



4245 North Fairfax Drive
Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org



June 10, 2014

Mr. John J. Canary, Director
Office of Regulations and Interpretations
US Department of Labor
Employee Benefits Security Administration
Frances Perkins Bldg., Rm. N-5655
200 Constitution Ave., NW
Washington DC 20210

Filed electronically at e-ORI@DOL.gov

Re: RIN 1210-AB08 – Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure Guide Proposal

Dear Mr. Canary:

The American Society of Pension Professionals & Actuaries (“ASPPA”) and the Council of Independent 401(k) Recordkeepers (“CIKR”) are pleased to provide comment with respect to the proposed amendment to ERISA Regulation Section 2550.408b-2 to require a guide or summary accompany the disclosures provided pursuant to ERISA Section 408(b)(2) .

ASPPA is a national organization of more than 16,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA’s membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. The independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of \$120 billion in assets.

Background

ASPPA and CIKR have been steadfast supporters of the regulatory initiatives of the Department of Labor (“DOL” or “Department”) to improve the disclosure of fees and services to responsible plan fiduciaries under ERISA Regulation Section 2550.408b-2 (the “final regulation”). ASPPA and CIKR believe strongly in fee transparency and that the final regulation, together with the Department’s other initiatives in this area, will help plan fiduciaries and participants make better, more informed decisions.

In our original comments filed in response to the proposed regulation, we specifically recommended that the final regulation include a summary mandate. We believe the requirement of a summary is particularly pertinent with respect to the investment disclosures required by the final regulation. A summary would be more useful to a fiduciary than a guide that references a stack of prospectuses or other more technical materials. In the absence of a summary, the process of sifting through the information provided by competing service providers may prove more burdensome than helpful.

Comments on the Proposed Regulation

I. Reopening of Comment Period on Proposed Rulemaking

As previously noted, ASPPA and CIKR have been strong supporters of the Department’s initiatives to improve transparency with respect to fees and services through enhanced disclosures to both plan fiduciaries as well as to plan participants. We have provided comments to the Department at every step of the rulemaking process.¹

We are concerned, however, that the proposed rulemaking with respect to a guide or summary may be moving forward without the benefit of informed public input. In particular, the final regulation has been effective for almost two years. This has resulted in both covered service providers (“CSPs”) and responsible plan fiduciaries gaining a considerable amount of experience with the regimes of disclosure under ERISA Section 408(b)(2). It is not clear to us what, if any, problems the Department has uncovered that would merit the current proposal and the expense associated with the amending the existing processes.

It is noteworthy that the Department is simultaneously conducting focus group sessions with fiduciaries of small pension plans, the purpose of which “...is to explore current practices and effects of EBSA’s final regulation. This may provide information about the need for a guide, summary or similar tool to help responsible plan fiduciaries navigate and understand the required

¹ See for example comment letters filed by ASPPA/CIKR: February 11, 2008; September 8, 2008; September 15, 2008; August 29, 2010; and June 11, 2011 (available at www.asppa.org).

disclosures.”² Unfortunately, the public will not have an opportunity to see the results of those focus group sessions before the close of the comment period for the current proposal.

The preamble to the proposal notes that that the Department may decide to reopen the comment period to solicit comments on the results of the focus group sessions.³ We would urge the DOL to do exactly that, although we would have much preferred to have the benefit of those results before filing our initial comments. Additionally, we respectfully request that the Department share with the regulated community the results of recent investigations where copies of disclosure materials have been requested. We understand from our members that this has become a routine request by DOL investigators. Informal comments of Department officials have indicated that these materials are being reviewed at the Department’s headquarters in Washington, DC. Information as to what was learned from the Department’s review would be extremely helpful in framing comments to the proposal.

We would be particularly interested in whether there is any indication that locating the salient information in the required disclosures is truly a problem for plan fiduciaries. Our members go to great lengths to assist plan fiduciaries in understanding the information that is provided. In fact, many already provide a summary of the requisite information so that comparisons can easily be made between covered service providers and investments. Based on our members’ experience, we continue to believe that a summary would be much preferable as a meaningful tool for responsible plan fiduciaries rather than the guide contemplated by the proposal.

ASPPA and CIKR believe that the additional information the Department is gaining through both its focus group sessions and investigatory processes would be significant influencers on our comments.

ASPPA and CIKR recommend that the Department reopen the comment period upon completion and tabulation of the focus group results and share this data, as well as the DOL’s investigatory efforts, a sufficient time ahead of doing so to give the regulated community time to consider and comment on such data and results.

II. A Summary Would be a More Useful Tool for Fiduciaries

The notion of a summary or guide was first mentioned in the preamble to the interim final regulation published on July 16, 2010.⁴ The preamble stated:

The Department is considering adding a requirement that covered service providers furnish a “summary” disclosure statement, for example, limited to one or two pages that would include key information intended to provide an overview for the responsible plan fiduciary of the information required to be disclosed. The

² Preamble at 79 Fed. Reg. 13953 (March 12, 2014).

