DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB53

Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document contains a proposed amendment to the final regulation under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) requiring that certain service providers to pension plans disclose information about the service providers' compensation and potential conflicts of interest. The amendment would, upon adoption, require covered service providers to furnish a guide to assist plan fiduciaries in reviewing the disclosures required by the final rule if the disclosures are contained in multiple or lengthy documents. This amendment will affect pension plan sponsors and fiduciaries and certain service providers to such plans.

DATES: Written comments on the proposed amendment should be received by the Department on or before [INSERT DATE THAT IS 90 DAYS FOLLOWING FEDERAL REGISTER PUBLICATION].

ADDRESSES: Written comments may be submitted to the addresses specified below. All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously. Comments may be submitted to the Department of Labor, identified by RIN 1210–AB08, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

• *Email: e-ORI@dol.gov*.

• *Mail or Hand Delivery:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, *Attention:* RIN 1210–AB08; 408(b)(2) Guide.

Comments received by the Department of Labor may be posted without change to *http://www.regulations.gov* and *http://www.dol.gov/ebsa*, and made available for public

inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue NW, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Allison Wielobob, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

1. General

On February 3, 2012, the Department published a final rule in the **Federal Register** concerning disclosures that must be furnished before plan fiduciaries enter into, extend or renew contracts or arrangements for services to certain pension plans in order for such a contract or arrangement to be "reasonable," as required by ERISA section 408(b)(2).[1] The final rule was

[1] 77 FR 5632 (Feb. 3, 2012); *see also* the interim final rule (75 FR 41600, July 16, 2010) and proposed rule (72 FR 70988, Dec. 13, 2007). The "408(b)(2)" regulation finalized by the Department addresses disclosures that must be furnished before plan fiduciaries enter into, extend or renew contracts or arrangements for services to certain pension plans. The final rule was part of a broader Departmental regulatory initiative to improve transparency of plan fees to plan fiduciaries, the Department, and plan participants and beneficiaries. As part of this initiative, the Department also implemented changes to the information that must be reported concerning service provider compensation as part of the Form 5500 Annual Report. These changes to Schedule C of the Form 5500 complement the final rule by assuring that plan fiduciaries have the information they need to monitor service providers consistent with their duties under ERISA section 404(a)(1). *See* 72 FR 64731; *see also* frequently asked questions on Schedule C, available on the Department's Web site at http://www.dol.gov/ebsa. Finally, the Department published a final rule in October 2010 requiring the disclosure of specified plan and investment-related information, including fee and expense information, to participants and beneficiaries of participant-directed individual account plans. *See* 75 FR 64910.

effective for covered plans on July 1, 2012.[2] The final rule was designed to help ensure that pension plan fiduciaries are provided the information they need to assess both the reasonableness of the compensation to be paid for plan services and potential conflicts of interest that may affect the performance of those services. Today, the Department is publishing in the **Federal Register** a proposed amendment to the final rule under which covered service providers would be required to furnish a guide along with the initial disclosures that must be provided to plan fiduciaries in accordance with the final regulation, if the initial disclosures are contained in multiple or lengthy documents.

2. Public Comments on Interim Final Regulation

In the preamble to the interim final rule, the Department requested comment on the format of disclosures required under the rule. Neither the proposal nor the interim final rule required covered service providers to disclose information in any particular format. Further, the preamble to the proposal specifically noted that covered service providers could use different documents from separate sources, as long as all of the documents, collectively, contained the required information. Commenters on the proposal disagreed as to whether this would lead to a cost-effective and meaningful presentation of the required information to responsible plan fiduciaries. In the preamble to the interim final rule, the Department explained that it had not determined whether it was feasible to provide specific and meaningful formatting standards. Accordingly, the Department requested comment on whether to revise the final rule to include a summary disclosure or other formatting requirement.

[2] *See* 77 FR 5632.

Commenters on the interim final rule, as on the proposed rule, continued to disagree about the utility of, and feasibility of, requiring a summary of, or otherwise mandating any particular format for the required disclosures. Many commenters argued that the Department should retain the position taken in the proposal and the interim final rule, giving covered service providers flexibility to determine the format of their disclosures. These commenters expressed concern that a "one-size-fits-all" approach could not accommodate the enormous variety of current pension plan service arrangements and likely changes in the future. They also believed that the costs to pension plans, and the participants and beneficiaries of such plans, of such an approach will be significant. Some of these commenters expressed concern that responsible plan fiduciaries would rely solely, and thus improperly, on the summary, rather than reviewing the fuller and more detailed disclosures required by the rule. The commenters also were concerned that requiring the comprehensive disclosures and a summary would result in unnecessarily duplicative disclosures. In addition, if there are discrepancies between the two, commenters argued that questions could arise over which disclosures would govern. These commenters preferred that the Department require covered service providers to furnish an index or "roadmap" to the disclosures. Commenters also suggested that any summary or other formatting requirement the Department may adopt be flexible and not mandate any particular language, formatting, or page limits.

Other commenters, however, supported the addition of a summary disclosure or similar requirement. They argued that plan fiduciaries, especially those for small and medium-sized plans, often are overwhelmed by highly technical disclosures from separate sources, especially

concerning plan investments. These commenters suggested placing the burden of organizing this information on covered service providers, who can do so more effectively and at less cost. Further, these commenters believe that associated costs to service providers have been overstated and are likely to be minimal following an initial transition to compliance with any new summary or other formatting requirement. These costs, they argued, would be greatly outweighed by the benefit of increased clarity to responsible plan fiduciaries. One commenter, for example, pointed out that fuller disclosure will not result in increased transparency if the information continues to be obscured in lengthy, technical documents. Some of these commenters suggested information that should be contained in a separate, summary disclosure requirement.

