should have gone beyond simply focusing on the number of products for which a guide locator would be necessary. Instead, it would have been more relevant for the Department to focus on the costs associated with preparing the guide for each arrangement in which a guide would likely be required. Moreover, as discussed above, in the case of a recordkeeper creating a guide, we do not believe covered service providers have "specialized knowledge" of the location of the required disclosures within mutual fund prospectuses, or the myriad of other documents that may include information required by the guide.³⁹

Second, as discussed above, we are concerned that the Department continues to believe that the vast majority of client service agreements are "master" agreements with no variation by client. Plan agreements and disclosure materials vary significantly for each service provider by product line, investment products, plan design and plan sponsor's preferences and needs. In addition, service agreements change over time to reflect changes to the service offered, so the tenure of a client with a provider often impacts the location of contract features. While model contracts may be used as a starting point, they are often customized and individualized due to changes requested by the plan sponsor, plan fiduciary, and/or legal counsel, among others. As such, we believe that a service provider preparing a guide likely would have to customize the guide for each client plan. For these reasons, a more appropriate way to estimate the costs associated with a guide requirement would be to use a covered-arrangement-by-covered arrangement basis.⁴⁰

³⁷ *Id.*

³⁸ *Id.* at 13959.

³⁹ See *supra* text accompanying notes 26-28.

⁴⁰ See *supra* text accompanying notes 24-25.

Significantly, using the Department's own numbers -- but applying them on a cost-per-arrangement basis -- a straightforward calculation shows that the aggregate costs associated with a guide requirement will far exceed the Department's estimate. In the preamble to the Proposed Rule, the Department estimates that there are 2.2 million covered arrangements between 12,000 covered services providers and nearly 684,000 plans for which disclosures are required under the Regulation.⁴¹ Assuming, as the Department does in the preamble,⁴² that the relevant information could be found and the guide could be constructed using a total of three hours of financial professional or similar professional's time with a labor rate of \$67.76 per hour (including time to review the document for accuracy), the overall cost to covered service providers to prepare the guide for all such covered arrangements would be \$447,216,000 (2.2 million arrangements x 3 hours x \$67.76) -- or more than ten times the \$40.3 million benefit the Department estimates would be derived by the provision of a guide to the disclosures.⁴³ In this regard, we are perplexed by how the Department could have concluded that the Proposed Rule, which would add a format requirement, is not considered economically significant, given its previous conclusion that the final 408(b)(2) rule, which does not require that the initial disclosures be furnished in a specific format, was economically significant.⁴⁴

II. Specific Comment Requests

Although the Proposed Rule would mandate use of a guide, the Department seeks comment not only with regard to the proposed guide itself, but on alternative tools that may assist plan fiduciaries in reviewing the initial disclosures, and whether such tools would be more or less beneficial to plan fiduciaries as compared to the proposed guide, taking into account the costs and burdens to covered service providers associated with production of the guide.⁴⁵ Before discussing our responses to certain

⁴¹ 79 Fed. Reg. at 13956.

⁴² *Id.* at 13958. We note that elsewhere in the preamble, the Department states that it believes that 3.7 hours would be more than adequate on average to create a guide for a single product or service or to add a product or service to an existing guide. *See Id.* at 13959. As discussed above, *see supra* text accompanying notes 27-29, we are concerned that the 3.7 hour estimate (or the Department's even lower estimate of 3 hours) vastly underestimates the time required to construct the guide.

⁴³ Even assuming that each of the 684,000 covered plans that are subject to the Proposed Rule has only two covered service providers and receives only required guides, the number of guides required would be 1,368,000, and the cost, using the Department's 3 hour preparation time estimate and \$67.76 wage rate would be \$278,087,040, or approximately 7 times the amount of the "benefit" the Department estimates will be derived by the provision of a guide to the disclosures.

⁴⁴ *See* Memorandum from Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, to Heads of Executive Departments and Agencies (March 20, 2012), directing agencies to consider the cumulative effect of regulations on regulated communities.

⁴⁵ 79 Fed. Reg. at 13958.

of the comment requests relating to the proposed guide, we describe our thoughts on alternatives to a guide requirement.

