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By first-class mail and electronic delivery
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Office of Regulations and Interpretations
Employee Benefits Security Administration,
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: RIN 1210-AB08; 408(b)(2) Guide

RE: Comments to Proposed Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure

Dear Sir or Madam:

The Employee Benefits and Executive Compensation Committee of the New York City Bar Association[1] (the "Committee") is composed of attorneys with diverse perspectives on employee benefits issues, including members of law firms and in-house counsel to corporations, banks and trust companies.

The Committee is pleased to respond to the request of the Employee Benefits Security Administration, U.S. Department of Labor (the "Department") for comments on the proposed rule (the "Proposed Rule") recently issued by the Department to amend the final regulation under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended

[1] This letter was prepared by a subcommittee of the Committee on Employee Benefits and Executive Compensation of the New York City Bar Association chaired by David Olstein. The other members of the subcommittee were Ira Bogner, Sarah Downie, Patricia Kuhn, Ken Laverriere, Judith Levy, Alicia McCarthy, Robert Morgan, Tara Purohit, William Ryan and Rania Sedhom. Subcommittee members Sarah Downie and William Ryan were the principal authors of this letter. This letter is presented by the Committee on Employee Benefits and Executive Compensation on behalf of the New York City Bar Association, and represents its views as a committee; it does not necessarily represent the views of any individual members of the Committee on Employee Benefits and Executive Compensation or their respective law firms or employer organizations.

("ERISA"), requiring that certain service providers to employee benefit plans disclose information about the service providers' services, status under ERISA with respect to the plans, and compensation (both direct and indirect) received in connection with those services (the "Final Regulation"). The Proposed Rule amends the Final Regulation to require covered service providers to furnish a summary guide to these disclosures (the "Guide") in certain circumstances to assist plan fiduciaries in reviewing the disclosuresthe Final Regulation requires.

According to the Department's press release accompanying the Proposed Rule, the purpose of the Guide is to "help employers locate fee information, which will help them better understand what they are being charged by financial services providers." The press release indicates that the Guide requirement is intended to be a further step toward "bringing transparency to the 401(k) industry." The preamble to the Proposed Rule (the "Preamble") states that the "Department believes that the proposed guide requirement strikes an appropriate balance between the need to facilitate responsible plan fiduciaries' review of information and the costs and burdens attendant to preparing such a guide." The Department invited comments on all aspects of the proposal, including the regulatory alternatives. Accordingly, the Committee offers the viewpoints below.

As a general matter, the Committee commends the Department for its efforts to promote clarity in fee disclosure. The Committee agrees with the Department that a Guide requirement is preferable to a summary disclosure requirement for the reasons stated in the Preamble. The Committee further agrees that in many situations a Guide may assist fiduciaries in performing their responsibilities, and agrees that a Guide will increase the probability that plan fiduciaries will fully review the disclosures. Further, the Committee believes that by promoting easy comparison of product choices a standard form Guide would provide the greatest benefit to plan fiduciaries. Therefore, the inclusion of a model in the final rule would be helpful. However, the Committee believes that the Proposed Rule may be unnecessarily burdensome in some situations.

With respect to the breadth of the Proposed Rule, the Department's focus appears to be the 401(k) plan industry – in particular, plan fiduciaries of small 401(k) plans who the Department believes are at a disadvantage in dealing with service providers. In the Preamble, the Department states that it believes that "plan fiduciaries, especially in the case of small plans, need a tool to effectively make use of the required disclosure." The Preamble further states that "[a]necdotal evidence suggests that small plan fiduciaries in particular often have difficulty obtaining required information in an understandable format, because such plans lack the bargaining power and specialized expertise possessed by large plan fiduciaries. Therefore, the Department anticipates that the guide requirement will be especially beneficial to fiduciaries of small and medium-sized plans." We believe, however, that, consistent with recent executive orders requiring regulatory agencies to assess the costs and benefits of regulation, the benefits of a Guide need to be weighed against the potential costs of implementation (both to the service providers furnishing it and the plan clients ultimately paying for it). We therefore suggest that the Department continue its efforts to solicit more information from service providers about the particular incremental costs that requiring a Guide, in its final form, would impose.