Following review and analysis of these comments, the Department decided to reserve paragraph (c)(1)(iv)(H) of the final rule, published in February 2012. The Department also explained its intention to publish, in a separate proposal, a guide or similar requirement to assist responsible plan fiduciaries' review of the rule's required disclosures. Given the lack of specific suggestions or data on how best to structure such a requirement, and what the real costs of such a requirement would be, the Department was not prepared, at that time, to implement a guide or similar requirement as part of the final rule.

Today, the Department is proposing a regulatory provision requiring that covered service providers furnish a guide along with the initial disclosures required by the rule, if the disclosures are contained in multiple or lengthy documents. The Department believes that plan fiduciaries, especially in the case of small plans, need a tool to effectively make use of the required disclosures. The guide being proposed in this document provides clarity and specificity, while

avoiding the uncertainty and burdens that some commenters argued may accompany construction of a "summary" of existing documents. The Department believes that a required summary without some guide to the underlying disclosures themselves, could become the primary document on which some responsible plan fiduciaries rely, which is not the Department's intention.

The Department is proposing a guide requirement in an effort to strike an appropriate balance between the need to facilitate a responsible plan fiduciary's review of information important to a prudent decision-making process and the costs and burdens attendant to the preparation of a new summary disclosure document. The Department believes that covered service providers are best positioned to provide the guide in a cost-effective manner, because they have the specialized knowledge required to determine where the required disclosures are located, and they generally will be able to structure their disclosures so that they need to locate the information only once when preparing guides for large numbers of clients, each of whom otherwise would have to locate the information separately in the underlying disclosures. A guide will assist responsible plan fiduciaries for these plans in finding information that ERISA requires them to assess in evaluating both the reasonableness of the compensation to be paid for plan services and potential conflicts of interest that may affect the performance of those services. A guide will also reduce the costs they otherwise would have incurred searching for such information. Anecdotal 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. Therefore,

the Department anticipates that the guide requirement will be especially beneficial to fiduciaries of small and medium-sized plans.

To avoid unnecessary cost to covered service providers, the proposal also allows for the fact that, in some cases, covered service providers may already furnish the required disclosures in a concise, single document. If that is the case, then the covered service provider will not be required to provide a separate guide to the disclosures. The Department believes that initial disclosures that are furnished in a concise, single document do not present the same challenges to responsible plan fiduciaries as disclosure that are contained in multiple or lengthy documents.

The Department has not been convinced by commenters that certain required disclosures are more important than others, such that the guide, if required, should include the location of only the most important data. Accordingly, the proposed guide requires that covered service providers disclose the location of all principle data elements required as initial disclosures. Nothing in the proposed amendment, however, would preclude a covered service provider from including additional information with or as part of the guide, as long as such information is not inaccurate or misleading. It is not the Department's goal to limit innovation in how information is effectively communicated to plan fiduciaries. Rather, the Department believes that the required guide to initial disclosures will provide a basic framework for ensuring that responsible plan fiduciaries understand exactly what information is being disclosed to them, and where to find such information.

B. Proposed Amendment to Regulations under Section 408(b)(2)

1. Overview of Proposed Amendment

The Department proposes to include, as paragraph (c)(1)(iv)(H) of the final rule, a new requirement that covered service providers furnish a guide along with the initial disclosures required by the rule, if the initial disclosures are contained in multiple or lengthy documents. This guide will assist responsible plan fiduciaries by ensuring that the location of all information required to be disclosed is evident and easy to find among other information that is provided. The Department agrees that covered service providers are in the best position to identify the location of information that otherwise may be difficult for a responsible plan fiduciary to find in multiple, highly technical or lengthy disclosure materials. Specifically, paragraph (c)(1)(iv)(H) provides that, if the information that must be disclosed pursuant to paragraph (c)(1)(iv)(A) through (G) of the final rule (the initial disclosures) is not contained in a single document, or if the document is in excess of a specified number of pages, the covered service provider must furnish to the responsible plan fiduciary a guide that specifically identifies the document and page or other sufficiently specific locator, such as a section, that enables the responsible plan fiduciary to quickly and easily find the specified information, as applicable to the contract or arrangement. The Department has reserved for comment the number of pages that will trigger the guide requirement even if the initial disclosures are furnished in a single document. Commenters should address whether such a page number requirement is an appropriate standard, whether standards must be included to prevent formatting or other manipulation of the page number requirement (e.g., by reducing font size or margins), what number of pages should be

included as the standard, and whether any alternative standards exist that would be more beneficial to responsible plan fiduciaries reviewing lengthy documents.

