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January 5, 2015

Filed Electronically

Office of Information and Regulatory Affairs
Attn: OMB Desk Officer for DOL-EBSA
Office of Management and Budget
Room 10235
725 17th Street NW
Washington DC 20503

Re: Information Collection Request – Focus Groups for Evaluating the
Effectiveness of the ERISA Section 408(b)(2) Disclosure Requirements
OMB ICR Reference No. 201408-1210-004

Dear Sir/Madam:

The Investment Company Institute¹ appreciates the opportunity to provide comments on the Department of Labor's Information Collection Request (ICR)² regarding the conduct of focus groups to explore current practices and effects of the final 408(b)(2) service provider disclosure regulation,³ and to gather information about the need for a guide, summary, or similar tool to help plan fiduciaries navigate and understand the disclosures. The Institute strongly supported DOL's service provider disclosure initiative⁴ and has long supported effective disclosure to plan fiduciaries that enables them to

¹ The Investment Company Institute (ICI) is the world's leading association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members managed total assets of \$17.7 trillion and serve more than 90 million shareholders.

² 79 Fed. Reg. 72213 (Dec. 5, 2014).

³ 77 Fed. Reg. 5632 (Feb. 3, 2012).

⁴ *See, e.g.*, Letter from Mary Podesta, Senior Counsel – Pension Regulation, Investment Company Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated August 30, 2010, available at www.dol.gov/ebsa/pdf/1210-AB08-0027.pdf.

fulfill their duties under the Employee Retirement Income Security Act of 1974 (ERISA). As an organization with established research capabilities, the Institute is in a unique position to comment on this matter.⁵

We understand that the Department intends to use information collected from the focus groups to (1) assess plan fiduciaries' experience in receiving the 408(b)(2) disclosures; (2) assess the effectiveness of these disclosures in helping plan fiduciaries make decisions; (3) determine how well plan fiduciaries understood the disclosures, especially in the small plan marketplace; and (4) evaluate whether, and how, a guide, summary, or similar tool would help fiduciaries understand the disclosures.⁶ The Department intends to conduct a total of eight focus group sessions with approximately 70 to 100 plan fiduciaries, primarily focusing on fiduciaries to small pension plans (those with less than 100 participants). Six focus groups will include fiduciaries from small plans, one focus group will include fiduciaries from plans with 100 to 999 participants, and one focus group will include fiduciaries from plans with 1,000 or more participants, and the focus group results will be used to inform and support the Department's notice of final rulemaking for the guide requirement.⁷

The Office of Management and Budget (OMB) seeks comment on whether the proposed ICR (*i.e.*, the proposed conduct of focus groups) is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. The Institute previously provided comments and recommended numerous changes to the proposed ICR materials in a letter to the Department dated May 12, 2014 (May 12, 2014 letter).⁸ Although we are appreciative that the Department made several of the changes we suggested to the focus group script now submitted to OMB, many of our concerns remain and we therefore believe it important to reiterate these unresolved concerns to OMB. In particular, as discussed in Part I, we have general concerns regarding the timing of the focus groups given that the Department has already issued a proposed rule requiring a guide to

⁵ One of the major roles the Institute serves is as a source for statistical data on the investment company industry. With a research department comprising more than 40 people, including seven PhD-level economists, the Institute conducts public policy research on fund industry trends, shareholder characteristics, the industry's role in U.S. and international financial markets, and the retirement market. For example, the Institute publishes reports focusing on the overall U.S. retirement market, fees and expenses, and the behavior of defined contribution plan participants and IRA investors. In its research on mutual fund investors, IRA owners, and 401(k) plan participants, the Institute conducts periodic household surveys that connect directly with investors.

⁶ See page 2 of the "Part A Supporting Statement for Paperwork Reduction Act 1995 Submissions," December 2014.

⁷ *Id.* at 1-2.

⁸ See Letter from David M. Abbey, Senior Counsel – Pension Regulation, Investment Company Institute, and Sarah Holden, Senior Director – Retirement and Investor Research, Investment Company Institute, to Office of the Assistant Secretary for Policy/Chief Evaluation Office, U.S. Department of Labor, dated May 12, 2014, available at www.ici.org/pdf/28119.pdf.

the disclosures. We also have concerns with respect to the proposed ICR design which are discussed in Part II of the letter. Part III of the letter provides specific comments on the focus group issue areas and questions. Lastly, Part IV of the letter provides comment on the *Focus Group Feedback Consent Form*.

I. General Comments

The Timing of the ICR

As we stated in our May 12, 2014 letter, while we support the Department's efforts to collect information to evaluate whether, and how, a guide, summary, or other tool would help fiduciaries understand the disclosures, we believe that the Department should have collected such information prior to issuing a proposed rule requiring a guide to the disclosures, given that the focus groups are designed to provide the Department with information as to the necessity of a guide requirement. On the same day the proposed ICR was published in the *Federal Register*, the Department also published a notice of proposed rulemaking, *Amendment Relating to Reasonable Contact or Arrangement Under Section 408(b)(2) – Fee Disclosure* (the "Proposed Rule").⁹ The Proposed Rule would amend the final 408(b)(2) service provider disclosure regulation (the "Regulation") under ERISA to require covered service providers to furnish a guide to assist plan fiduciaries in reviewing the required disclosure documents provided pursuant to 408(b)(2), unless the covered service provider furnishes the required disclosures in a single summary document that does not exceed a yet-to-be determined number of pages.

