

May 9, 2014

Reference:

**Agency**

Employee Benefits Security Administration (EBSA) and the Office of the Assistant Secretary for Policy / Chief Evaluation Office, Department of Labor

**Proposed Information Collection**

Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements

Dear Ms. Richie:

The Retirement Advisor Council (“The Council”) is grateful for the opportunity to comment on the Department of Labor’s proposed collection of information titled “Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements.”

As we understand it, the research initiative is to explore current practices and effects of EBSA's rule issued in February 2012, known as the “408(b)(2) regulation,” which requires covered service providers (“CSPs”) to pension plans to provide specific disclosures to responsible plan fiduciaries (“RPFs”) regarding the CSP's compensation for the services. In addition, EBSA intends to gather information about the utility of a guide, summary, or similar tool to help plan fiduciaries identify and understand the disclosures.

**Overall Objective, Research Approach and Sample Selection**

First, the Council wants to commend EBSA for soliciting input from end users regarding 408(b)(2) disclosures and the benefits of a guide, summary or other tool to help plan fiduciaries understand disclosures. It is important to test if regulations (current or proposed) meet stated objectives. It is important also to gauge if side-effects of regulations reduce the effectiveness of the national retirement system.

We applaud the Department’s decision to recruit from EBSA’s database, to screen for responsible plan fiduciaries with the authority to cause the plan to enter into a service arrangement even if this person is not the one listed on EBSA records, to collect data anonymously, and to make it clear there will be no enforcement action based on focus group responses or recruiting response.

The primary objective of the information collection is to explore current practices and effects of 408(b)(2) regulation. The regulation applies to plans of all size. However, we noted the universe you intend to study consists of small pension plans with fewer than 100 participants. Although this size segment is large in numbers of plans, participants of plans in this segment are a fraction of the universe affected by regulation 408(b)(2). Conclusions from this study will impact plan sponsors across size bands. For this reason,

we recommend the universe studied be expanded to cover the entire spectrum affected by regulation 408(b)(2). Specifically, we suggest you include in your sample fiduciaries of large plans, and that you stratify the sample to over-represent plans with 100 to 1000 employees and plans with 1000 or more employees.

One assumption underlying the initiative is that a written guide – paper or electronic will satisfy plan sponsor’s need for help with 408(b)(2) disclosures. It is our observation that information delivered in writing rarely satisfies plan sponsors’ need for assistance because many lack the time, interest, or expertise needed to dedicate several hours to study the information presented. To act with prudence, many rely on the services of a Professional Retirement Plan Advisor. For those who retain the services of a specialized Advisor, the ultimate guide is the Advisor they have selected to examine disclosures, to provide the necessary explanations, to explain how facts and circumstances of their plan impacts services and cost, and to answer all questions – baseline and technical. The assistance the best written guide can provide pales in comparison with the interaction between a plan sponsor and a plan Advisor familiar with the sponsor, participant demographics, plan design, and investment policy.

In the request for comment the agency enquired about methodology. The plan is to conduct eight to ten in-person focus groups in select locations with seven to ten sponsors in each group. As an alternative, we suggest the agency conducts four online focus groups with a nationwide sample of ten to twelve plan sponsors in each group. Our rationale is that focus groups are qualitative in nature, meant to discern a range of attitudes or behaviors, not their frequency. Quality of the research is less a factor of the number of focus group attendees than of the variety of recruits. Redundancy in observations past the initial four or five sessions make additional groups wasteful. Our rationale for online focus groups is that it is the only group methodology allowing the department to hear input from sponsors outside large Metropolitan Statistical Areas. The methodology will also save travel dollars, and compress the data collection schedule. Internet access among employers in all sectors has become so ubiquitous as to make bias irrelevant. Online groups also make it possible to invite a greater number of stakeholders to observe discussions. The Council would be delighted with the opportunity to observe sessions as they are taking place.

Finally, we recommend EBSA verify the individual who moderates focus group discussions and conducts in-person interviews is experienced working with retirement plan sponsors. A generalist moderator with peripheral understanding of retirement plans will not draw the quality of information the agency needs to support rule making in what is by nature a technical field.

### **Scope: Solicit Input from Professional Retirement Plan Advisors Who Assume Fiduciary Responsibility**

We agree with EBSA on the importance of querying plan sponsors to explore practices and the effects of 408(b)(2) regulation. However, we question if plan sponsors can give the agency a complete picture. Indeed, few small plan sponsors have on staff an employee dedicated to retirement benefits. Many rely on the services of a Retirement

Plan Advisor whom they may have hired in an ERISA 3(21), ERISA 3(38), or ERISA 3(16) fiduciary capacity to comply with the requirement to act with the care, skill, prudence and diligence that a prudent man would use in the conduct of an enterprise of a like character and with like aims. For this reason, we recommend that you solicit input and feedback not only from plan sponsors but also from Professional Retirement Plan Advisors whom plan sponsors have hired in a fiduciary capacity. Our experience suggests the feedback you will receive from plan Advisors will be more insightful than opinions of individuals who hired a professional Advisor specifically because they personally lack the knowledge and confidence that an expert can impart.

To collect information from plan Advisors, we recommend EBSA conduct a series of in-depth one-on-one interviews. Indeed, plan Advisors compete with one-another and we believe the agency will collect better quality information one-on-one than it would in a group setting. A series of 20 to 30 one-on-one interviews using a structured discussion guide will provide the range and consistency of input you need to make informed decisions. Because your focus is on plan fiduciaries, we recommend you interview in priority Advisors who assume 3(21), 3(38), or 3(16) responsibility for at least some client plans. The sample could be derived from EBSA records, or assembled with the help of trade groups and Self-Regulatory Organizations (SRO).