In the Department's view, merely stating, for example, that required information is contained in a separate service contract or prospectus would not be sufficient. This new provision requires a specific locator to find the required information, including not only the identity of the document (to the extent disclosure may be contained in multiple documents) but also where such information is located within the document. In common parlance, a "guide" is a mechanism or tool that serves to direct or indicate information, or that advises or shows the way. Thus, in the context of this proposal, a guide would be helpful to the extent it serves to direct plan fiduciaries to specific relevant information required under the regulation. A document and pagination requirement represents one approach to guide plan fiduciaries by providing them with a direct unambiguous point of reference to the specific place where they could find the information. Alternatively, other locators, for example, direct links to the required information on an Internet/webpage, or section identification within a document may also be helpful but at the same or potentially lower cost. Accordingly, the proposal seeks comments on the use of two alternate locators. Each is equally weighted under the proposal. The first is a document and page requirement. The Department assumes for purposes of this proposal that paginated documents are the norm for employee benefit contracts and other materials subject to disclosure under the regulation. The second choice is a "sufficiently specific" locator, such as a section. This alternative is intended to be more general, but only to the extent still effective. Specifically, in addition to specifying the document or documents where required disclosures are located, the proposal requires that the guide identify the "page or other sufficiently specific locator, such as

section, that enables the plan fiduciary to quickly and easily find" the required information. The Department is neutral as between these alternatives because either would satisfy the intended purpose of the guide—to help plan fiduciaries quickly and easily find the required disclosures. The proposal's reference to "section" is meant as an example, however, and not as a safe harbor. Section references, whether by name or number or some other method, would be acceptable locators only if they were sufficiently specific to enable plan fiduciaries to quickly and easily find the relevant information. The proposal allows covered service providers to choose pagination or the more general alternative. Individuals are encouraged to comment on whether a final rule, assuming it were to include a guide requirement, should permit a choice of locators, as proposed, or whether the rule should require only one locator, and why. The Department also welcomes comments on whether page numbers and sections are effective and feasible locators, whether individually or as alternatives, and whether and why other locators may be preferable. The Department also welcomes comment on other mechanisms which could be used in a guide to quickly identify relevant information for fiduciaries and on the benefits and costs of the two options outlined here.

A similar standard applies for information disclosed electronically. A covered service provider may not merely furnish the link to a separate contract or to a prospectus. Either a more specific link directly to the required information must be furnished, or a page or other sufficiently specific locator, such as a section, must be furnished in addition to an electronic hyperlink.

Some interested parties have suggested that a guide requiring inclusion of a specific page or other locator could be difficult and potentially very costly to covered service providers and plans. The Department is particularly interested in comments on this issue. The Department asks that comments specifically identify such challenges and the anticipated cost of addressing them, and explain how currently available technology can or cannot reduce those costs. The Department also is interested in whether web-based approaches, which allow the reader to move readily by hyperlink back and forth between related information in a summary document and the more detailed document or documents from which the summary was derived, could provide an effective alternative for disclosures provided electronically. In offering alternatives, please explain how they would meet the Department's objective in proposing a guide, which is to assist responsible plan fiduciaries by ensuring that the location of all information required to be disclosed is evident and easy to find among other information that is provided.

2. Required Elements; Changes to Guide

If a guide is required, the covered service provider must disclose the location of: (*i*) the description of services to be provided to the covered plan, as required by paragraph (c)(1)(iv)(A) of the final rule; (*ii*) the statement concerning services to be provided as a fiduciary and/or as a registered investment adviser, as required by paragraph (c)(1)(iv)(B) of the final rule; (*iii*) the description of all direct compensation, as required by paragraph (c)(1)(iv)(C)(*1*) of the final rule; (*iv*) the description of all indirect compensation, as required by paragraph (c)(1)(iv)(C)(*2*) of the final rule; (*v*) the description of any compensation that will be paid among related parties, as required by paragraph (c)(1)(iv)(C)(*3*) of the final rule; (*vi*) the description of any compensation

for termination of the contract or arrangement, as required by paragraph (c)(1)(iv)(C)(*4*) of the final rule; (*vii*) the description of all compensation (and/or a reasonable estimate of the cost to the covered plan) for recordkeeping services, as required by paragraph (c)(1)(iv)(D) of the final rule; and (*viii*) for covered service providers described in paragraphs (c)(1)(iii)(A)(*2*) or (c)(1)(iii)(B) of the final rule, the description of any compensation, annual operating expenses, and ongoing expenses (or, if applicable, total annual operating expenses), set forth in paragraph (c)(1)(iv)(E)(*1*) and (*2*), as required by paragraphs (c)(1)(iv)(E)(*1*) and (*2*) and (c)(1)(iv)(F)(*1*) of the final rule.

The guide also must identify a person or office, including contact information, that the responsible plan fiduciary may use regarding the disclosures provided pursuant to the final rule. Paragraph (c)(1)(iv)(H)(*2*). This requirement will further assist responsible plan fiduciaries by clearly identifying an individual or office that the fiduciary may contact to the extent he or she has difficulty locating any information referenced in the guide, or has questions concerning the disclosures themselves. A required guide must be furnished as a separate document. Paragraph (c)(1)(iv)(H)(*3*). The Department's goal, in requiring that the guide be a separate document, is to ensure that it is brought to the attention of the responsible plan fiduciary and prominently featured so that the fiduciary can use it effectively in his or her review of the required disclosures. The Department solicits comments on whether the separate document requirement, by itself, is likely to ensure that the responsible plan fiduciary adequately understands both the existence and purpose of the guide, or whether other conditions are needed. For instance, in addition to the separate document requirement, would the guide be improved by requiring specific language, such as an introductory statement in the guide as to the purpose of the guide?

Further, if the guide is furnished electronically, for example as an attachment to email, would responsible plan fiduciaries benefit from a notice comparable to the notice required pursuant by 29 CFR 2520.104b-1(c)(1)(iii) (requiring the provision of notice to participants at the time a document is furnished electronically that apprises participants of the significance of the document when it is not otherwise reasonably evident as transmitted).