We continue to question the practical utility of the conduct of focus groups designed to assist the Department in determining whether a guide to the disclosures is necessary concurrent with the issuance of a proposed rule that would require a guide. In Part A of the Supporting Statement for Paperwork Reduction Act 1995 Submissions (the Supporting Statement), the Department states that "the focus group results will be used to inform and support the Department's notice of final rulemaking for the guide requirement."¹⁰ We believe the Department should have conducted the ICR and evaluated the ICR results as an initial step in determining whether the Proposed Rule is necessary. By issuing the ICR concurrent with the issuance of the Proposed Rule, the Department is eliminating the opportunity for the public to provide comment on the ICR results and the impact that such results would have on any rule requiring a guide to the disclosures. Although the Department states in the Supporting Statement that it may decide to reopen the Proposed Rule's comment period to solicit comments on the focus group results, given the concurrent issuance of the ICR and the Proposed Rule, we recommend that the Department reopen the Proposed Rule's comment period to enable the public to review and comment on the ICR results.¹¹

⁹ 79 Fed. Reg. 13949 (March 12, 2014).

¹⁰ See page 2 of the "Part A Supporting Statement for Paperwork Reduction Act 1995 Submissions," December 2014.

¹¹ The Department's Fall 2014 Regulatory Agenda states that the next regulatory action is issuance of a final rule. See www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1210-AB53.

Further, as detailed in the Institute's June 10, 2014 comment letter to the Department on the Proposed Rule,¹² we are concerned that the conduct of focus groups concurrent with the Department's issuance of the Proposed Rule is inconsistent with the procedural requirements applicable to agency rulemaking. More specifically, Executive Order 12866,¹³ as reaffirmed by this Administration in January 2011,¹⁴ is well understood to govern the rulemaking process. Executive Order 12866 provides that Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need. Executive Order 12866 further provides that each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of the problem. Clearly, the Proposed Rule is neither required by law nor necessary to interpret the law. Pursuant to Executive Order 12866 then, the Department must illustrate that the Proposed Rule is made necessary by "compelling public need." We do not believe that the Department has provided support or evidence that the Proposed Rule is made necessary by "compelling public need" and appears to be conducting the focus groups, concurrent with the issuance of the Proposed Rule, in an attempt to establish that there is a "compelling public need" for a guide requirement.

II. The ICR Design

The Institute has significant experience with surveys relating to the mutual fund industry, mutual fund shareholders, IRA owners, and defined contribution plan participants. For example, each spring the Institute conducts the *Annual Mutual Fund Shareholder Tracking Survey* to gather information on the demographic and financial characteristics of mutual fund-owning households in the United States.¹⁵ The most recent survey was conducted from May to July 2014 and was based on a dual frame telephone sample of 6,003 U.S. households selected by random digit dialing. The Institute also conducts the *IRA Owners Survey* each spring to gather information on the characteristics and activities

¹² See Letter from David M. Abbey, Senior Counsel – Pension Regulation, Investment Company Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0037.pdf.

¹³ 58 Fed. Reg. 51735 (Oct. 4, 1993).

¹⁴ The current administration reaffirmed the principle and structures that were established in Executive Order 12866 in Executive Order 13563. See 76 Fed. Reg. 3821 (Jan. 21, 2011).

¹⁵ See Burham, Bogdan, and Schrass, "Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2014," *ICI Research Perspective* 20, no. 8 (November 2014), available at www.ici.org/pdf/per20-08.pdf.

of IRA-owning households in the United States.¹⁶ The most recent survey was conducted from May to July 2014 and was based on a dual frame telephone sample of 3,200, randomly selected, representative U.S. households owning traditional IRAs, Roth IRAs, and employer-sponsored IRAs.

Based on our experience in the collection of information and the conduct of surveys, we have the following general comments and concerns with regard to the proposed ICR design.

A. Limitations of Focus Groups

While we appreciate the Department's effort to collect information to evaluate whether, and how, a guide, summary, or other tool would help plan fiduciaries understand the 408(b)(2) disclosures, as discussed below, we do not believe that the conduct of focus groups is the appropriate vehicle for the collection of such information.