A. The Department's Consideration of Alternatives to a Guide Requirement

As discussed above, the Department seeks comment on alternative tools that may assist plan fiduciaries in reviewing the disclosures and whether such tools would be more or less beneficial to plan fiduciaries as compared to the proposed guide, taking into account the costs and burdens to covered service providers associated with production of the guide. Further, the Department seeks comment on whether the proposed amendment should instead require a summary of specified key disclosures, including what “key” information warrants inclusion in the summary, how costly it would be to prepare a summary (and who would bear the cost), what liability and other legal issues might arise for covered service providers and others from summarizing key information, and how such liability issues would be managed.⁴⁶ In discussing its consideration of a required summary versus a required guide, the Department states that it believes a summary of the disclosures, without some guide to the underlying disclosures, could become the primary document on which some plan fiduciaries rely.⁴⁷ The Department, however, provides no studies or data to support this conclusion.

As discussed above, the Institute does not support a one-size-fits-all format requirement to providing disclosures pursuant to the Regulation. In this respect, we believe that the manner by which the disclosures are provided is more appropriately based on the specific circumstances of the relationship between the service provider and the plan, including the category of service provider (*e.g.*, investment advisory, broker or recordkeeper), the nature of the services provided, and client needs and preferences.⁴⁸ The Institute understands that covered service providers seek to tailor the format of their disclosures based on the specific details of their relationship with their client.

⁴⁶ *Id.*

⁴⁷ The Department does not explain why it believes that providing a summary will result in plan fiduciaries not reviewing the required disclosures. *See* 79 Fed. Reg. at 13955.

⁴⁸ The approximately 45,000 defined benefit plans and 638,000 defined contribution estimated by the Department to be subject to the Proposed Rule enter into various different kinds of arrangements involving more than 12,000 service providers, including (1) those providing services directly to a covered plan as a plan fiduciary under ERISA or the Investment Advisers Act of 1940; (2) those providing services as a plan fiduciary to investment vehicles that hold plan assets; (3) those providing services as a registered investment adviser; (4) those providing recordkeeping or brokerage services where a platform of investments is offered to plans; and (5) those providing other plan services (such as accounting, actuarial, legal and other professional services, consulting, banking, insurance, securities or other investment brokerage, recordkeeping and third-party administration services, among others). Even within these categories of covered service providers there are varying service arrangements. For example, the nature of services provided by a plan recordkeeper or broker may vary depending on the client's preferences and needs. Covered service providers often tailor their disclosure methodology to the nature and type of service relationships they have with their clients and to their clients' preferences and needs.

For example, we understand that some of our members provide a “How to Read Guide” with their disclosure materials providing further detailed explanation of the information disclosed. Other members provide a summary-type document with the required disclosures with a hyperlink or reference to documents discussed in the summary (such as plan services agreements or mutual fund prospectuses) where the plan fiduciary may obtain and is encouraged to review more detailed information. We understand that members providing such summary-type documents do so in an effort to present sometimes complex legal or financial information in a format that would be easier for plan fiduciaries to understand. We are concerned that such innovation and client tailoring would be negatively impacted by a guide requirement as covered service providers may decide, given the potential cost associated with manually preparing the guide, to provide the disclosures and the guide without additional explanatory or client-tailored materials. In this respect, for many plan fiduciaries, a summary may be preferred to the extent it is seen to present complex information in an easier to understand manner.⁴⁹ If the overall goal of the Department’s rulemaking is to provide a tool that would assist plan fiduciaries in better understanding the disclosures, we question whether a guide will further that goal, or if a guide requirement would simply direct plan fiduciaries to specific information that they may or may not fully understand.

We also believe the Department should consider and further evaluate alternatives to a mandated guide. For example, the Department should consider amending the Regulation to require only that covered service providers provide a contact name and telephone number in the event that plan fiduciaries have questions about the disclosures or cannot locate information within the disclosures, as provided for in Section (c)(1)(iv)(H)(I) of the Proposed Rule. We understand that many of our members currently provide contact information with their disclosures. Such a requirement would further the Department’s goal of ensuring that plan fiduciaries have the tools needed to understand and locate specific information within the disclosures.