Finally, the proposal includes an amendment to paragraph (c)(1)(v) of the final rule, concerning the disclosure of changes to previously disclosed information. Specifically, the Department proposes to revise paragraph (c)(1)(v)(B)(2) of the rule to require that changes to the information contained in the guide must be disclosed, at least annually to responsible plan fiduciaries. The Department believes that a periodic requirement to disclose any changes to the information contained in the guide will be more beneficial to plan fiduciaries and less burdensome to covered service providers than ongoing and sporadic disclosure each time a change to one component of the guide occurs. The Department solicits comment on whether it would be more effective to require that the entire guide (rather than only changes to information contained in the guide) be disclosed on an annual basis, if changes have occurred during the preceding year.

3. Compliance and Delivery

Several commenters on the interim final rule suggested that if the Department were to adopt a summary or other formatting requirement in the final rule, it should provide an illustration of how a covered service provider may comply with such requirement to encourage

consistency and allow for lower cost alternatives. While the Department is not including a model guide as part of this publication, the Department previously posted on its Web site, at www.dol.gov/ebsa/pdf/408b2sampleguide.pdf, a sample guide to initial disclosures that may be useful to plan service providers. The guide was published as an appendix to the final rule as a sample and is an example of what the Department believes guides to initial disclosures may look like in practice.

In addition, commenters on the interim final rule requested guidance on the manner of delivering required information to responsible plan fiduciaries. Nothing in the regulation limits the ability of covered service providers to furnish information required by the regulation to responsible plan fiduciaries via electronic media, for example, on a website.[3] However, unless the information disclosed by a covered service provider on a website is readily accessible to responsible plan fiduciaries, and fiduciaries have clear notification on how to gain such access, the information on the website may not be regarded as furnished within the meaning of the regulation.

C. Request for Comments

As discussed above, the Department believes that the proposed guide requirement strikes an appropriate balance between the need to facilitate responsible plan fiduciaries' review of information and the costs and burdens attendant to preparing such a guide. However, the Department invites comments from interested persons on all aspects of this proposal, including

[3] The Department's regulations at 29 CFR § 2520.104b-1 apply solely for purposes of disclosures from plans to participants and beneficiaries and do not extend to disclosures from third parties to plan fiduciaries.

the regulatory alternatives discussed in Section 4 of the Regulatory Impact Analysis, below, that were considered by the Department in developing this proposal.

The Department encourages parties to provide specific suggestions or data concerning the structure of the guide, as proposed, and whether its requirements are feasible and cost-effective. For example, how many (and what types of) products and services will require a guide? Do economies of scale exist such that the guide service providers prepare for one product or service could be used for multiple clients? Can service providers give the Department an estimate of the costs they will incur to create a guide? While aggregate costs of the guide are helpful, commenters are strongly encouraged to break down these costs into their constituent elements when possible. For example, when possible, break down the costs of the guide requirement as applied to each of the specific content requirements in paragraph (c)(1)(iv) of the final rule (i.e., subparagraphs (A) through (G) of the final rule), and as applied to the different types of covered service providers described in paragraph (c)(1)(iii) of the final rule.

The Department also invites comments and suggestions as to alternative tools that would assist plan fiduciaries in reviewing the initial disclosures. Commenters are encouraged to state whether they believe these tools would be more, or less, beneficial to plan fiduciaries, as compared to the proposed guide, taking into account the costs and burdens to covered service providers, and possibly other parties, to prepare such tools.

Further, the Department invites comments on whether the amendment instead should require that covered service providers furnish a summary of specified “key” disclosures. If so,

what “key” information warrants inclusion in a summary? How costly would it be to prepare a summary and who would bear its costs? Would these costs decrease significantly after an initial transition period and, if so, how significantly? Which parties, other than covered service providers, might be involved in the preparation of a summary? What liability and other legal issues might arise for covered service providers and others from summarizing “key” information, and how should these issues be managed? How would responsible plan fiduciaries likely use the summarized information and what effect, if any, would it have on their review of the underlying disclosures? Further, what are the likely benefits and costs of requiring that covered service providers furnish any required tool (whether a guide, a summary, or other tool) in a specified format? Is a guide or other tool likely to increase the probability that responsible plan fiduciaries review the initial disclosures, because the required information is easier to find? What formatting requirements (*e.g.*, a chart, page limits), if any, lend themselves to presentation of the initial disclosures required by the rule? Finally, what innovations in the preparation and delivery of disclosures currently exist in the marketplace, and how might a formatting requirement take advantage of these innovations?