As we have previously cautioned the Department, while focus groups may serve certain purposes (*e.g.*, in helping to craft a survey instrument), their results cannot and should not be taken as an indication of broad population sentiment.¹⁷ Mainstream market research literature suggests that focus groups are a useful tool for getting desired information quickly, particularly as a means for establishing the appropriate way to conduct quantitative research using a survey-based approach in a follow-up.¹⁸ For example, in response to the Department's January 2013 ICR regarding a proposed survey on pension benefit statements, the Institute supported the Department's methodology in using focus groups for pre-testing a survey instrument before fielding it through the RAND American Life Panel.¹⁹ However, focus groups have at least two important shortcomings that severely limit the utility

¹⁶ See Holden and Schrass, "The Role of IRAs in U.S. Households' Saving for Retirement, 2014," *ICI Research Perspective* forthcoming. For the 2013 survey results, see Holden and Schrass, "The Role of IRAs in U.S. Households' Saving for Retirement, 2013," *ICI Research Perspective* 19, no. 11 (November 2013), available at www.ici.org/pdf/per19-11.pdf.

¹⁷ See Letter from David Abbey, Senior Counsel – Pension Regulation, Investment Company Institute, and Sarah Holden, Senior Director, Retirement and Investor Research, Investment Company Institute, to Office of the Assistant Secretary for Policy/Chief Evaluation Office, Employee Benefits Security Administration, U.S. Department of Labor, dated May 12, 2014, available at: www.ici.org/pdf/28119.pdf. See also Letter from Elizabeth Krentzman, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, dated Apr. 4, 2005 (commenting on the SEC's proposed point of sale and confirmation disclosure requirements), available at www.sec.gov/rules/proposed/s70604/ekrentzman040405.pdf.

¹⁸ See, *e.g.*, Cox, Chinnappa, Christianson, Colledge, and Kott, *Business Survey Methods* (New York: John Wiley and Sons, Inc., 1995), 285–287.

Focus groups are conducted to develop, assess, and clarify survey concepts and their indicators, to evaluate questions and instruction, and to identify errors or burdens associated with understanding and answering questions and retrieving data.

¹⁹ See, *e.g.*, Letter from David M. Abbey, Senior Counsel – Pension Regulation, Investment Company Institute, and Sarah Holden, Senior Director – Retirement and Investor Research, Investment Company Institute, to G. Christopher Cosby,

of the conclusions that can be drawn from them: (1) limited sample size and potential selection bias; and (2) subjectivity.²⁰ We discuss each of these areas below, with respect to the ICR.

1. Limited Sample Size and Representation

In our May 12, 2014 letter, we expressed concern regarding the Department's intent to limit the focus groups to fiduciaries of small plans (pension plans with less than 100 participants). We understand that the Department has modified the focus groups to include six focus groups for small plan fiduciaries, one focus group for fiduciaries to plans with 100 to 999 participants and one focus group for fiduciaries to plans with 1,000 or more participants. While we appreciate the Department's addition of two focus groups to include fiduciaries of large plans, we continue to be concerned about using focus groups to draw inferences about fiduciaries to nearly 680,000 private pension plans. Using results from six focus groups consisting of small pension plan fiduciaries, one focus group consisting of fiduciaries to plans with 100 to 999 participants, and one focus group consisting of fiduciaries to plans with 1000 or more participants as the sole basis for making observations about the preferences of over 43,000 small and large defined benefit (DB) plans and more than 630,000 small and large defined

Employee Benefits Security Administration, U.S. Department of Labor, dated Mar. 25, 2013, available at www.dol.gov/ebsa/pdf/icr-0004.pdf.

²⁰ See, e.g., Tull and Hawkins, *Marketing Research* (New York: Macmillan, Inc., 1993), 451.

The combined effects of potential nonresponse errors, small sample sizes caused by high costs, abnormal behavior by participants, and the potential for interviewer effects makes generalization from a few focus groups to the larger population a risky undertaking.

See also Aaker, Kumar, and Day, *Marketing Research* (New York: John Wiley and Sons, Inc., 2004), 209–210.

The dangers of accepting the unstructured output of a focus group or a brief series of informal interviews are twofold. First, the results are not necessarily representative of what would be found in the population, and hence cannot be projected. Second, there is typically a good deal of ambiguity in the results. The flexibility that is the hallmark of these methods gives the moderator or interviewer great latitude in directing the questions; similarly, an analyst with a particular point of view may interpret the thoughts and comments selectively to support that view. In view of these pitfalls, these methods should be used strictly for insights into the reality of the consumer perspective and to suggest hypotheses for further research.

See also Phipps, Butani, and Chun, "Research on Establishment-Survey Questionnaire Design," *Journal of Business & Economic Statistics*, 1995, 340.

