



December 2, 2011

Assistant Secretary Phyllis Borzi
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue, N.W.
Room S-2524
Washington, DC 20210

Dear Secretary Borzi:

I am writing in connection with the final regulations to be issued by the Department of Labor under section 408(b)(2) of ERISA. The financial institutions which are members of the Securities Industry and Financial Markets Association (“SIFMA”) are increasingly concerned about the timing of the issuance of the final regulation, which has been pending at the Office of Management and Budget since July 2011. As originally published, the effective date for the interim final 408(b)(2) regulation was July 16, 2011, for both new and existing contracts or arrangements between covered plans and covered service providers. On June 1, 2011, the Department published a proposal to formally delay the effective date of the 408(b)(2) regulation to January 1, 2012. On July 19, 2011, the Department extended the effective date of the 408(b)(2) regulation to April 1, 2012. The regulation still has not been published in the Federal Register and service providers have no idea how, and to what extent, it will be changed from the interim final.

At the time of the July 2011 extension, we were hopeful the regulation would be issued by mid-October. While we were concerned that a little over 5 months would not be adequate to prepare and send the disclosure required by the regulation to hundreds of thousands of plans, we thought it would be prudent to wait until the final regulation was published in the Federal Register to understand the changes from the interim final regulation and the time it would take (and the costs) of making these new changes. At this point, taking into account holiday schedules, service providers realistically have 3 months to craft, review with all interested parties and revise based on their input, then make the necessary computer changes before then printing, and delivering the disclosure. Further, we still do not know what will be the required contours and content of that disclosure, to even determine whether the typical computer adjustments and review process will be sufficient. There may be changes that require discussions and approvals throughout different parts of the organization, as well as possible system changes to capture data we might not have previously captured in the format being asked.

While we appreciate the time your staff has made for inquiries, we believe they share our concern that the details of the requirements are not clear. Moreover, based on our and your staff’s experience with the similar rules for the Schedule C a few years ago, several rounds of FAQs may be necessary to clarify how particular provisions should be interpreted. For example, service providers

continue to question whether a service provider will have to anticipate all the possible kinds of products or services a client might be interested in, since the disclosure is required to be provided in advance of the commencement of the relationship. For regular brokerage accounts, we question whether a broker should assume that a defined benefit plan will be investing in international securities (and therefore, foreign custody fees and foreign brokerage fees and transactions costs should be disclosed). Similarly, we wonder whether a broker should assume that a particular plan will invest in futures, short sales, mutual funds, private funds or structured products and whether we should provide all of the fee disclosure for those.

While Department staff has said publicly that the new regulation will require a “roadmap,” this concept was not included in the interim final regulations and we therefore have no details on what that document will look like and how much customization it will require. Systems designed reliably to provide disclosure to a mass audience cannot be built based on broad concepts, nor will most service providers attempt to predict what the requirements will be and then commit resources to build a system on the slim hope that they will get it right. We believe even a very basic “roadmap” crafted through a series of links or references will be a significant undertaking that will take at a minimum six to twelve months to design and implement.

We had concerns about the April 1, 2012 date even when we believed the final regulation would be out by October. However, as we enter December, it is simply unrealistic to assume firms and their counsel will be able read the rule, absorb it, receive guidance from the Department regarding any ambiguities and then design, test and implement systems and assure compliance in a matter of months (all, of course, with the specter of prohibited transaction excise taxes and rescission hanging over them if they get anything wrong).

Our members want to start on this disclosure project and as we have said in our comments, we support this initiative and believe given the time to do it correctly, service providers and their plan clients will benefit from increased disclosure. We do not think that will be the case if we have a few months to try to comply. We urge the Department to issue a statement that the effective date of the final regulation will be no earlier than 12 to 18 months from its publication in the Federal Register.

Sincerely,

A handwritten signature in black ink, reading "Lisa J. Bleier". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Lisa J. Bleier
Managing Director, Public Policy and Advocacy
Securities Industry and Financial Markets Association