B. Comments Related to the Guide Requirement

Despite the lack of specificity and completeness of the Proposed Rule, the Department asks a number of questions related to the implementation of the guide requirement. The uncertain nature of the requirement and the breadth of possible issues and answers prevent the Institute from providing substantive responses to such questions – although we attempt below to provide what general

⁴⁹ We note that a summary might in many circumstances be more consistent with how investors prefer to receive information. In a recent study, SEC staff found that investors favor “layered” disclosure, and, wherever possible, the use of a summary document containing key information about a product or service. The study defines “layered disclosure” as “an approach to disclosure in which key information is sent or given to the investor and more detailed information is provided online and, upon request, is sent in paper or by e-mail.” See “Study Regarding Financial Literacy Among Investors,” SEC Office of Investor Education and Advocacy (August 2012), available at: www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf.

commentary is available. We strongly believe that, given the lack of specificity and completeness, the nature of the comments requested is more appropriate for a survey or Request for Information (RFI) -- not a proposed rule.

1. Effective Date

The Department proposes that the Proposed Rule be effective 12 months after publication of a final rule in the *Federal Register* and seeks comment, on whether any final rule should be effective on a different date. As discussed below, our members have informed us that there are complex technological issues and limitations associated with the preparation of the guide as contemplated by the Proposed Rule. Further, the Proposed Rule reserves several significant aspects for inclusion in the final rule including specifying the page limitation for summaries that would trigger the guide requirement even if the disclosures are made in a single document, as well as the specific locator or locators (page or section number) that would be required. Accordingly, covered service providers will not have the benefit of knowing the specifics of the final amendment until the Proposed Rule is finalized and published in the *Federal Register*.

Given the lack of specificity and clarity regarding the application of the Proposed Rule as well as the challenges associated with implementing a guide requirement, it is impossible to comment on what period of time would be required for reasonable implementation without resolution of those questions and issues. The only certainty is that, given the absence of technological solutions to automate compliance with the Department's guide requirement, an effective date of 12 months after publication of the final amendment in the *Federal Register* will not provide covered service providers with sufficient time to develop and implement systems or processes required to prepare the guide. A period considerably longer than 12 months will be necessary to establish the manual processes and procedures necessary to ensure compliance.⁵⁰

2. The Technological Challenges Associated with Preparing a Guide

The Department seeks comment on several technological issues associated with the preparation of a guide. Specifically, the Department seeks comment on the challenges associated with preparing a

⁵⁰ We also recommend that the Department clarify that the Proposed Rule is effective for contracts or arrangements entered into after the effective date of the final amendment, and is not applicable to existing contracts or arrangements. Our members have spent tens of millions of dollars in their preparation of the initial disclosures, and, as noted above, received few, if any questions in response to locating information within the disclosures. It would be unduly burdensome to require covered service providers to repeat this costly undertaking based on the Department's "hunch" that a guide to the disclosures is needed.

guide and the anticipated costs of addressing such challenges, and whether current technology can or cannot reduce those costs. The Department also seeks comment on whether page numbers and section references are feasible locators. As discussed below, we believe that preparing a guide to the disclosures with page and/or section locators will present complex challenges for covered service providers which would likely require them to rely on manual processes to prepare the guide associated with each of the plans to which they provide services.

As discussed above, plan agreements and disclosure materials vary significantly for each service provider by product line, investment products, plan design and plan sponsor's needs and preferences. Moreover, such agreements are often individually negotiated. In order to obtain the required disclosure information, covered service providers would likely be required to review each agreement, prospectus and/or offering materials associated with the services and investment options offered by the plan to determine the specific location of the required disclosures.

Our members have informed us that there are significant differences associated with the technology used to automate their disclosures pursuant to the Regulation and the technology that would be required to comply with the guide requirement contemplated by the Proposed Rule. In this respect, many service providers are able to automate preparation of a substantial portion of their 408(b)(2) disclosures by leveraging or creating data feeds from their own internal systems or from third-party providers. In order to automate a guide requirement, providers would need a data-driven system and a data source. We understand that there is currently no commercially available data source or technology available that would allow for automation of page and section locators as contemplated by the Proposed Rule. Given the absence of such external data sources, a service provider would be required to manually review each supporting document, identify the page or section, and build a data storage solution to house and maintain the collected data in order to comply with the guide requirement.