Focus groups were developed as qualitative research tool, and as such they prevent social scientists from making quantitative estimates. This limitation stems primarily from the nature of focus-group samples, which are small and nonprobability based.... Because analysis of these data further involves the researcher's subjective judgment, we interpret the results with caution.

contribution (DC) plans with over 90 million active participants combined would strain statistical credibility.²¹ It is misleading to analyze a focus group as representative of a population.²²

2. Subjectivity and Bias

The second shortcoming of focus groups is deciphering the “take-away message.” The conclusions drawn from focus groups by nature involve a level of subjectivity. Subjectivity can be injected into the process at two junctures. First, the moderator has a great deal of flexibility to ask participants questions in a certain manner, or to emphasize certain elements over others, which can affect the answers given. While formal surveys may also include questions that may appear to invoke bias, careful survey design can minimize this risk. Further, by specifying that the questions be asked using the precise language provided, it is possible to limit the opportunity for an individual interviewer to introduce bias. Second, subjectivity can also be incorporated into focus group results as they are compiled. Typically, such results are assembled in a written report, in which the opinions elicited from the group are listed, characterized, and summarized in a qualitative way. By contrast, the results of a formal survey are compiled in a quantitative manner.

While we are appreciative of the Department’s changes to the focus group script intended to reduce or eliminate potential answer bias,²³ we continue to be concerned that the proposed focus group script continues to include elements of subjectivity and bias and thus may lead participants to answer in a particular way. The script’s introduction continues to state that the focus group is being used by the “Department of Labor.” Although the script states that the responses will not be used for enforcement purposes, the repeated references in the introduction to the Department may influence the responses - as focus group participants are likely to be aware that the Department is tasked with enforcing compliance with ERISA and may therefore be influenced to respond in a manner they believe the Department would support. Additionally, the script states that “service providers may receive revenue sharing, which some people refer to as hidden fees.” As we stated in our May 12, 2014 letter, use of the term “hidden fees” could signal to participants that the fees are supposed to be difficult for them to find or that the administrator of the focus groups wants them to find the fees difficult to locate within the disclosures. Further elements of subjectivity and bias in the focus group script are discussed in Section III, below.

²¹ For aggregate 2012 Form 5500 data, see U.S. Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2012 Form 5500 Annual Reports* (Version 1.0; October 2014), available at www.dol.gov/ebsa/pdf/2012pensionplanbulletin.pdf.

²² See Sandburg, “Marketing Feature – Focusing on the Benefits-Sharpening the Focus of Focus Groups,” *Harvard Business School Working Knowledge* (July 2002), available at hbswk.hbs.edu/archive/3004.html.

²³ See page 6 of the “Part A Supporting Statement for Paperwork Reduction Act 1995 Submissions,” December 2014.

3. The Department Should Conduct a Survey

Under certain circumstances focus groups are likely to provide answers that are consistent with formal surveys, but it is impossible to recognize those circumstances without conducting both types of research. If the range of opinions in the population being studied is very narrow, the chance of small-sample bias is mitigated, because the focus group is less likely to (randomly) include people who disagree with the commonly held opinion. As a result of the limitations of focus groups described above, the Institute cautions against relying on their results -- in isolation -- for the purposes of crafting regulations. We therefore continue to recommend that the Department use the focus groups to pre-test a survey and collect the information it seeks through the use of a survey instrument (subject to notice and comment) rather than solely through the conduct of focus groups.

In the Supporting Statement, the Department states that it “understands that a survey could provide statistical validity, depending on how it is constructed and carried out, whereas a focus group would not.” The Department further states that it has decided not to pursue a survey at this time, because (1) a focus group allows more in-depth study of the topic, including responses to other focus group participants’ ideas and comments, and (2) the development and clearance of a survey would also delay obtaining information, including another ICR. Additionally, the Department states that these two items suggest a survey may have limited practical utility for the Department and that a survey is not within the scope of the Department’s current contract and funding. Finally, the Department states that the “recall” issue is of even greater concern with a survey, because respondents would not be prompted by a moderator to refresh their recollection about the disclosures they received, as they would in a focus group setting.²⁴

As discussed below, we have several concerns with the Department’s response regarding the conduct of a survey. First, as we stated in our June 10, 2014 comment letter to the Department on the Proposed Rule, we believe that the Department has vastly underestimated the cost to service providers associated with the guide requirement. Second, given, as many have argued,²⁵ that the Department has

²⁴ *Id.* at 5. We do not understand the Department’s rationale for arguing that the conduct of focus groups versus the conduct of a survey impacts participant recall issues. In contrast to the Department’s argument, face-to-face or telephone surveys are in fact “moderated” by the individual conducting the survey -- typically pursuant to a script.

²⁵ *See, e.g.*, Letter from Timothy E. Keehan, Vice President and Senior Counsel, American Bankers Association, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 6, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0015.pdf; Letter from Lisa J. Bleier, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0019.pdf; Letter from Walter C. Welsh, Executive Vice President – Taxes and Retirement Security, American Council of Life Insurers, James H. Szostek, Vice President – Taxes and Retirement Security, American Council of Life Insurers, and Shannon Salinas, Counsel – Taxes and Retirement Security, American Council of Life Insurers, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0027.pdf; Letter from Robert G. Wuelfing,

not established a “compelling public need” for the guide requirement, we do not understand the Department’s sense of urgency associated with the promulgation of a rule requiring a guide. Given the potential cost to covered service providers associated with a guide requirement, it appears rather flippant for the Department to use lack of funds as an excuse for not undertaking a survey. We believe it is critical that the Department take the time and expend the funds necessary to collect information in a statistically credible manner to determine, what, if any difficulties plan fiduciaries may be encountering in connection with the receipt of the 408(b)(2) disclosures as well as cost-effective solutions to address those problems.