D. Focus Group Testing

Elsewhere in today’s *Federal Register*, the Department announced its intention to conduct approximately eight to 10 focus group sessions with approximately 70 to 100 fiduciaries to small pension plans (those with fewer than 100 participants). The purpose of the focus group testing is to explore current practices and effects of EBSA’s final regulation. This may provide information about the need for a guide, summary, or similar tool to help responsible plan

fiduciaries navigate and understand the required disclosures. The focus group participants will be asked to provide information including the following: (1) their role with respect to their plan; (2) the number of service providers hired by the plan; (3) whether they are aware of and understand the disclosures mandated by the 408(b)(2) final regulation; (4) their experience with receiving the disclosures; (5) whether they were able to find information regarding the services that would be provided and the costs of those services; (6) whether their review of the disclosures impacted their decision-making with regard to hiring, monitoring, or retaining service providers or changing plan investment options; (7) whether their covered service providers furnish a guide or similar organizational tool to help find specific information within the disclosures; and (8) whether a guide to the required disclosures would be beneficial to them, and if so, how much they would be willing to pay to receive a guide. The focus group announcement, published pursuant to the Paperwork Reduction Act of 1995, explains the planned focus group testing in more detail and provides other relevant information, including how and from whom to obtain more information about the planned testing process. 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. In making this decision, the Department is

mindful of the fact that the ERISA section 408(b)(2) rulemaking, in general, began in 2007[4] and that the final rule was effective on July 1, 2012.[5]

E. Effective Date

The Department proposes that the amendment to the final rule contained in this notice will be effective 12 months after publication of a final amendment in the **Federal Register**. The Department invites comments on whether the amendment, as finalized, should be effective on a different date.

F. Regulatory Impact Analysis

1. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. OMB has determined that this action is not "economically significant" within the meaning of 3(f)(1) of the executive order because it is not likely to have an effect on the economy of $100 million or more in any one year. The proposed rule is significant under

[4] 72 FR 70988 (December 13, 2007).
[5] 77 FR 5632 (February 3, 2012).

section 3(f)(4) of the Executive Order, because it raises novel legal or policy issues arising from the President's priorities. Accordingly, the rule has been reviewed by OMB.

2. *The Need for Regulatory Action*

On February 3, 2012, the Department published a final rule in the **Federal Register** concerning disclosures that must be furnished before plan fiduciaries enter into, extend or renew contracts or arrangements for services to certain pension plans in order for such a contract or arrangement to be "reasonable," as required by ERISA section 408(b)(2).

In seeking to promote economic efficiency, the final regulation allowed covered service providers to satisfy the disclosure requirements using different documents from various sources as long as the documents, collectively, contained the required disclosures. The Department recognized, however, that allowing the disclosure requirements to be satisfied through multiple documents could make it difficult and time consuming for responsible plan fiduciaries to find and analyze particular disclosures. Moreover, the benefits associated with providing the disclosures could be diluted if the information provided to responsible plan fiduciaries is obscured in long, highly technical documents. Therefore, when publishing the interim final regulation, the Department requested comments regarding whether it should include a summary of or guide to the mandated disclosure requirements. Specifically, the Department requested comments addressing the costs, benefits, and burdens associated with requiring a summary or guide and how it could effectively construct such a requirement to ensure that it is practical and useful.

Based on comments received in response to its request, the Department concluded when it issued the final rule that it lacked specific suggestions or data on how best to structure a guide or similar requirement and what the real costs of such a requirement would be. The Department therefore decided not to include such a requirement in the final rule without providing separately for public review and comment. The Department stated its intent to publish a Notice of Proposed Rulemaking under which covered service providers may be required to furnish a guide or similar tool along with the rule's initial disclosures. The Department believes that a guide will enable the responsible plan fiduciaries to find needed compensation and other information and will reduce the costs they otherwise would incur searching for such information when the required disclosures are contained in multiple or lengthy documents. The Department also believes that covered service providers are best positioned to provide the guide, when required, in a cost-effective manner, because they have the specialized knowledge required to determine where the required disclosures are located, and they generally will need to locate the information only once for a large number of clients, each of whom otherwise would have to locate the information separately. Anecdotal evidence suggests that small plan fiduciaries in particular often have difficulty obtaining required information in an understandable format, because small plans lack the bargaining power and specialized expertise possessed by large plan fiduciaries. Therefore, the Department anticipates that requiring the covered service providers to furnish a guide in circumstances where the required disclosures cannot otherwise be quickly and easily located will especially benefit small plan fiduciaries.

3. *Summary of Impacts*

In accordance with OMB Circular A-4,[6] Table 1 below depicts an accounting statement showing the Department's assessment of the benefits and costs associated with this proposed regulatory action.

Table 1.--*Accounting Table*

Category	Primary Estimate	Low Estimate	High Estimate	Year Dollar	Discount Rate	Period Covered
Benefits						
Annualized Monetized ($millions/year)[7]	40.3	26.9	60.4	2013	7%	2014-2023
	40.3	26.9	60.4	2013	3%	2014-2023
Note: Quantified benefits are from time savings resulting from use of the guide.						
Costs						
Annualized Monetized ($millions/year)	13.4	6.8	22.3	2013	7%	2014-2023
	13.4	6.8	22.3	2013	3%	2014-2023
Note: Quantified costs are for service providers to prepare and deliver a guide.						
Transfers			Not Applicable			

4. *Regulatory Alternatives*

Executive Orders 12866 and 13563 require an economically significant regulation to include an assessment of the costs and benefits of potentially effective and reasonably feasible alternatives to a planned regulation, and an explanation of why the planned regulatory action is

[6] Available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*.
[7] The annualized monetized benefit and cost estimates are the same for the three and seven percent discount rates as the underlying yearly benefits and costs are the same for each year.

preferable to the identified potential alternatives. While this proposed rule is not economically significant, the Department, nevertheless, believes it would be helpful to identify several alternatives considered to enhance the proposed rule's economic efficiency. The major alternatives are discussed below.