## Discussion Guide

Attached, please find an edited version of the discussion guide in MS Word including detailed comments. This section outlines our logic and suggests additional edits.

In a nutshell, our first observation concerns the assumption of frequent interaction between the recordkeeping service provider and plan sponsors that underlies the discussion guide. In our experience, the frequency of direct interaction varies considerably depending on the role the plan sponsor wants their Advisor to play in the relationship. We believe you will collect more complete information asking about the role of the Advisor in the relationship throughout the discussion. Of all the professionals (auditor, attorney, etc.) with whom plan sponsors interact, we believe the Advisor is the best placed to deliver 408(b) disclosure education. You may want to consider asking plan sponsors if they prefer receiving the information explaining 408(b)(2) disclosures in a paper document or in-person from their plan Advisor.

Our second recommendation is to use more neutral language in the discussion guide. For instance, we strongly recommend that you eliminate any reference to “hidden fees”. Two years of standardized 408(b)(2) disclosures have rendered the notion of “hidden fees” obsolete. Also, we recommend questions be less directive. For instance, we suggest the question “Were the 408(b)(2) disclosures easy to understand?” be replaced with the less leading “On a scale of very easy to very difficult, how easy or difficult to understand are the disclosure materials without the help of an Advisor?”

A third suggestion is to include exercises to collect behavioral data in the focus groups to supplement information about attitudes and opinions. For instance, you might

distribute multiple sample disclosure documents and ask recruits to rank order disclosure documents from easiest to most difficult. Presenting multiple templates will foster creative thinking, and provide focus group attendees an opportunity to suggest enhancements. Polls also generate insightful group-wide data sometimes inconsistent with quotes from a small number of more verbose attendees. We suggest the exercise currently included in the discussion (value of a guide) be modified so plan sponsors who believe the guide has no value be allowed to express their opinion.

A fourth recommendation is to better balance the time spent on both study objectives: (1) current practices and effect of 408(b)(2) regulation and (2) utility of a guide, summary, or similar tool to help plan fiduciaries. We believe the current discussion guide pays too much attention to the written disclosure guide and not enough to the effect of 408(b)(2) regulation. For instance, you might solicit input about the evaluation of service providers in general, the effect of mandated fee disclosures on the evaluation process and the need for periodic benchmarking of services and associated cost. You may consider asking which is most beneficial to their plan: mandating fee disclosures or mandating periodic cost and service benchmarking. You may want to ask if disclosures have affected the balance between service and fees in their evaluation of service providers. We would recommend you ask what services plan sponsors receive now and how these compare with the services they received prior to 2011. Do plan sponsors anticipate the set of services available to them will stay the same or change in the coming years as a result of fee disclosures? What is the long term impact of the trend? Do plan sponsors view the trend as a positive development or a negative development?

A fifth recommendation is to shift the focus from price alone to reasonableness of package: Is the service package of reasonable value? For example – question 10 asking about direct and indirect compensation should be expanded to ask about the services provided for the compensation. Question 15 should be amended to ask more directly about the services provided.

Finally, we recommend questions be reworded to better reflect real life. For instance, question 11 implies the number of investment offerings is a major factor in plan complexity and a driver of cost. We believe the number of investment offerings within a reasonable range has a marginal impact on cost. On the other hand, the guide does not recognize employee demographics, employee turnover, activity sector, plan design features such as loan provisions, hardship withdrawal provisions, automatic enrollment, or employer contribution allocation formula as major drivers of plan operating cost. For the same reason, we urge the agency to present study subjects only with stimuli that are materially feasible. As an alternative to a 408(b)(2) disclosure guide, the agency is considering mandating a simplified disclosure. We question the feasibility of a simplified disclosure in situations where a plan sponsor receives a complex disclosure today, and we urge the agency not to test disclosures so abbreviated that they are operationally impossible to execute.

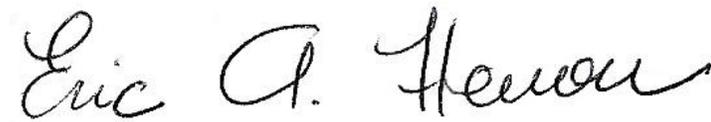
## **Analysis and Reporting**

We encourage EBSA to verify the agency will receive from the research firm selected (ICF International) all standard deliverables from a qualitative research initiative: Screener questionnaires, observer seats, session recordings, transcripts, slide presentation including quotes, excerpt videos if necessary, polling results, and recruit profiles, full narrative report of conclusions, and an executive summary of recommendations. In the analysis, it is important the agency differentiate between attitudes and opinions voiced in focus groups, and real life experience. For instance, you may want to contrast the amount of time sponsors say they spend reading disclosures with the amount of time they spend examining templates distributed in the sessions. Take the words with a grain of salt, observe real life behavior and focus conclusions on real life behavior.

## **Final Note**

On a final note, we are grateful for your consideration of our comments on your proposed collection of information. We believe your efforts to collect information from final users and their Advisors will be rewarded with rich data and lead to more effective regulations grounded in reality. For additional information, please contact me at (860) 653-1705.

Respectfully,



Eric Henon  
Executive Director  
Retirement Advisor Council