1. Given the Potential Cost of a Guide Requirement, the Department Should Take the Appropriate Time and Expend the Necessary Funds to Collect Information

In the preamble to the Proposed Rule, the Department included a low-range (\$6.7 million annually), a medium-range (\$13.3 million annually), and a high-range (\$22.2 million annually), as its estimated cost to covered service providers to create the guide.²⁶ As we stated in our June 10, 2014 comment letter to the Department on the Proposed Rule, we believe there are several flaws with the Department’s cost analysis methodology. First, the cost analysis ignores the fact that the disclosures required by the Regulation include information contained in documents beyond mutual fund prospectuses, including documents generated by other covered service providers, such as recordkeepers, banks, consultants, custodians, advisers, investment managers and insurance companies. Thus, the Department’s cost analysis should have gone beyond simply focusing on the number of products for which a guide locator would be necessary. Instead, it would have been more relevant for the Department to focus on the costs associated with preparing the guide for each arrangement in which a guide would likely be required.

Executive Director, The SPARK Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0029.pdf; Letter from Jason Berkowitz, Vice President – Regulatory Affairs and Compliance, Insured Retirement Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0035.pdf; Letter from Randel K. Johnson, Senior Vice President – Labor, Immigration & Employee Benefits, U.S. Chamber of Commerce, and Aliya Wong, Executive Director – Retirement Policy, U.S. Chamber of Commerce, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 9, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0018.pdf; Letter from Plan Sponsor Council of America to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0033.pdf; Letter from Jan Jacobsen, Senior Counsel – Retirement Policy, American Benefits Council to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0030.pdf.

²⁶ See 79 Fed. Reg. 13958. The Department multiplied the number of certain products offered by financial firms by three, four, and five in order to obtain a range of potential products and services for which service providers would have to provide a guide and used a labor rate of \$67.76 per hour to calculate the low, medium, and high range estimated costs to covered service providers to create the guide.

Second, we expressed concern that the Department continues to believe that the vast majority of client service agreements are “master” agreements with no variation by client. Plan agreements and disclosure materials vary significantly for each service provider by product line, investment products, plan design and plan sponsor’s preferences and needs. In addition, service agreements change over time to reflect changes to the services offered, so the tenure of a client with a provider often impacts the location of contract features. While model contracts may be used as a starting point, they are often customized and individualized due to changes requested by the plan sponsor, plan fiduciary, and/or legal counsel, among others. As such, we believe that a service provider preparing a guide likely would have to customize the guide for each client plan. For these reasons, a more appropriate way to estimate the costs associated with a guide requirement would be to use a covered-arrangement-by-covered arrangement basis.

Using the Department’s own numbers -- but applying them on a cost-per-arrangement basis – a straightforward calculation shows that the aggregate costs associated with a guide requirement will far exceed the Department’s estimate. In the preamble to the Proposed Rule, the Department estimates that there are 2.2 million covered arrangements between 12,000 covered services providers and nearly 684,000 plans for which disclosures are required under the Regulation.²⁷ Assuming, as the Department does in the preamble to the Proposed Rule,²⁸ that the relevant information could be found and the guide could be constructed using a total of three hours of financial professional or similar professional’s time with a labor rate of \$67.76 per hour (including time to review the document for accuracy), the overall cost to covered service providers to prepare the guide for all such covered arrangements would be \$447,216,000 (2.2 million arrangements x 3 hours x \$67.76). Given the potential cost to service providers to create the guide required by the Proposed Rule, we believe it critical that the Department take the appropriate amount of time and expend the funds necessary to collect information in a statistically credible manner to determine what, if any, difficulties plan fiduciaries may be encountering in connection with the receipt of the 408(b)(2) disclosures prior to implementing a rule that would require a guide to the disclosures.

2. The Department’s Urgency to Conduct the ICR Is Unwarranted

As discussed above, in the Supporting Statement, the Department states that the development and clearance of a survey would also delay obtaining information, and would require another ICR. As we stated in our June 10, 2014 comment letter on the Proposed Rule, based on the experience of the Institute’s members in implementing the disclosure requirements, there is no indication that a problem exists with regard to the disclosures. At the time we submitted the June 10, 2014 comment letter, it

²⁷ 79 Fed. Reg. at 13956.