Status quo: The Department considered, and rejected, some commenters' views on the interim final rule that the Department should take no further action – *i.e.*, that the Department not adopt a guide or any formatting or similar requirement. These commenters explained that, although they understand the Department's goal in requiring a tool such as a guide, they believe that a "one size fits all" format may not be feasible and that the costs associated with any such tool would be significant. For the reasons discussed at length earlier in this document, the Department continues to believe that furnishing a tool to assist responsible plan fiduciaries' review of the regulation's initial disclosures is essential.

Mandate a summary: As discussed earlier in this preamble, commenters advocating for a summary stressed the need for medium and small plan fiduciaries to have a summary of the required disclosures to help them navigate through and analyze highly technical disclosures that are scattered throughout multiple documents. They argue that service providers could produce summaries more efficiently and at less cost than responsible plan fiduciaries. Other comments raised concerns that mandating the specific format of a summary would hinder innovation and not allow flexibility when dealing with the great variety of pension plan service arrangements. Some commenters raised additional concerns that a summary could unintentionally become the primary document upon which some fiduciaries would rely without thoroughly reviewing all of

the required disclosures. Some commenters argued that the benefits of the summary would exceed the cost of preparing it. The Department believes that the costs to provide a summary likely would be higher for many service providers than the cost incurred to provide a guide or roadmap to responsible plan fiduciaries. For this reason, and the other reasons discussed earlier in this document including the concern that fiduciaries could over-rely on the summary, the Department viewed this option as less preferable than a guide requirement. The Department, however, specifically solicits comments on these issues, including ideas on how to overcome the danger that fiduciaries will rely exclusively on the summary, without appropriately considering the more complete disclosures from which the summary was derived.

Conditional exemption: The Department considered mandating a guide, with page number requirement, but exempting covered service providers from this requirement if producing the guide were either impossible or unreasonably burdensome. Since publication of the final rule, some covered service providers have expressed concern to the Department that it would be prohibitively expensive and unreasonably burdensome for them to comply with a guide requirement, especially if such a requirement resembles the sample guide that is available on the Department's website, which includes page number references. Some of these service providers, for example, argue that their service contracts or arrangements and disclosure materials are unique and individualized based on the needs of each of their plan clients, and that this uniqueness makes it unreasonably burdensome, if not practically impossible, in these cases to efficiently produce guides on a group basis. The Department believes, however, that the public record neither supports nor refutes this position, and the Department is not independently aware of any research or studies bearing one way or the other on this issue. As explained earlier in this

document, the Department intends to use this proposal as the vehicle to solicit specific comments and build a robust public record on this issue. The Department generally is skeptical that a guide and page number requirement is unreasonably burdensome in light of advances in technology, such as data tagging, and the standardization of many service agreements and investment and other disclosure documents. Absent credible evidence to the contrary, the Department believes that economies of scale still may be achieved by covered services providers that produce guides for multiple plan clients. Further, a conditional exemption of the type under this alternative also suffers from a degree of inherent ambiguity in that covered service providers and others would need metrics and standards to define the circumstances when the production of a guide was "impossible" or "unreasonably burdensome." This alternative also would treat covered service providers differently in a way that may not be positive and beneficial for plans over the long run. For instance, the Department is concerned that giving an exemption to those covered service providers who cannot currently provide a guide efficiently would effectively reward them for their inefficiency. Also, such an exemption would undercut the policy being advanced by the new 408(b)(2) disclosures.

After analyzing the comments, the Department chose to require covered service providers to provide fiduciaries with a guide to the required disclosures, but to allow the use of page number or a specific locator. The Department believes that the guide requirement strikes an appropriate balance between facilitating a plan fiduciary's evaluation of information critical to a prudent decision-making process and the costs and burdens associated with the preparation of a guide. The guide will provide clarity and specificity, while avoiding the uncertainty and burdens inherent in constructing a summary of the required disclosures. In contrast, a summary could

result in unnecessarily duplicative disclosures for at least some service providers to the extent the same information that is disclosed to comply with the initial disclosures is also required to be disclosed on the summary. Further, for some service providers, some information that must be disclosed may be highly technical and may not lend itself to a "simplified" summary. The Department agrees that a summary document may be useful to some fiduciaries, especially in comparing fees and services among competing service providers, but is concerned that a summary may unintentionally become the primary document some responsible plan fiduciaries would rely on, which would be counter to the Department's intention that required disclosures be reviewed and understood by responsible plan fiduciaries.

The Department is making available on its website (http://www.dol.gov/ebsa/pdf/408b2sampleguide.pdf) a sample guide to the initial disclosures to facilitate public comments on this proposal and solicits comments on whether including such a model in the final rule would provide useful guidance and reduce compliance costs for at least some service providers.

5. *Affected Entities and Other Assumptions*

The Department estimates that this proposed rule will affect about 45,000 defined benefit pension plans with over 40.9 million participants and almost 638,000 defined contribution pension plans with approximately 88.7 million participants. The overwhelming majority of the affected businesses sponsoring these plans will be small businesses: out of the affected pension plans, the Department estimates that approximately 35,000 are small defined benefit plans and

563,000 small individual account plans.[8] Most of the defined contribution pension plans, approximately 506,000, are participant-directed individual account plans.

The proposed regulation applies to contracts or arrangements between covered plans and covered service providers. A familiar example is a contract between a recordkeeper and a covered individual account plan under which the recordkeeper will make available a platform of designated investment alternatives consisting of mutual funds, monitor plan and participant and beneficiary transactions, and provide plan administrative services such as maintaining participant accounts, records, and statements.[9] In order to estimate the number of covered service providers and the number of service provider-plan arrangements, the Department used data from Schedule C of the plan year 2011 Form 5500 submissions filed with the Department.

