



May 12, 2014

Office of the Assistant Secretary for Policy/Chief Evaluation Office
U.S. Department of Labor
Room S-2312
200 Constitution Avenue NW
Washington, DC 20210

**Re: Proposed Information Collection Request Submitted for Public Comment;
Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements**

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for comments on the proposed Information Collection Request Submitted for Public Comment; Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements issued by the Department of Labor ("Department") on March 12, 2014.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Introduction

This proposed information collection is for the purpose of conducting a survey of employer sponsored retirement plan "responsible plan fiduciaries" (RPFs) and "covered service providers" (CSPs) to inform regulatory decision making related to EBSA's proposed fee disclosure guidance regulation. EBSA has simultaneously published a notice of proposed rulemaking (NPRM) to require CSPs to provide RPFs with a guide, summary, or similar tool to

assist RPFs in assessing the reasonableness of the fees paid for services and the conflicts of interest that may affect a service provider's performance. In addition to serving the Department's information needs and decision making with respect to the proposed fee disclosure guidance, the project will also contribute to evaluation of the implementation of the broader Section 408(b)(2) service provider disclosures regulation that was promulgated in 2012.

The proposed information collection will survey 70 to 100 RPFs through a focus group, guided discussion format. The research plan is to interview RPFs representing small pension plans (with less than 100 participants).

Comments

The proposed information collection is an example of the kind of research and data collection that is frequently needed but too seldom undertaken to inform regulatory decision making. However, the Chamber has two sets of reservations that temper our endorsement of the ICR: (1) the current plan scheduling of the information collection research after the issuance of the notice of proposed rulemaking is improper; and (2) the information collection research plan could be improved in several specific ways which are detailed below.

The research should be conducted and results made public before the Department issues a proposed rule. While the proposed information collection is an example of the sort of research that Executive Orders 12866 and 13563 intend that agencies conduct as part of the overall regulatory impact analysis effort, the Executive Orders envision that such research would inform decision makers before decisions are made. In this case, critical regulatory decisions seem already to have been made (evidenced by the publication of an NPRM). The Executive Orders direct agencies to conduct rulemaking as a rational process wherein decisions about whether to regulate or how to regulate are based on facts, not prejudice or supposition. To achieve a fact-driven regulatory decision making process, the needed facts must be collected first and then analyzed in relation to each of several regulatory alternatives (including the alternative of no regulation) to identify the relative social costs and social benefits associated with each alternative. Only after the relevant facts and benefit/cost analyses have been completed can the policy decision maker properly select an alternative to propose to be adopted. Public comment becomes a more meaningful part of the regulatory process when the public has the benefit of seeing laid before it the full detail of the decision maker's proposal and the facts and analyses on which it is based. When the public is fully informed in this way, the public can better assist the process by identifying omitted or incorrect items in the factual basis or errors in the analysis on which the proposed policy decision is based.

Part C of the notice of proposed rulemaking reveals a tentative element in the DOL's decisions regarding the proposed guide requirement and explicitly solicits public input on a number of issues and makes clear that a number of details that would likely be addressed in a final rule are still undecided.¹ The NPRM addresses the scheduling issues raised above by stating the following:

¹ 79FR48, p. 13593.

- “The results of the focus group testing will be made available to the public after the testing has been completed. Because this will not occur until after the close of the 90-day comment period for this proposal, the Department may decide to reopen the comment period on this proposal to solicit comments on such results.”
- “The Department decided to proceed with both this proposal and the focus group information-gathering techniques simultaneously rather than consecutively, in order to avoid further, and unnecessary, delay.”

These statements show that the Department is aware that it is not following the course outlined above: collect and analyze information first, and then make preliminary regulatory strategy decisions, publish a proposed rule, including the results of the survey on which decisions were based, and receive public comment. The Department’s statement that it “may” reopen the comment period subsequent to compilation of information collection results is inadequate. The Department should, at the least, unequivocally state that it will reopen the comment period. The Department should also state that it will revisit the preliminary decisions that are reflected in the present NPRM, and which have been made without the benefit of the necessary facts, which the information collection may reveal, and that it will publish a revised NPRM at that time.

In effect, the present notice would have been better described as an Advance Notice of Proposed Rulemaking (ANPRM), a useful regulatory notice that provides, for public comment, the agency’s preliminary ideas, information needs, and open questions. An ANPRM properly sets the stage for stakeholder input and for systematic information collection (such as that proposed in the notice at 79FR48, p.14085). We urge the Department to publish a clarification stating that the notice published at 79FR48, p. 13949, is re-designated as an “Advance Notice of Proposed Rule” instead of “Proposed Rule,” and that a “Proposed Rule” will be published for public comment at some future date after the planned information collection described has been completed and results analyzed and considered.

The Department’s attempt to justify the tangled rulemaking process evidenced by the notices published in 79FR49 on March 12, 2014, on the basis of avoiding delay is specious. The genesis of the current rulemaking is found in a notice published at 72FR70988 on December 13, 2007. It appears that the Department is now attempting to overturn the normal process of regulatory information collection, analysis and deliberation in order to meet an arbitrary time frame. The Department does not offer any reason why a sudden rush to regulatory judgment is necessary. The status quo established by the interim final rule issued February 3, 2012, provides flexibility for covered service providers to furnish information in a variety of formats. The Department has not shown any compelling reason why that interim solution has resulted in any problem that justifies overturning the normal process of regulatory information collection, analysis, and deliberation.

The information collection research plan could be improved in several specific ways. The information collection design specifies that the focus groups from which information will be collected will be composed only of small pension plan responsible plan fiduciaries (RPFs), i.e., representing plans with less than 100 participants. While the small plan group is an important element of the affected population, it is not the entirety. Focus groups comprised of RPFs from medium and large pension plans should also be represented in the information collection design.

The information collection request does not adequately describe the manner in which members of the focus groups will be selected. For the results of the information collection to be statistically reliable and useful, the Department should ensure that the focus groups are representative of the underlying population of pension plans and other stakeholders. For example, the Department could select plans and their RPFs randomly from available sampling frames constructed from the Department's existing records of plans stratified by various participant size categories. The Department should avoid the potential bias that may arise if focus group participation is influenced by location or time constraints.

Focus groups are a valid and very useful technique for gathering complex subjective information such as that needed to inform the disclosure guide rulemaking, but focus groups can introduce subtle forms of bias into the results. Sometimes one or a few focus group members may dominate the discussion or influence the opinions of other members of the group. The moderator should apply consistent means to elicit responses from all participants, and the transcription of the responses should be designed to track item responses in relation to group members or categories. As a further validation of the focus group findings, the Department should consider using the focus group responses to design an individual item response survey instrument that would be sent to a random selection of RPFs who were not part of the focus groups.

The RPFs will be able to provide important information from their perspective about the content and format of disclosure information that is useful, understandable, or not so, but their perspective is not the only information that the Department needs to decide whether or not a guidance specification rule is needed and, if so, what it should specify. The Department also needs information from the service providers regarding what they currently do, what is feasible and what competing constraints they face. To provide that information, the Department should expand its information collection design to include focus groups comprised of representatives of service providers who would be required to furnish the proposed guidance documents.

Conclusion

We are encouraged by the Department's effort to collect data and feedback as part of the regulatory process. We believe that our suggestions will improve that process even further. We look forward to working with you and thank you for your consideration of these comments.

Sincerely,



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