³ Id.

⁴ Preamble to Interim Final Regulation §1.408b-2, at 75 Fed. Reg.41607 (July 16, 2010).

summary also would be required to include a roadmap describing where to find the more detailed elements of the disclosure required by the regulation.⁵

ASPPA and CIKR, in response to the original proposed regulation,⁶ recommended that the final regulation include a summary mandate.⁷ We believed then, and still believe today, that a summary would be particularly pertinent and useful with respect to the investment disclosures⁸ (“investment information”) required by the final regulation. A summary would put before the responsible plan fiduciary the most important information in a form that would assist in making comparisons. The mandate of a summary would also reduce the obfuscation that could otherwise occur through distribution of materials that are less than clear on their face. At the very least, a summary should be acceptable as an alternative to providing a guide so that CSPs can choose the approach that will be both cost effective and best serve the needs of the fiduciaries they serve.

The investment information, in particular, could be summarized on a cost effective basis. This is due to the fact that, in most cases, the data could be drawn from the very same database used to populate the participant chart mandated by ERISA Regulation Section 2550.404a-5.⁹ As noted in the preamble to ERISA Regulation Section 2550.408b-2, “[U]se of a reputable and reliable third party database as a source of the investment information ... would ordinarily constitute disclosures made ‘in good faith and with reasonable diligence’ under ... the final rule.”¹⁰ These same databases could and would be used to populate a summary of investment information given to plan fiduciaries and would qualify under the “good faith” provisions of ERISA Regulation Section 2550.408b-2(c)(1)(vii).

Many of our members already provide a summary with respect to the required investment information that is patterned on the model comparative chart that was included as an appendix to ERISA Regulation Section 2550.404a-5.¹¹ We believe that the investment information required to be disclosed by CSPs who provide certain recordkeeping or brokerage services¹² contain some of the most important data that fiduciaries must consider. A summary is a more useful tool and should be available as an alternative means of compliance if a guide or “roadmap” is mandated by the final regulation.

According to the preamble to the proposal, some commentators have suggested that a summary would be problematic because it might cause fiduciaries to rely solely on it rather than reading the documentation otherwise provided.¹³ Analyzing the investment information without the benefit of a summary is a daunting task for any plan fiduciary. For this reason, a summarized chart that follows the formatting and content requirements of the participant disclosure regulation would be much more useful as a fiduciary tool than a “roadmap” that only provides the location

⁵ Id.

⁶ Proposed Regulation §2550.408b-2, 72 Fed. Reg. 70988 (December 13, 2007).

⁷ See ASPPA/CIKR comment letter dated August 29, 2010 at page 5.

⁸ See Reg. §2550.408b-2(c)(1)(iv)(F).

⁹ See 75 Fed. Reg. 64910.

¹⁰ See 77 Fed. Reg. 5645 (February 3, 2012).

¹¹ See 75 Fed. Reg. 64942.

¹² See Reg. §2550.408b-2(c)(1)(iii) (B) and (iv)(F).

¹³ See 79 Fed. Reg. 13950 (March 12, 2014).

for technical jargon. One could argue that a summary of the sort we are recommending is a necessary step for a responsible plan fiduciary to be able to truly understand and compare the fee information and the available investment options. As a result, the lack of a summary mandate requires the responsible fiduciary to prepare it by wending one's way through the technical information that might be referenced in a guide. Surely it is better to have a CSP prepare a summary that accurately recites the data elements required for the investment information, rather than having the fiduciary find and cull the needed information by hunting through the documentation with the assistance of a roadmap.¹⁴

The proposal also contemplates requiring the CSP to provide a contact that the responsible plan fiduciary could reach out to for help in locating the required information in the source documents.¹⁵ Providing a contact to answer questions when needed would be a far less costly alternative than requiring a guide accompany every required 408(b)(2) disclosure and could provide a much better, complete service than a guide would represent.

ASPPA and CIKR believe that a summary should be permissible as an alternative compliance option in lieu of a guide or "roadmap." We believe a summary could include, at a manageable cost, a recitation of all the disclosure data elements, such as fiduciary status (if applicable), the services being provided, the compensation being paid for those services (as well as any compensation due on termination) and an estimate of the cost of recordkeeping services (if not provided for an explicit fee). A summary of such items is already being provided by many of our members (if not otherwise obvious from the contract documentation itself). If a plan fiduciary has a question about either the fees being charged or the location of such information in the disclosure documentation, the CSP (through the required contact) could assist in answering that question. In fact, most CSPs do this already. We expect that this would be a far less costly alternative than requiring the creation of a new "roadmap" document.