In general, only plans with 100 or more participants that have made payments to a service provider of at least $5,000 are required to file the Form 5500 Schedule C. These plans are also required to report the type of services provided by each service provider. The Department counted the service providers most likely to provide the services described in paragraph (c)(1)(iii) of the final rule, which defines which service providers are "covered" by the rule.[10] In

[8] Estimates of the number of plans and participants are taken from the EBSA's 2011 Pension Research File, http://www.dol.gov/ebsa/publications/form5500dataresearch.html#planbulletins. Small pension plans are plans with generally less than 100 participants, as specified in the Form 5500 instructions.

[9] In order to be a covered service provider, the regulation also requires that a service provider must reasonably expect $1,000 or more in compensation, direct or indirect, to be received in connection with the services to the plan. 29 CFR 250.408b-2(c)(1)(iii).

[10] In order to provide a reasonable estimate, the Department used Schedule C service codes where it believed a majority of service providers would be covered service providers. The following codes were used: service providers with reported type codes corresponding to contract administrator, recordkeeping and information management, consulting (pension), custodial (other than securities), custodial (pension), trustee (individual), trustee (bank, trust company, or similar financial institution), insurance agents and brokers, insurance services, trustee (discretionary), trustee (directed), investment advisory (participant), investment advisory (plan), investment management, real

total, there were nearly 12,000 distinct covered service providers reported in the Form 5500 Schedule C data.

The Department acknowledges that this estimate may be imprecise. On the one hand, some of the service providers counted here may not be covered service providers, but the Department is unable to further refine this group due to the limitations of the Schedule C data. On the other hand, because small plans generally do not file Schedule C, the number of covered service providers will be understated if a substantial number of them service only small plans. However, the Department believes that most small plans use the same service providers as large plans; therefore, the estimate based on the Schedule C filings by large plans is reasonable.[11]

Schedule C data was also used to count the number of covered plan-service provider arrangements. On average, defined benefit plans employ more covered service providers per plan than defined contribution plans, and large plans use more covered service providers per plan than small plans. In total, the Department estimates that defined benefit plans have over 136,000 arrangements with covered service providers, while defined contribution plans have over 2 million arrangements. The Department does not have sufficient data to estimate the number of these arrangements that will require a guide because the required disclosures are contained in multiple or lengthy documents. Therefore, for purposes of the analysis, the Department assumes that all of these arrangements will require a guide.

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estate brokerage, securities brokerage, valuation (appraisals, etc.), copying and duplicating, participant loan processing, participant communications, and foreign entities.

[11] While in general small plans are not required to file a Schedule C, some voluntarily file. Looking at Schedule C filings by small plans, the Department concluded that most small plans reporting data on Schedule C used the same group of service providers as most larger plans.

In the interim final and final rule, the Department assumed that 50 percent of disclosures would be delivered electronically. The Department did not receive any comments regarding this assumption; therefore, the Department continues to assume that about 50 percent of disclosures between covered service providers and responsible plan fiduciaries are delivered only in electronic format.

The Department lacks data on the number of service providers that are currently providing a guide or other aid to help responsible plan fiduciaries understand the disclosures provided and find required information. Therefore, the Department has estimated benefits and costs of the rule assuming that currently covered service providers are not providing guides or other aids to their disclosures. To the extent that some covered service providers are already voluntarily providing guides, both benefits and costs will be overestimated.

Similarly, our assumption of 100 percent compliance with the 2012 final rule, if incorrect, would cause our estimate of time savings to be too high. In such a case, however, this proposed rule could have the effect of increasing compliance with the 2012 final rule, which would yield both time costs (associated with review of disclosures) and consumer protection benefits that have not been quantified in this impact analysis.

6. *Benefits*

The final regulation allows covered service providers to make the required disclosures through multiple documents. However, comments on the interim final rule raised concerns that providing many voluminous documents to fiduciaries could overwhelm them and the time and effort needed to find the relevant information still could be substantial. This proposed rule addresses this concern by requiring the covered service provider to provide the responsible plan fiduciary with a guide that specifically identifies the document and page or other specific locator, such as a section, that will allow the responsible plan fiduciary to quickly and easily find the required disclosures if the disclosures are not contained in a single document, or if the document is in excess of [RESERVED] number of pages. The positive net benefit of the guide requirement arises from specialization and economies of scale. Covered service providers are most familiar with the documents containing the required disclosures, and will make similar, if not identical, disclosures to many different responsible plan fiduciaries. Therefore, the Department expects that covered service providers will be able to find the information and create a guide, when required, at a lower cost than the responsible plan fiduciary. Some service providers will be able to spread these costs across hundreds, and in some cases, thousands, of arrangements.

The Department estimates that there are 2.2 million covered arrangements between 12,000 covered service providers and nearly 684,000 covered plans for which disclosures are required under the final rule. While some of these arrangements are simple, others are complex and would require much information to be disclosed. The Department is not aware of any information that currently exists that could be used to measure the time savings that would result from the guide in circumstances where a guide would be required.