Further, there is no uniform place where the required information can be located in publicly available documents. For example, there is no standard location in investment documents where information about investment expense ratios can be found. The location varies by type of document (prospectus, summary prospectus, participation agreement, or insurance contract) and by manager or distributor. Even in the case of source documents controlled by the covered service provider (such as fee provisions in service agreements), the location of such information may be different in each client service agreement and there is generally no current business practice that requires automating the location of the information in such agreements.

Finally, as discussed above, many covered service providers use separate documents from separate sources (including third-party sources) to meet their disclosure obligations under the Regulation. Covered service providers have no control or ability to know if a third-party source makes a

change to a disclosure document. For example, if a mutual fund makes a change to its prospectus, but there was no change to the substantive disclosure information (such as the fund's expense ratio), the covered service provider would not be aware of the change. In such circumstances, the guide locator would be inaccurate and the covered service provider would not be in compliance with the Proposed Rule. The risk of slight inaccuracies, both as a result of changes to source documents outside the service provider's control, as well as those that are likely to be caused by human error in connection with the manual preparation of each guide, is a significant concern. This concern is heightened given that failure to comply with the guide requirement would result in the loss of the exemptive relief provided under ERISA Section 408(b)(2).⁵¹

3. Content and Structure of the Guide

The Department requests comment on various issues associated with the content and structure of the guide, including (1) whether the guide should be provided as a separate document; (2) the maximum number of pages of a single disclosure document that would provide an exception from the guide requirement; and (3) the potential alternative locators to be included in a guide. Our comments responsive to each of these issues are discussed below.

Separate document requirement. Section (c)(1)(iv)(H)(3) of the Proposed Rule would require that the guide be provided as a separate document. The Department states in the preamble that its 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.⁵² It is unclear whether this "separate document" requirement means that the guide must be provided in a mailing or electronic disclosure separate from the required disclosures, or if the guide may be provided as a separate document delivered simultaneously with the required disclosures. The Department has not provided any evidence or data to illustrate that a guide provided as an independent mailing or electronic disclosure would be more useful to a plan fiduciary than a guide provided simultaneously with the disclosures. Given the potential cost and burden associated with the preparation of a guide, we recommend that any guide requirement allow for delivery concurrent with the required disclosures, either by mail or electronically.

Summary page limit. The Proposed Rule would require covered service providers to furnish a guide unless the covered service provider furnishes the required disclosures under 408(b)(2) in a single summary document that does not exceed a specific number of pages. The Department has reserved for inclusion in the final amendment the number of pages that would trigger the guide requirement and seeks comment on the appropriate triggering page requirement. As with other

⁵¹ See *supra* note 6.

⁵² 79 Fed. Reg. at 13952.

provisions of the Proposed Rule, meaningful analysis and comment are difficult given the lack of specificity and completeness of the proposal.

Despite the inability to be fully responsive, we believe that utilizing a page requirement as a trigger for the guide requirement is inappropriate and arbitrary. For example, a covered service provider for a plan with a relatively simple investment lineup and service offerings may be able to provide all of the required disclosures in a five page document, whereas a covered service provider for plan with 15 designated investment alternatives, participant advice services and a brokerage window would not. Additionally, the Department provides no data or evidence to illustrate the relationship between the number of pages of a single summary document and a plan fiduciary's ability to understand or locate specific information within the disclosures. For example, is a plan fiduciary less likely to fully review a ten page document than an eight page document? How would one draw an appropriate line in the absence of a behavioral study involving a statistically valid sample of plan fiduciaries?

