

## COMMENT LETTER

June 14, 2011

# Institute Comment Letter on 408(b)(2) and Participant Disclosure Extension (pdf)

June 14, 2011 Submitted Electronically 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 Attn: Fee Disclosure Applicability The Investment Company Institute\* strongly supported the Department's 408(b)(2) and participant disclosure initiatives from the very beginning and has worked closely with the Department and the industry on implementation. Open issues remain on both rules. The 408(b)(2) rule was adopted on an interim basis and the Department sought comment on and has not yet adopted a final version of the rule. The participant disclosure rule is a final rule, but the Department reserved the issue of electronic delivery and also expects to issue guidance in FAQs on a number of implementation issues. We are pleased to comment on the Department's recent proposal to extend the rules' applicability dates. The Institute supports providing sufficient time for plan sponsors and service providers to come into compliance. Our members are concerned, however, that the proposed extension to January 2012 may not be sufficient for 408(b)(2), if the final rule the Department plans to adopt this fall imposes new obligations. 408(b)(2) Service Provider Disclosure Effective Date The proposal would extend the 408(b)(2) applicability date to January 1, 2012. The Department received over 40 comments on the interim rule, released July 16, 2010, and has said the final rule will contain changes, including a possible new requirement to summarize information in a single document. As we stated in our August 2010 comment letter on the interim rule, if the final rule Office of Regulations and Interpretations Fee Disclosure Applicability June 14, 2011 Page 2 of 3 imposes new obligations on service providers, the effective date should be extended to give service providers at least a year to implement the new requirements.<sup>1</sup> How the Department resolves other issues raised in comments on the interim rule also may bear on the time needed for implementation. These issues include:

- Whether and how minor changes in expense ratios throughout the year must be reported
- Whether the recordkeeping definition in the rule would sweep in participant-level accounts held on mutual fund books
- How investment menu changes initiated by the fiduciary and not the service provider must be treated
- Whether and under what circumstances recordkeepers must provide information on off- platform investments
- How to report indirect compensation in brokerage windows

Because the final 408(b)(2) regulation is not yet under review at the Office of Management and Budget, the earliest the Department could release it is in mid-September 2011, giving service providers at most 3 ½ months to digest the changes and clarifications and modify their systems accordingly. Without knowing what the final rule provides, it is hard to know whether this time is sufficient, but if the final rule

imposes obligations that were not in, or not clear in, the interim rule, 3 ½ months is not sufficient time to adjust. 404(a) Participant Disclosure Applicability Date and Transition Rule

The Institute strongly supports the Department's proposal to extend the 60-day transition rule to 120 days and apply this transition rule to participants who become eligible for the plan in between the applicability date for that plan and the end of the 120-day period. Without the latter change, the transition rule is of limited value because plans must have the disclosures ready on the applicability date in case an employee becomes newly eligible for the plan. Except for the transition rule, the Department 1 One member informed us that it undertook to create a summary disclosure document on a voluntary basis after the interim final regulation was released. Creating, reviewing, and programming for this document took the better part of the last 11 months. We would expect that many service providers subject to the rule are waiting to see whether the Department imposes a new summary requirement before working on how they would implement the requirement.

Office of Regulations and Interpretations Fee Disclosure Applicability June 14, 2011 Page 3 of 3 is not proposing to extend the general applicability date (plan years beginning on or after November 1, 2011). In the proposal release, the Department states that aligning application dates for the 408(b)(2) and participant disclosure rules will help plans obtain information required to provide the participant- level disclosure. The Department also has said it is working on informal guidance such as FAQs to address technical issues on the participant disclosure rule that the Institute and others have raised with EBSA staff. The Department may want to reconsider the general applicability date for participant disclosure if it further extends the date for 408(b)(2) or if the anticipated FAQs require time to digest.

\* \* \* \* We appreciate that Department staff has been open to discussing industry work on implementation and our members' technical questions about the rules. The new disclosure requirements are important for Americans saving for retirement and the Institute has focused on ensuring the rules are implemented correctly and accurately. We urge the Department to consider carefully the time needed for successful implementation. Please feel free to contact the undersigned at 202.326.5826 (podesta@ici.org) with any questions.

Sincerely, /s/ Mary S. Podesta Mary S. Podesta Senior Counsel – Pension Regulation \* The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$13.1 trillion and serve over 90 million shareholders.