IAA INVESTMENT ADVISER ASSOCIATION

June 6, 2014

Via Electronic Mail

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-AB08: 408(b)(2) Guide

Ladies and Gentlemen:

The Investment Adviser Association[1] appreciates the opportunity to comment on the Department of Labor's proposed amendment to its final rule under section 408(b)(2) of the Employee Retirement Income Security Act (ERISA).[2] The Department's proposal would require that the disclosures required of service providers to ERISA retirement plans under the current rule include a guide to the disclosures.

While we do not support a guide requirement in general, our specific comments focus on disclosures by investment advisers registered with the Securities and Exchange Commission (SEC) to responsible plan fiduciaries acting on behalf of plans in entering into individually managed "separate account" arrangements. As we detail below, the fees and services provided under such arrangements are straightforward and generally found in two documents, the investment management agreement and the adviser's Form ADV, Part 2. In light of the sophistication of the plan fiduciaries representing plans in such arrangements and the uncomplicated nature of their fee structures, we believe that the addition of a guide to the disclosures in such a context would not add to the fiduciaries' already detailed understanding of the structures and thus would be unnecessary. If the Department were to conclude that a guide should be required in this context, we suggest a streamlined guide for such arrangements.

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[1] The Investment Adviser Association ("IAA") is a not-for-profit association that represents the interests of investment adviser firms registered with the SEC. Founded in 1937, the IAA's membership consists of more than 500 firms that collectively manage approximately $14 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our website: www.investmentadviser.org.

[2] Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure, 79 Fed. Reg. 13949 (Mar. 12, 2014).

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Background

The IAA has long maintained that the section 408(b)(2) disclosure regime should not apply in the context of the straightforward fee arrangements typical for defined benefit plans. In response to the Department's initial 2007 proposal, the IAA focused its testimony at the 2008 public hearing on the application of the proposed regulation to defined benefit plans. The IAA noted that the Department's disclosure proposal was prompted primarily by concerns about fees and expenses in defined contribution plans and the changes in the fee structures of these plans over time.[3] Such structural changes generally had not occurred in the defined benefit context; therefore, the IAA questioned whether the proposed rule should apply to defined benefit plans.

The IAA's comments on the 2010 interim final rule reiterated these concerns, especially as to the Department's request for comments on the advisability of adding a requirement for a summary or guide to the disclosures. Our 2010 letter expressed concern that the development and implementation of this concept would be difficult, because of the variety of arrangements to which it would apply. The letter suggested that, if such a summary or guide were to be required, then this requirement should not apply in the defined benefit plan context, in light of the straightforward nature of the compensation arrangements and the ability of prospective clients to easily compare among potential providers of investment advisory services.[4]

Current Proposal to Require a Guide to the Disclosures

We continue to believe that a guide is not necessary, especially in situations in which the fee and compensation structure is simple and straightforward, such as in the context of an investment adviser's services to plans through individually managed separate accounts.[5] Such accounts typically involve plans for which sophisticated responsible plan fiduciaries select investment advisers. The compensation received by the investment adviser in almost all circumstances is a percentage of assets under management. This percentage typically decreases as the assets of the account grow, in accordance with established breakpoints.

The responsible plan fiduciary for such a plan generally will issue a request for proposal (RFP) from potential advisers, often with the assistance of a pension consultant. In responding to the RFP, advisers provide detailed information about their experience, services and compensation. When the plan selects an investment adviser through the RFP process, the parties negotiate an agreement. The negotiations address numerous aspects of the relationship, and the form of agreement is often provided by the client, not the adviser. Therefore, clients establishing

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[3] The IAA's 2008 testimony is available at http://www.dol.gov/ebsa/pdf/IAA408b2.pdf.

[4] The IAA's 2010 comment letter is available at http://www.dol.gov/ebsa/pdf/1210-AB08-0029.pdf.

[5] Such accounts are established most often in the defined benefit context.

these accounts are well-versed as to the terms of the agreements, which reflect the client's original agreement and any negotiated changes to that agreement.[6]

Modified Guide Requirement

In the alternative, if the Department were to require a guide, we request that the requirements be tailored to accommodate these accounts and current practices to which plan clients have become accustomed since the final rule under section 408(b)(2) became effective in 2012. First, the number of documents or pages should not be dispositive in determining whether a guide should be required for individually managed separate accounts. Instead, the final rule should provide that investment advisers' required disclosures need not be accompanied by a guide if they are contained in two documents, the investment management agreement and the adviser's Form ADV, Part 2.