Finally, as discussed above, our members have informed us that they received very few questions or inquiries regarding the location of information within the disclosures. We believe this is the result of covered service providers tailoring their disclosure materials and the format of their disclosures based on product line, investment products, plan design, and the plan sponsor's needs and preferences. We are concerned that imposition of a page limit that would "trigger" a guide requirement would further limit innovation and flexibility in the provision of user friendly disclosures and prevent service providers from developing more efficient and tailored disclosures.

Required disclosure elements. Section (c)(1)(iv)(H)(I)(viii) of the Proposed Rule would require covered service providers acting as a plan fiduciary for investment vehicles that hold plan assets (and in which the plan has a direct equity investment) and those service providers providing record keeping or brokerage services where a platform of investments is offered to plans, to provide the location of the description of any annual operating expenses, ongoing expenses (or if applicable total operating expenses) and any compensation charged directly against an investment. The provision references the requirements of Sections (c)(1)(iv)(E)(I) and (2) and (c)(1)(iv)(F)(I) of the Regulation. However, we note that Section (c)(1)(iv)(F)(I) cross references to the information required by Sections (c)(1)(iv)(E)(I) and (2) and (3) of the Regulation. Section (c)(1)(iv)(E)(3)'s disclosure requirements include, for an investment contract, product or entity that is a designated investment alternative, any other information or data about the designated investment alternative that is within the control of, or reasonably available to, the covered service provider and is required for the covered plan administrator to comply with the 404a-5 participant-level disclosure regulation. We request that the Department clarify whether the proposed guide's requirements include the disclosures required by Section (c)(1)(iv)(E)(3) of the Regulation.

Alternative locator options. Section (c)(1)(iv)(H)(I) of the Proposed Rule requires a covered service provider to furnish the plan fiduciary with a guide specifically identifying the document and page or other sufficiently specific locator, such as a section, that enables the plan fiduciary to quickly and easily locate required information. The Department seeks comment on whether a final rule, assuming it were to include a guide requirement, should permit a choice of locators (as proposed) or whether the rule should allow for only one type of locator to be used, and why. Further, the Department seeks comment on whether page numbers and sections are effective and feasible locators, whether individually or as alternatives, and whether and why other locators may be preferable. Additionally, the Department seeks comment on other mechanisms which could be used in a guide to quickly identify relevant information for fiduciaries.

As discussed above, we do not believe that the Department has demonstrated that there is a compelling public need for a guide to the disclosures and we recommend that the Department maintain the existing rule allowing for flexibility in the format of the disclosures provided to plan fiduciaries. Given current technological limitations, in many cases covered service providers will need to manually prepare a guide with either of the alternative locators. Finally, we do not believe that the Department conducted a meaningful assessment of the costs of preparing the guide with either locator, or with any locator. As such, we do not believe that either locator – or any locator – would be appropriate. We are also concerned that the Department, in addition to raising the possibility that the final amendment will not require a guide, also raises the possibility that the final amendment will include an alternative locator other than the two discussed in the preamble, thereby excluding the regulated community from the opportunity to comment on the specifics of the Proposed Rule prior to its publication as a final amendment in the *Federal Register*.

With respect to information disclosed electronically, the Department states that a covered service provider may not merely furnish the link to a separate contract or prospectus, but would be required to furnish either a more specific link directly to the required information, or a page or other sufficiently specific locator, such as a section reference, in addition to the electronic hyperlink. We disagree with this approach. It is likely that the documents being hyperlinked (such as a prospectus,⁵³ contract, or Form ADV⁵⁴) will include a table of contents and/or will be organized by page or section. A plan fiduciary should be able to locate the disclosure information using the organization tool contained within the linked document.

⁵³ SEC Regulation Section 230.481(c) requires a mutual fund prospectus to include, on either the outside front, inside front, or outside back cover page of the prospectus, a reasonably detailed table of contents. The table of contents must show the page number of the various sections or subdivisions of the prospectus. The table of contents is required to be located immediately after the cover page in any prospectus delivered electronically.

⁵⁴ SEC instructions applicable to Part 2 of the Form ADV require that the Client Brochure include a table of contents. See www.sec.gov/about/forms/formadv-part2.pdf.