ASPPA and CIKR recommend that a summary of the relevant disclosure information, particularly the investment information, would be a more useful tool for plan fiduciaries and should be the focus of any change to ERISA Regulation Section 2550.408b-2 rather than a "roadmap" document. If the final regulation were to require a guide or "roadmap," than a summary should be permitted as an acceptable alternative means of compliance.

III. Additional Comments

a. When Should a Summary Document be Mandatory

As proposed, the guide or summary would be mandated if the disclosure documentation is not contained in a single document or in a document whose number of pages exceeds an unspecified limit.¹⁶

¹⁴ If need be, an accompanying statement could be required that informs fiduciaries that more detailed information can be found in the source documents (typically a prospectus or summary prospectus).

¹⁵ See Prop. Reg. §2550.408b-2(c)(10)(iv)(H)(2).

¹⁶ See Prop. Reg. §2550.408b-2(c)(1)(iv) (H)(1).

While ASPPA and CIKR are not, at this time, making a recommendation as to the number of pages that should trigger the guide requirement, we are concerned about how those pages are determined. As discussed above, many CSPs (including ASPPA and CIKR members) already replicate and summarize the investment information in a user-friendly format for plan fiduciaries. As such, the summary should not be included in the page count or considered to be an additional document for purposes of the multiple documents standard. In fact, as described above, we recommend that a summary be permitted as an acceptable alternative to providing a guide.

There are also concerns as to what constitutes “a single document” or what “pages” should be considered when engaging in a page count. For example, some current disclosures contain the service and compensation information in summary form in a single document of relatively short length (with attached and separately delineated appendices for greater detail). Similarly, many CSPs have attached the fee information in succinct, separately delineated appendices to an otherwise lengthy service agreement. In these circumstances, only the summary documents that constitute the fee disclosures should be considered and the separately delineated appendices a single document. On the other hand, the investment information should be subject to a mandatory summary if provided through multiple documents. As previously noted, ASPPA and CIKR strongly believe requiring a roadmap in addition to a summary chart would be an unnecessary additional cost in these circumstances.

ASPPA and CIKR recommend, that because it is not clear from the proposal what constitutes a “single” document and where page count begins and ends, that the Department provide more specific definitions and clarity and reopen this issue for comment. Furthermore, we recommend that only the fee information, and not any separate attachments, be included in the page count.¹⁷

b. Transitional Concerns

As previously noted, the final regulation has been in effect for almost two years. CSPs have expended a great deal of time, effort and expense to insure that plan fiduciaries for arrangements in existence on the regulatory effective date received the required disclosures. Our members have significant concerns as to how the proposal will be applied to these plans (and plan fiduciaries) who have already received the necessary information.

In general, the final regulation only requires the disclosure information to be given “reasonably in advance” of the date the contract or arrangement is first entered into, extended or renewed.¹⁸ Although the proposal indicates that it would not become effective until one year after it is published in final form in the Federal Register, there is a conspicuous absence of how it might impact existing arrangements that have already complied with the final rule.

¹⁷ It is anticipated that this could be done in conjunction with reopening the comment period after the results from the focus group sessions are made available to the public.

¹⁸ Reg. §2550.408b-2(c)(1)(v).

ASPPA and CIKR believe that, with respect to CSPs that have already satisfied the disclosure requirements as they currently exist, the new requirement of a summary (or guide) should be applied only at the time new disclosures are required. For example, if the contract or arrangement is renewed or extended, it would be reasonable to require that the updated disclosure would need to comply with the then current rules, including the need for the summary or guide. Similarly, if there is a change in the required disclosure information, then the new mandate should apply only with respect to the changed information and be provided as part of the updated disclosure. To do otherwise, particularly if the Department were to require an across-the-board new disclosure by all CSPs, would result in significant additional expense (which, in many cases, will be passed on to plan participants and beneficiaries). This would be of little value if provided in connection with existing contracts where CSPs (and responsible plan fiduciaries) have already complied in good faith (and at great expense) with the final regulation issued in 2012.

ASPPA and CIKR recommend that the final regulation apply to existing contracts or arrangements only at such time as they are extended or renewed; and, if there is a change in the required disclosure information, then the new mandate should apply only with respect to the changed information.

* * *

These comments were primarily prepared by Craig P. Hoffman, General Counsel and Director of Regulatory Affairs at ASPPA. If you have any comments or questions regarding the matters discussed herein, please contact him at (703) 516-9300, ext. 128. Thank you for your consideration.

Respectfully submitted,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Ilene H. Ferenczy, Esq., APM, Co-chair
Government Affairs Committee

/s/
Craig P. Hoffman, Esq., APM
General Counsel

/s/
Judy A. Miller, MSPA
Executive Director ACOPA

/s/
Robert Kaplan, CPC, QPA, Co-chair,
Government Affairs Committee

/s/
John Markley, FSPA, Co-chair
Government Affairs Committee

/s/
Tommy Thomasson, Chair
Council of Independent 401(k)
Recordkeepers