Responsible plan fiduciaries negotiate (and in many cases actually draft) the investment management agreement and therefore already know its terms. Typically, the other source of 408(b)(2) disclosures is the investment adviser's Form ADV, which must be provided to clients initially, along with (at least) annual updates in the event of changes. This document is required under the Investment Advisers Act of 1940, and its form is mandated by the SEC. Importantly, the mandated disclosures in Form ADV, Part 2, which is a narrative brochure, must be presented in a prescribed order and must be introduced by a table of contents. Therefore, the responsible plan fiduciaries that enter into individually managed separate accounts on behalf of plans can easily find relevant information in Form ADV, Part 2.

Second, for the same reasons, the requirement of a page or other locator should not apply in this context. As noted above, the plan fiduciaries who negotiate the investment management agreement do not need directions on how to locate the disclosures. In many cases, the client has the superior knowledge of the location of these provisions, especially if the agreement is based on the client's own document. In addition, because Form ADV, Part 2 must contain an internal table of contents, further direction as to location would be superfluous.

Separate Document Requirement

The proposed rule would require that the guide constitute a separate document. For the reasons set forth above, we urge that investment advisers to individually managed separate accounts be permitted to incorporate a streamlined guide into its existing disclosures. To the extent that an investment adviser does prepare a separate document, however, this document should not be precluded from including disclosures in addition to serving as a "roadmap." Some

[6] Indeed, our members report that in order to prepare a customized guide for each client, they may need to sort through hundreds of individualized agreements drafted primarily by the clients to whom they must provide the disclosures.

advisers to separate accounts and other arrangements already use a form of guide that provides required disclosures as well as a "roadmap" to the other documents containing the disclosures. This approach may bring more attention to certain disclosures. Furthermore, these advisers' clients are accustomed to receiving such documents, and have not reported any confusion. Advisers therefore should be permitted to continue providing these types of disclosures.

Annual Update Requirement

The proposed amendment would include a requirement that the guide be updated annually for changes. We submit that updates would be redundant in that the client would have to have agreed to changes in the relevant fees and services before the changes came into effect. To rehash these changes annually would not add to these clients' understanding and could lead to more confusion if the client thought that the annual update reflected a separate round of changes. In addition, under SEC rules, within 120 days of the firm's fiscal year end, the adviser must deliver to each client: (1) an updated Form ADV, Part 2 brochure with a summary of material changes, or (2) a summary of material changes that includes an offer to provide a copy of the updated brochure and information on how the client may obtain the brochure. Thus, the plan client would automatically receive an annual update to the Form ADV, Part 2 if there were changes from the brochure previously provided. If the Department required a separate annually updated guide in this context, then the same date (within 120 days of the firm's fiscal year end) should apply to changes in the 408(b)(2) disclosures in order to simplify the distribution of the updates.

Effective Date

The Department proposes in the preamble that the guide requirement would be effective 12 months after final publication of the final amendment in the Federal Register. Whether that timeframe would be sufficient will depend upon the scope of the final amendment; therefore, we cannot predict the length of time that investment advisers would need to prepare. We also request that the Department clarify that the amendment would apply only to those contracts or agreements entered into, extended or renewed after the effective date.

Regulatory Impact Analysis

The cost estimates in the Department's regulatory impact analysis appear to be based primarily on the number of U.S. registered investment companies; therefore, the analysis does not fully consider the impact of the proposed rule on investment advisers that provide investment advisory services to retirement plans.[7] We submit that the Department has underestimated the potential scope of the proposed guide, and urge the Department to revise its regulatory impact analysis in order to more precisely reflect the potential costs of this proposal.

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The IAA appreciates the Department's consideration of this letter. We look forward to working with you on these important issues, and request the opportunity to testify at any public hearing on the proposed amendment. If you have questions or require further information, please contact the undersigned at (202) 293-4222.

Sincerely,

Kathy D. Ireland
Associate General Counsel

cc: Joe Canary, Director, Office of Regulations and Interpretations, EBSA
Allison Wielobob, Senior Employee Benefits Law Specialist, Office of Regulations and Interpretations, EBSA

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[7] 79 Fed. Reg. 13958. In addition, the analysis states that "[t]here were 776 financial services firms that provided investment management services in the U.S.," but this figure is likely drawn from the 2013 Investment Company Fact Book, which describes this 776 figure as the number of "financial firms from around the world [that] competed in the U.S. market to provide investment management services to fund investors" (emphasis supplied). *Id.*; 2013 Investment Company Fact Book at 13 (available at http://icifactbook.org/pdf/2013_factbook.pdf). Although the Department's cost analysis does not appear to rely on this number, we note that, according to the SEC's records, there were over 10,500 SEC-registered investment advisers on April 12, 2013, of which 49.1% indicated at least one pension or profit sharing plan client. *Evolution Revolution 2013 – A Profile of the Investment Adviser Profession* (available at https://www.investmentadviser.org/eweb/docs/Publications_News/Reports_and_Brochures/IAA-NRS_Evolution_Revolution_Reports/evolution_revolution_2013.pdf).