4. The Proposed Rule’s “Quickly and Easily” Compliance Standard

Adding to the uncertainty of the requirements regarding the content and structure of the guide is that compliance with the Proposed Rule hinges on whether a plan fiduciary can “quickly and easily” locate the required disclosure information. Such use of a clearly subjective standard is particularly disconcerting given that the failure to comply would result in the loss of the exemptive relief provided under ERISA Section 408(b)(2), and the provision of services and receipt of fees for such services would result in a prohibited transaction.⁵⁵ The “quickness” and “ease” of locating the required disclosure information will likely depend on many factors, including the background and sophistication of the plan fiduciary receiving the disclosures, and will therefore likely vary from plan fiduciary to plan fiduciary. Who will be making the determination whether a covered service provider’s guide meets the “quickly and easily” standard? Clarity and certainty regarding the compliance standard is essential, especially in circumstances where a compliance failure results in a prohibited transaction. Therefore, we recommend the elimination of this and any other subjective standard in any final rule.

5. Changes to the Guide

The Proposed Rule would require that a covered service provider must, at least annually, disclose any changes to the guide. In the preamble, the Department states that it believes that a periodic requirement to disclose any changes to the information contained in 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 guide occurs. The Department seeks comment on whether it would be more effective to require that the entire guide (rather than only changes to information contained in the guide) be disclosed on an annual basis if changes occurred during the prior year.

Currently, the Regulation requires a covered service provider to provide the disclosures reasonably in advance of the date a contract is entered into, extended, or renewed. The Regulation requires periodic updates for certain non-investment information related disclosures and annual updates of investment information related disclosures. The Proposed Rule may therefore be seen as inconsistent with the Regulation. If, for example, a covered service provider makes a change to the services it provides to the plan it must disclose the change within 60 days. If that were the only change made, no annual disclosure of the change would subsequently be required. Under the Proposed Rule, the covered service provider would have to disclose the change within 60 days of the change and provide an annual update to the Guide. We request that the Department clarify this provision, as it appears to implement an annual disclosure requirement beyond that contemplated by the Regulation.

⁵⁵ See *supra* note 6.

Further, we recommend that the Department only require changes to the guide to be disclosed on an annual basis, rather than reissuance of the entire guide. Updating and reissuing the entire guide on an annual basis will result in the imposition of additional costs and burdens on covered service providers – beyond those associated with the preparation of the guide itself. We note that the Regulation requires only disclosure of changes to the disclosures and does not require a reissuance of the disclosure upon changes. The same standard should apply here.

III. Conclusion

As noted above, the Institute has long supported effective disclosure to plan fiduciaries that enables them to fulfill their duties under ERISA. It has been only two years since the Regulation has been effective, and we believe that the flexibility regarding the format of the required disclosures has been a crucial aspect in the successful implementation of the Regulation. Such flexibility has allowed service providers to design their disclosure materials based on the particularities of product lines, investment products, plan design and plan sponsors' needs and preferences. The Proposed Rule represents a "one-size-fits-all" solution that will not advance the goal of facilitating the plan fiduciary's review of information relevant to a prudent decision-making process. Moreover, we believe that the failure to follow a proper rulemaking process has led to a proposal that lacks necessary specificity and completeness on which to frame meaningful comments on either the benefit implications of the proposal or its costs. We urge the Department to withdraw the Proposed Rule and conduct a statistically valid study and other review, including publishing a Request for Information, to determine if there is a compelling public need for a guide to the disclosures. Further, in the event that the Department determines that such a compelling public need exists, we urge the Department to include within any re-proposal a realistic and adequate regulatory impact analysis associated with the estimated burdens and costs to covered service providers of preparing such a guide, and to seek comment on cost-effective solutions to address any specific problems.

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We appreciate your consideration of these comments and we are available to meet with you to discuss our comments or to provide additional information or clarification. Please do not hesitate to contact me at (202) 326-5820 (david.abbey@ici.org) or Howard Bard at (202) 326-5810 (howard.bard@ici.org).

Sincerely,

/s/ David M. Abbey

David M. Abbey
Senior Counsel – Pension Regulation

cc: Howard Shelanski, Administrator
Office of Information and Regulatory Affairs, OMB