²⁸ *Id.* at 13958. We note that elsewhere in the preamble, the Department states that it believes that 3.7 hours would be more than adequate on average to create a guide for a single product or service or to add a product or service to an existing guide. *See Id.* at 13959.

had been almost two years since covered service providers first provided the disclosures pursuant to the 408(b)(2) service provider disclosure regulation. In that time, service providers had received very few questions from plan sponsors about where to find information within the disclosures or about the ability to access needed information.²⁹ Additionally, comment letters submitted by groups representing plan sponsors on the Proposed Rule did not raise issues or concerns about the ability to find information within the disclosures.³⁰ Given, as we stated in our June 10, 2014 comment letter on the Proposed Rule, that we do not believe that the Department has provided any factual evidence or data to support the proposition that plan sponsors are encountering difficulties in understanding or locating information within the disclosures, and the fact that neither our members nor members of groups representing plan sponsors believe such a problem exists, we do not understand the urgency associated with the conduct of the focus groups. We urge the Department to take the appropriate amount of time and spend the necessary funds to collect information in a statistically credible manner to determine what, if any, difficulties plan fiduciaries may be encountering in connection with the receipt of the 408(b)(2) disclosures prior to implementing a rule that would require a guide to the disclosures. As discussed above, we believe that the Department should use the focus groups to pre-test a survey and collect the information it seeks through a survey instrument (subject to notice and comment) rather than solely through the conduct of focus groups.

3. Survey Recall Issues

Finally, we do not agree with the Department's statement that the "recall" issue is of even greater concern with a survey, because respondents would not be prompted by a moderator to refresh

²⁹ The Institute conducted a survey of a cross-section of the Institute's members to learn more about inquiries received from plan fiduciaries resulting from the required disclosures since the effective date of the Regulation. The survey respondents include service providers with total assets under administration of nearly \$3 trillion and who distributed disclosures pursuant to the Regulation to more than 200,000 plans. Our survey found that less than 1 percent of plan fiduciaries who received such disclosures requested information or guidance regarding the location of specific information within the disclosures.

³⁰ See, e.g., Letter from Randel K. Johnson, Senior Vice President – Labor, Immigration & Employee Benefits, U.S. Chamber of Commerce, and Aliya Wong, Executive Director – Retirement Policy, U.S. Chamber of Commerce, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 9, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0018.pdf. (“*The need for an additional disclosure requirement is unclear.*”); Letter from Plan Sponsor Council of America to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0033.pdf. (“*After surveying our members on this topic, we believe it is premature to require plan service providers to produce a guide for the purpose of assisting plan fiduciaries with locating and understanding initial disclosures under 408(b)(2) when such disclosures are contained in multiple or lengthy documents.*”); Letter from Jan Jacobsen – Senior Counsel, Retirement Policy, American Benefits Council to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, dated June 10, 2014, available at www.dol.gov/ebsa/pdf/1210-AB53-0030.pdf. (“*There is no demonstrated need for a plan sponsor guide to the 408(b)(2) disclosures.*”)

their recollection about the disclosures they received, as they would in a focus group setting. Based on the Institute's extensive experience in the conduct of surveys,³¹ we believe that a survey can easily be constructed to ask the respondent to review his or her disclosure materials prior to taking the survey. Additionally, using a survey allows for standardized questions for all respondents, a larger sample size, and the ability to use the results to make inferences about the population of pension plan fiduciaries. With respect to the ability of a focus group facilitator to "prompt" respondents to refresh their recollection, this may also occur in a telephone or face-to-face survey. We are also not aware of any research illustrating that focus groups are more effective than surveys because the moderator can prompt the respondents.

B. Focus Group Participant Recall

In our May 12, 2014 letter, we raised concerns about the level of recall expected from focus group participants with regard to the disclosures, given that it had likely been almost two years since many of the participants would have received the disclosures. We appreciate that the Department has taken steps to address this concern by including in the survey design instructions that encourage prospective focus group participants to review their disclosures prior to the focus groups, or even bring them to the focus groups. However, as is discussed further below, we continue to be concerned that a focus group participant's review of the disclosures to refresh his or her memory regarding the specific contents of the disclosures will not improve a focus group participant's recall regarding the process by which he or she reviewed the disclosures upon their receipt over two years ago, or assist a participant in his or her recall of other disclosure materials received prior to receipt of the required 408(b)(2) disclosures. We continue to have concerns about a focus group participant's ability to accurately respond to such questions given the over two-year passage of time between the time the disclosures were received and the conduct of the focus groups.³² Further, plan sponsors may receive many communications regarding the plan over the course of two or more years. With a long recall period, focus group participants could report impressions from other documents that may have been received before or after the 408(b)(2) disclosures.³³

³¹ See *supra* note 5.

³² See Crossley and Winter, "Asking Households About Expenditures: What Have We Learned?" *NBER Working Paper*, no. 19543 (October 2013), 7.

There is now substantial evidence of 'forgetting': that memory declines with the length of the recall period...complicated by the fact that forgetting does not occur at random.

³³ See Bradburn, "Recall Period in Consumer Expenditure Surveys Program," *Bureau of Labor Statistics Consumer Expenditure Survey Methods Workshop*, 2010, 4–6, available at www.copafs.org/seminars/labor_statistics.aspx.