In light of the foregoing, the purpose of this letter is to recommend some specific modifications to the Proposed Rule that preserve flexibility in covered service provider disclosure and promote

the utility of required fee disclosure for the entire pension plan industry, while at the same time managing the cost burden for covered service providers. These specific modifications are as set forth below:

1. ***If existing 408(b)(2) fee disclosure is provided in a single document, the page limit triggering the Guide requirement should be substantial (at least 100 pages) and should take into account electronic disclosure.***

The Department has requested comments on the number of pages that will trigger the Guide requirement even if the initial disclosures are furnished in a single document. The Preamble indicates that a covered service provider will not be required to provide a Guide if disclosure is furnished in a concise, single document.

Covered service providers required by the Final Regulations to provide a considerable amount of disclosure should not have to incur the cost of producing a separate Guide if such disclosure can be provided in a single document. A responsible plan fiduciary that complies with its duty under ERISA to be a "prudent expert" should be able to review and understand a 100-page document. The page limit should therefore not be less than 100 pages, which is typically well below the number of pages required to accomodate standard SEC-mandated disclosure for a particular mutual fund.

For example, with respect to required investment-related disclosure under the Final Regulation,[2] where the covered service provider furnishes fiduciary services to an investment contract, product, or entity that holds plan assets, the following information must be set forth:

- a description of any compensation that will be charged directly against such investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, if such amounts are not included in the annual operating expenses of the investment contract, product, or entity;

- a description of the annual operating expenses if the return is not fixed and any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees), or, for an investment contract, product or entity that is a "designated investment alternative," the total annual operating expenses expressed as a percentage and calculated in accordance with the participant-level disclosure regulation; and

- for an investment contract, product, or entity that is a "designated investment alternative," any information or data about the designated investment alternative that is

[2] Under the Final Regulation, certain service providers must provide disclosure with respect to certain investment-related information in addition to the required general initial disclosure. The required general initial disclosure ("Initial General Disclosure") must describe with respect to the covered service provider's contract or arrangement with the covered plan: (1) the services to be provided, (2) the provider's status as a fiduciary under ERISA or registered investment adviser, if applicable, and (3) the types and amounts of compensation that the provider reasonably expects to receive with respect to its services to the plan and the manner of receipt of such compensation.

reasonably available to the covered service provider and that is required for the plan administrator to comply with the participant-level disclosure regulation.

A covered service provider that is required to make the foregoing disclosure may be able to provide such information as well as the Initial General Disclosure in a single document that is under 100 pages in length. If such covered service provider can do so, it should have the ability to produce such a document and not incur the additional cost of providing a Guide.

With respect to covered service providers that have been providing, pursuant to the Final Regulation, hyperlinks or other electronic disclosure that is not in PDF form or in another format that can be easily paginated, it is unclear how the Department's proposed page length would apply (e.g., if a hyperlink is provided, would the covered service provider be required to "count" the pages of referenced documents, such as a prospectus, for page limit purposes?). Moreover, the Committee believes that imposing a page limit on a web-based searchable document or searchable database may be unnecessary because responsible plan fiduciaries are able to search such documents to find all relevant information. The Committee requests that the Department clarify, at a minimum, the application of any proposed page length to hyperlinks or other documents incorporated by reference.

2. ***Assuming a final rule requires a Guide, the summary disclosure guide published in 2012 accompanying the Final Regulation (the "Sample Guide") should be a "safe harbor" that covered service providers can rely upon to satisfy the requirements under a final rule.***

Many covered service providers, especially those with multiple lines of business and product offerings, devoted considerable time and resources to preparing for initial disclosures under the Final Regulations. The preparation included development of new systems and procedures, the implementation of which took many covered service providers a year or more to finalize and implement. Under the Final Regulations, the Department strongly encouraged the use of a Guide as a "best practice" and provided the Sample Guide as an illustrative appendix to the Final Regulations. To the extent covered service providers have elected to furnish a Guide with their initial disclosures, they have often based such a Guide on the Sample Guide, or used other documentation (such as a table of contents, index or otherwise) to provide a roadmap to disclosure.

