



The
ERISA
Industry
Committee

May 12, 2014

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

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

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the request of the U.S. Department of Labor (“DOL”) for comments on the Proposed Information Collection Request Submitted for Public Comment; Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements (the “Information Collection Request”).¹

ERIC’S INTEREST IN THE PROPOSED REGULATIONS

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and welfare benefit plans of America’s largest employers. ERIC’s members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals that would affect its members’ ability to provide secure pension benefits in a cost-effective manner.

COMMENTS

I. The DOL should not require the provision of a guide, summary or similar tool for large plans.

In 2012, the DOL issued regulations under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), which required certain service providers (known as “covered service providers”) to disclose a variety of information to plan fiduciaries, including the amount of fees being charged to the plan (the “408(b)(2) regulations”).

The DOL indicates in the Information Collection Request that it is exploring the current practices and effects of the 408(b)(2) regulations and evaluating the need for a guide, summary or similar tool to help plan fiduciaries understand the information being

¹ U.S. Department of Labor, *Proposed Information Collection Request Submitted for Public Comment; Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements*, 79 Fed. Reg. 14085 (Mar. 12, 2014).

disclosed to them. The Information Collection Request states that the DOL is planning to conduct focus groups with small pension plans (i.e., plans with fewer than 100 participants).

The DOL is also proposing to amend the 408(b)(2) regulations (the “proposed amendment”) to require covered service providers to provide a guide to plan fiduciaries if their initial disclosures are contained in multiple or lengthy documents. The DOL states in the preamble to the proposed amendment that “[a]necdotal evidence suggests that small plan fiduciaries in particular often have difficulty obtaining required information in an understandable format, because such plans lack the bargaining power and specialized expertise possessed by large plan fiduciaries.”²

ERIC is concerned that the DOL’s focus on small plans may cause it to assume that similar issues exist for large plans. As ERIC noted in our comment letter on the DOL’s proposed 408(b)(2) regulations that were issued in 2007,³ there is a tremendous range in the resources and information available to responsible plan fiduciaries when evaluating plan fees. Fiduciaries of plans sponsored by America’s largest employers generally have a team of sophisticated professionals and access to independent expert advice to help them analyze plan fees. Smaller plan sponsors typically have limited resources to expend analyzing plan fees and less information readily at their disposal.

Fiduciaries of large plans can use the multitude of resources available to them to analyze their plans’ arrangements with their service providers. They typically also have relationships with their service providers that enable them to get clarification and additional details, as needed. As a result, a guide or summary would result in an additional expense to service providers that would ultimately harm the plan participants as:

- the additional costs that the service provider incurs to prepare the guide will likely be passed through to the plan and, in many cases, to the plan’s participants, and
- the service provider will provide the guide in lieu of providing some other service or disclosure that is more beneficial to plan participants.

In addition, fiduciaries will need to devote time and resources to ensure that they receive and review the guide. Even if a fiduciary reviews and understands the guide, the fiduciary will also need to ensure the accuracy of the guide and question the service provider about any inadvertent discrepancies in order to avoid the appearance that it did not thoroughly review all the disclosures. Fiduciaries could better serve plan participants using this time to review and improve other administrative aspects of a plan’s operations.

While ERIC supports the efforts of the DOL to analyze the impact of the 408(b)(2) regulations on small and mid-sized plans, we urge the DOL to recognize the differences between small and large

² U.S. Department of Labor, *Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 79 Fed. Reg. 13949, 13951 (Mar. 12, 2014).

³ ERISA Industry Committee (ERIC), College and University Professional Association for Human Resources (CUPA-HR), National Association of Manufacturers (NAM), Profit Sharing/401k Council of America (PSCA), Society for Human Resource Management (SHRM), U.S. Chamber of Commerce, *Letter to Department of Labor regarding Proposed Rule under 29 CFR Part 2550, Reasonable Contract or Arrangement under Section 408(b)(2) – Fee Disclosure* (Feb. 11, 2008), available at <http://www.dol.gov/ebsa/pdf/Ugoretz021108.pdf>.

plans, and ultimately exclude large plans from any amendment to the 408(b)(2) regulations that would require service providers to distribute a guide, summary or similar tool to fiduciaries.

However, if DOL is inclined to make any changes to how the 408(b)(2) regulations apply to large employer plans, we urge the DOL to include representatives of large employers in the focus group discussions so that DOL can clearly understand how any changes would affect large employers and their plans.

II. The DOL should review the comments provided on the proposed amendment to the 408(b)(2) regulations before conducting any focus groups.

The DOL indicates in the Information Collection Request that it is planning to conduct focus group sessions with small pension plans. The DOL does not specify the timing of the focus groups, but requests comments on the Information Collection Request approximately a month before comments are due on its proposed amendment to the 408(b)(2) regulations.

ERIC believes that the comments provided on the proposed amendment to the 408(b)(2) regulations will provide the DOL with meaningful feedback that will be instrumental in guiding the development of the focus groups. As a result, we urge the DOL to review those comments prior to conducting the focus groups.

ERIC appreciates the opportunity to provide comments on the Information Collection Request. If the DOL has any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,



Kathryn Ricard
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