The longer ago the event, the more difficult it is to remember...When people experience many similar incidents, such as repeated purchase of common goods, recalling each event is more difficult...Initially distinguishable events may become confused or blended with later similar events...With a longer reference period, the amount of

III. Specific Comments on the Draft Focus Group Script

As discussed above, we do not believe that focus groups are the appropriate vehicle for the ICR. However, in the event that the Department determines it appropriate to collect the information it seeks through the use of focus groups, we have the following specific comments on the draft focus group script.

A. Introduction

- As stated in the May 12, 2014 letter, we recommend that the introduction be redesigned to elicit more candid responses. For example, we recommend removing references to the Department and instead use the term “our client.” We also continue to recommend removing references to “enforcement” in order to put participants at ease and elicit candid and honest responses. As discussed above, we are concerned that plan fiduciaries participating in the focus groups may be more focused on responding in a manner they believe the Department would support than providing candid responses.
- We also continue to recommend that the script eliminate statements that illustrate bias or have the potential of leading focus group participants toward specific conclusions, such as the statement that service providers may receive revenue sharing, which some people refer to as “hidden fees.” We recommend that the focus group script describe the 408(b)(2) regulation’s requirements in a factual, unbiased, and objective manner.

B. Issue Area # 1

- As we stated in our May 12, 2014 letter, although the questions contained in Issue Area # 1 may serve as icebreakers, we recommend the use of a pre-screening tool to confirm the appropriate composition of the focus group. For example, Question 1 asks focus group participants to describe their role with respect to the plan. If a participant is not a responsible plan fiduciary who received the disclosures, he or she should not be in the focus group. A pre-screening process to ensure that all focus group participants are “responsible plan fiduciaries” would solve this problem.

C. Issue Area # 2

- Prior to seeking information in Issue Area # 2 regarding focus group participants’ experiences with the 408(b)(2) disclosures, we recommend that the moderator provide a factual overview of the disclosure requirements, given that the disclosures were likely received by the focus group participants over two years ago.

telescoping will increase, because respondent uncertainty about when events happened becomes greater the further away from the present the event occurred.

- Question 6 asks the focus group participants the purpose of the disclosures. As we stated in our May 12, 2014 letter, we believe that asking the question in this manner may be seen as asking each focus group participant if he or she knows what his or her responsibilities are as an ERISA fiduciary. We suggest that this question be revised to ask the focus group participants how they would describe the purpose of the 408(b)(2) disclosures to another person.
- Question 7 asks the focus group participants when they received the disclosure materials, and includes additional possible probes regarding contact with service providers to obtain the disclosures. We are appreciative that the Department revised this question to obtain information as to whether focus group participants had to ask service providers to provide them with the disclosures. However, as discussed above, although we appreciate that the Department has taken steps to address focus group participant recall, we remain concerned that a focus group participant's review of the disclosures to refresh his or her memory regarding the specific contents of the disclosures will not improve a his or her recall regarding the timing of his or her receipt of the disclosures, or whether he or she had to proactively contact service providers to obtain the disclosure materials and the result of the participant's request.
- Question 8 asks the focus group participants the about the process that was followed at their company to review the disclosure materials that were received. As discussed above, although we appreciate that the Department has taken steps to address focus group participant recall, we remain concerned that a focus group participant's review of the disclosures to refresh his or her memory regarding the specific contents of the disclosures will not improve a focus group participant's recall with regard to the process undertaken by the plan sponsor to review the disclosures. For example, in some circumstances, the focus group participant may have been one member of a group of plan sponsor employees involved in the review of the disclosures, with each group member having a different level of interaction with the disclosure materials and undertaking a different process in reviewing the disclosures.

D. Issue Area # 3

- Question 9 asks if the information in the disclosure materials was "clear and understandable." Although we appreciate the Department's modification of this question to elicit responses regarding the clarity of the disclosures, we continue to be concerned that the Department seeks responses regarding whether the disclosures were "understandable." The perceived level of understanding of the disclosure materials will likely differ based on the experience and general knowledge of each focus group participant. Additionally, asking focus group participants if there were particular

sections or components of the disclosure materials that were difficult to understand may produce bias and lead participants to believe that the “right” answer is that there were sections or components of the disclosure materials that were difficult to understand. We continue to recommend that the question be revised to focus on the clarity of the disclosure materials, as opposed to the participants’ understanding of the disclosure materials. The Department may wish to ask focus group participants to rate the clarity of the disclosures they received on a scale of one to ten, with ten being “very clear” and one being “very unclear.”

E. Issue Area # 5

- Questions 16 and 17 raise additional recall issues. Although we appreciate that the Department has taken steps to address participant recall, we remain concerned that a focus group participant’s review of the disclosures to refresh his or her memory regarding the specific contents of the disclosures will not improve a focus group participant’s recall regarding other service provider disclosure information that he or she may have received prior to receiving the required 408(b)(2) disclosure materials.