The Committee believes that the Sample Guide should be deemed a "safe harbor" that covered service providers can rely upon to satisfy the requirements of a final rule. Additionally, the Committee believes that covered service providers that furnished a Guide based on the Sample Guide – either as a separate document or as an attachment to the master disclosure – with the required initial disclosures under the Final Regulation should be deemed in full compliance with the Final Regulation and any final rule with respect to the Guide requirement. If covered service providers provided a Guide with required initial disclosures that was based on the Sample Guide, those covered service providers should not be required to undertake time and expense to modify further a Guide format to conform to the requirements of a final rule.

3. ***Assuming a final rule requires a Guide, the Guide requirement should only apply prospectively to new engagements with covered service providers or material modifications of***

existing arrangements. If, however, a final rule requires that covered service providers issue a Guide to accompany initial disclosure already furnished under existing arrangements, the effective date of the final rule should be delayed until 18 months after publication of the final rule in the Federal Register.

Many covered service providers incurred considerable cost to prepare and produce the initial disclosure the Final Regulation required; much of that expense was previously described to the Department in submissions related to the adoption of the original Section 408(b)(2) disclosure rules, including the Final Regulation. To require covered service providers that did not furnish a Guide with their initial disclosure to supplement their initial disclosure with a Guide would, we believe, force covered service providers unreasonably to incur additional cost. Therefore, the Committee believes that any final rule requiring a Guide should apply only prospectively to new engagements with covered service providers or in situations where there is a material modification of an existing disclosure otherwise warranting communication to plan clients.

Alternatively, if a Guide requirement, as adopted under a final rule, applies to existing arrangements for which initial disclosure has already been provided, the Committee believes that the effective date for the final rule should be delayed until 18 months after the final rule is published in the Federal Register. The delay would provide covered service providers with the additional time needed to conduct a review of already-issued initial disclosures in order to prepare and design a Guide.

4. ***Assuming a final rule requires a Guide, covered service providers should be able to choose between using a page number reference and another specific locator, such as a section reference or, in the case of electronic disclosure, a hyperlink.***

In the Proposed Rule, the Department has invited comment on whether a final rule, assuming it includes a Guide requirement, should permit a choice between a page number locator or other "sufficiently specific locator" such as a section reference, or whether the rule should require only one locator, and why.

Assuming a final rule requires a Guide, the Committee believes that a covered service provider should have the choice between using a page number reference and a section reference. With respect to covered service providers that furnish electronic disclosure in a format that is not easily paginated, the Committee believes that a covered service provider should have the option to provide hyperlinks in a Guide to help plan fiduciaries locate relevant disclosure.

Many covered service providers have multiple clients under multiple lines of business. For example, an investment manager that offers a variety of investment products may, as a result of, individual client relationships, historical practice or business evolution, to name but a few reasons, use non-standardized documentation in various paper and electronic formats. If a covered service provider must standardize a Guide, it may be better able to furnish such a Guide referencing disclosure documents given to multiple clients if the Guide permits reference to sections (or hyperlinks in the case of electronic disclosure) instead of page numbers only. Section references and hyperlinks are more likely to be unchanged across documentation provided to multiple clients, whereas page numbers may vary widely (or be impossible to

provide, if a covered service provider produces electronic disclosure in a format that is not easily paginated).

5. ***Assuming a final rule requires a Guide, such a Guide should be permitted to be attached as an exhibit or appendix to another disclosure document or included on the same website as required documents disclosed electronically***.

The Preamble states that a required Guide "must be furnished as a separate document…The Department's goal, in requiring that the guide be a separate document, is to ensure that it is brought to the attention of the responsible plan fiduciary and prominently featured so that the fiduciary can use it effectively in his or her review of the required disclosures."