G. Issue Area # 6

- Question 22 asks focus group participants to review an organizational tool called a “disclosure guide.” Pursuant to the directions in the ICR published in the *Federal Register*, and based on a telephone conversation with a Departmental representative,³⁴ we obtained the ICR materials from the OMB website. A sample “disclosure guide” was not included in the materials the Institute obtained from the OMB website and therefore we are not able to comment on the “disclosure guide.” However if the sample “disclosure guide” is similar to the sample guide included as an appendix to the final 408(b)(2) regulation (which includes references to a “Master Service Agreement”), we are concerned that the Department continues to believe that many client service agreements are “master” agreements with no variation by client. As we have previously discussed with the Department,³⁵ plan agreements and disclosure materials vary significantly for each service provider by product line, investment products, plan design and plan sponsor’s needs and preferences. They are often individually negotiated (and designed) on a client-by-client basis. In addition, the guide presented to the respondents does not relate to the particular disclosures received by the respondents.

³⁴ On December 16, 2014, we contacted Michel Smyth to obtain copies of the ICR materials and were informed that all of the ICR materials were available on the OMB website, www.reginfo.gov. Mr. Smyth confirmed that all of the ICR materials were available on the OMB website.

³⁵ Institute staff discussed this issue with the Department during a November 14, 2013 meeting with representatives from the Office of Management and Budget and during a subsequent meeting with the Department on October 15, 2014.

- Question 23 involves the distribution of cards with dollar amounts (with ranges from roughly \$10 to \$200, the exact values to be determined) and seeks information regarding the amount focus group participants would be willing to pay for a disclosure guide. We recommend that the Department delete this question for several reasons. First, the Department stated in the preamble to the Proposed Rule that it “lacks complete data and empirical evidence to estimate the cost for covered service providers to create the guide.”³⁶ Lacking such data, there is no relationship between the card values presented to focus group participants and the actual cost that may be incurred to create a guide. Second, the proposed rule does not provide an “option” allowing a plan fiduciary to “purchase” a guide – it makes the provision of a guide to the disclosures mandatory. Third, we do not believe any results from this question will provide statistically valid data. We suggest that the Department ask focus group participants if they would support a rule requiring a guide, if such a rule resulted in increased plan administrative costs, to be paid by either the plan sponsor or plan participants.³⁷

IV. The Focus Group Feedback Consent Form

Included within the ICR materials we obtained from the OMB website³⁸ is a *Focus Group Feedback Consent Form* (Consent Form). The Consent Form requires each focus group participant to sign the form, evidencing his or her consent to take part in the study. Under the paragraph captioned “Confidentiality,” the Consent Form states that “EBSA will have access to reports resulting from the data; those reports will not include information that allows EBSA to identify any individuals.”³⁹ As discussed above, we continue to be concerned that the repeated references to the Department contained in the focus group script introduction may influence the responses – as focus group participants are likely aware that the Department is tasked with enforcing compliance with ERISA and may therefore be influenced to respond in a manner they believe the Department would support. Accordingly, we recommend that the Consent Form’s “Confidentiality” provisions be modified to specify that the reports EBSA will have access to will not include information that allows EBSA to identify any individual, retirement plan, or retirement plan sponsor.

³⁶ 79 Fed. Reg. at 13958.

³⁷ We note that in the preamble to the Interim Final Rule, the Department acknowledged the possibility that the costs associated with providing disclosures in a required format could ultimately be passed along to plan participants and beneficiaries. *See* 75 Fed. Reg. 41600 (July 16, 2010), at 41607.

³⁸ *See supra* note 34.

³⁹ *See* “Evaluating the Effectiveness for a 408(b)(2) Disclosure Requirement – *Focus Group Feedback Consent Form*,” page 1.

V. Conclusion

As discussed above, we continue to have concerns regarding the timing of the focus groups, the ICR design, and specific issues relating to the proposed focus group script. These concerns should be of significant relevance to OMB given that, as described above, the cost associated with a guide requirement will far exceed the estimated cost ranges calculated by the Department and that we are not aware that fiduciaries are currently experiencing difficulties understanding the disclosures or locating information within the disclosures – a belief shared by several organizations representing plan sponsors.⁴⁰ Because it appears that the Department intends to use the focus group results as the primary basis for finalizing a rule that would have significant cost implications, it is fundamental to the role of OMB to insure that the process undertaken by the Department to identify what, if any, difficulties plan fiduciaries may be encountering in connection with the receipt of the disclosures is conducted in a statistically credible manner and that any relevant results supported by the focus groups be used to produce cost-effective solutions to address any specific problems that may be determined to exist.

* * *

We appreciate your consideration of these comments and we are available to meet with you to discuss our comments or to provide additional information or clarification.

Sincerely,

s/s David M. Abbey

s/s Sarah Holden

David M. Abbey
Senior Counsel
Pension Regulation

Sarah Holden
Senior Director
Retirement and Investor Research

⁴⁰ See *supra* note 30.

Office of Information and Regulatory Affairs

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cc: U.S. Department of Labor – OASAM
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