The Committee appreciates the Department's intent to promote the utility of the Guide by requiring that it be prominently featured. However, the Committee believes that a requirement that the Guide be delivered as a separate document may actually limit its utility, and may impose an unreasonable cost burden on service providers. For these reasons, assuming a final rule requires a Guide, the Committee believes that the Department should permit the Guide to be attached as an exhibit or otherwise appended to another disclosure document or included on the same website as required documents that are disclosed electronically.

If the Guide must be distributed as a separate document from other required disclosure documents, the Guide's usefulness as a "roadmap" to disclosure may be compromised. The disclosure required by the Final Regulation frequently necessitates distribution of multiple documents, the most significant of which may be bound together or distributed as a bundle. A Guide appended to the bundle, or to the most significant document, that refers to specific sections of the bundle or document may be more efficiently distributed and more accessible to plan fiduciaries. A Guide that may consist of only a few pages may go astray or be misplaced, whereas a Guide appended to a larger document or bundle of documents is more likely to be retained. A responsible plan fiduciary always has the choice, with an appended Guide, to separate it from the larger document or bundle to improve its usefulness for that particular fiduciary.

In addition, with respect to covered service providers who produce required disclosure in electronic format, it is difficult to determine with precision how a "separateness" requirement would be implemented. Electronic disclosure may be provided in a tremendous variety of formats, including searchable databases, html and other web-based documents and PDF documents. Assuming a Guide is required, a Guide featured on the same webpage as required disclosure, as part of a searchable database, or otherwise readily accessible to a responsible plan fiduciary as part of the distribution of electronic disclosure should be sufficient. The Committee believes it would be unreasonable to expect covered service providers who furnish required disclosure in electronic form to provide a separate paper document or a separate electronic document; these service providers may need to incur additional costs in order to revise their current format or deal with the uncertainty of a "separateness" requirement in the electronic context.

6. ***Because the information gathered through focus group sessions the Department intends to conduct with fiduciaries of small pension plans could affect the parameters of a Guide requirement, the comment period with respect to the Proposed Rule should remain open for a reasonable period after the focus group results are made public.***

The Preamble states that the Department intends to conduct approximately eight to ten focus group sessions with approximately 70-100 fiduciaries of small pension plans to explore current practices and the effect of the Final Regulation. The focus group participants will be asked to provide information including: (a) the number of service providers the plan hired, (b) whether the fiduciaries are aware of and understand the disclosures the Final Regulation mandated, (c) whether the fiduciaries were able to find information regarding the services provided and the costs of these services, (d) whether their covered service providers furnished a Guide or similar organizational tool to help find specific information within the disclosures, and (e) whether a Guide would be beneficial to them, and if so, how much they would be willing to pay to receive a Guide.

The information requests the Preamble enumerates may elicit substantial information for the Department and covered service providers about the current level of demand for a Guide from the plan fiduciary's perspective, and the Preamble states that the focus group sessions "may provide information about the need for a guide, summary or similar tool to help responsible plan fiduciaries navigate and understand the required disclosures." The Preamble further states that the Department may decide to reopen the comment period on the Proposed Rule once it has received the results of the focus group sessions. Because the focus group sessions may provide information that has a direct effect on the Proposed Rule and the need for a Guide, the Committee believes commenters to the Proposed Rule should have a chance to respond to the focus group results in their comments to the Proposed Rule. Therefore, the Committee believes that the Department should commit to keeping the current comment period on the Proposed Rule open during the focus group consultation period and for an additional three months following the publication of the focus group results.

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Members of the Committee would be pleased to answer any questions you might have regarding our comments and to meet with the Department if that would assist your efforts.

Respectfully submitted,

Rania V. Sedhom

cc. Ira Bogner, Esq.
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*Ms. La Londe, Ms. Mitnick and Mr. Rutchik did not take part in the discussion of this letter and neither supported nor dissented from the positions in this letter.

**Mr. Stein and Ms. Weekley dissented from the positions in this letter.