In order to produce an estimate of possible time savings, the Department conducted an informal study with two groups of staff. One group searched for specified information in plan and investment documents using a guide-like document, while the other group searched for the specified information in the same documents using a list of the documents in which the information could be found. The result of the informal study was that the group that used the guide-like document, on average, saved 30 minutes compared to that group that used the list. While only a subset (a convenience sample) of the information required to be disclosed by the final rule was searched for as part of the informal study, the results provide a basis for a conservative estimate of possible time savings that would result from the guide. Using this time savings as a proxy for the time savings that would be realized by a plan fiduciary, a total annual time savings of 342,000 hours would result (0.5 hours x 684,000 fiduciaries). If the responsible plan fiduciary's time were valued at $118 per hour, the value of the annual time saved would be $40.3 million.[12, 13]

The Department notes that the amount of time savings is uncertain. If the average time savings were only 20 minutes, the total value of the time saving would be $26.9 million, while the value of the time savings would be $60.4 million if the average time savings were 45

[12] EBSA estimates of 2013 labor rates include wages, other benefits, and overhead based on the National Occupational Employment Survey (June 2012, Bureau of Labor Statistics) and the Employment Cost Index (September 2012, Bureau of Labor Statistics). Total labor costs were estimated to average $126.07 per hour over the period for legal professionals, $67.76 for financial professionals, and $29.14 per hour for clerical staff. This estimate uses the average labor rate of a financial manager, $117.88, as a proxy for a plan fiduciary's labor rate.

[13] Many disclosures will stay the same over time, and therefore fiduciaries could experience lesser savings two years after implementation of the rule (and every year beyond) because they would already have gone through the upfront process of learning which sections of which documents contain the necessary disclosures. On the other hand, plans may put out bids for service providers, for example, once every three to five years, at which time they may review disclosures from multiple service providers and many assets, thereby experiencing abnormally high time savings if they have access to disclosure guides. Given these offsetting effects, the Department assumes that the estimate presented here represents a plausible average across years.

minutes. Time savings also will depend on the sophistication and abilities of the individual fiduciary reviewer. For instance, if a reviewing responsible plan fiduciary is sophisticated relative to the informal study's participants, the savings to this fiduciary would be more toward the lower point of this range, and the reverse would be true to the extent the reviewing responsible plan fiduciary is less sophisticated. Time savings might be greater to the extent that responsible plan fiduciaries will have to review changes to previously disclosed information, plans have multiple plan fiduciaries that will experience the time savings, or plans review bids from multiple service providers in response to requests for proposal.

An additional benefit of the guide requirement is that appropriate use of the guide will provide responsible plan fiduciaries with confidence that they have found the relevant information in the covered service provider's disclosures to fulfill their ERISA fiduciary responsibility to determine whether a contract or arrangement is reasonable. This confidence will lead to a further reduction in the time a responsible plan fiduciary spends searching through documents to make certain they have not missed additional relevant information. While the Department was unable to estimate this portion of the time savings, it has the potential to be large.

The guide document used in the informal study included pagination, because page numbers are used in most industry contracts and similar documents that contain the required disclosures, and the Department wanted to obtain an upper-bound estimate of the benefits that would be obtained through the most specific locator, a page number. The Department did not analyze the incremental benefits of providing pagination relative to providing the section or area

by name or other identifier, because it does not have the necessary data on the prevalence and characteristics of other identifiers to perform a meaningful analysis. The Department is aware of numerous possible identifiers other than pagination, for example, by page and line, paragraph, section, chapter, part, and volume. In addition, in the case of electronic media, other identifiers include character, screen, web-page, link, and folder. However, unlike pagination, we have no information on the extent to which these identifiers are used in employee benefit contracts and similar documents. The Department, therefore, solicits comments on the prevalence and characteristics of identifiers other than pagination and their usefulness. The Department also solicits comments on whether there are any relevant federal or state regulatory or similar requirements or standards on effective and not misleading disclosures that should be considered by the Department. Information received will be used to analyze and attempt to quantify the incremental benefits of alternatives to pagination. Our premise is that there is a positive correlation between the precision of the identifier and the ease with which it can be located and the benefits realized, such that more precise and easily located identifiers will result in more time saved, and less precise identifiers will result in less time saved. For instance, if pagination is a more precise identifier than section, identification by section only will result in fewer benefits to plan fiduciaries than identification by pagination. Commenters are encouraged to be specific in identifying and describing the characteristics of identifiers. In addition, please also provide data, if available, on incremental costs of pagination relative to other identifiers.

7. *Costs*

As stated above, the proposed regulation modifies the requirements of the final rule by requiring covered service providers that provide the required disclosures in multiple or lengthy documents to provide a guide to the disclosures to responsible plan fiduciaries that will enable responsible plan fiduciaries to effectively review the disclosures made under the final regulation. The hour and cost burden associated with the guide requirement result from preparing and distributing the guide. As noted above, the Department estimates that approximately 12,000 covered service providers, 684,000 covered plans, and 2.2 million arrangements with covered plans would be affected by this proposed rule.

Covered service providers are responsible for locating the information and preparing the guide. In the initial year, service providers will have to locate the required information in the disclosures and create the guide. The Department believes that covered service providers will incur lower costs to locate this information than responsible plan fiduciaries, because they are more familiar with the required disclosure documents. Once the covered service provider locates the information in the documents, it can be used to create multiple guides.

While the final rule covers contracts and arrangements, the burden of creating the guide will be proportional to the number of products and services included in the contracts. In order to estimate the total cost associated with the guide requirement, the Department must determine the number of products and services that will require a guide. The Department is uncertain regarding the number of products or services; however, the Department believes that the total number of products offered by financial services firms exceeds the total number of services provided by other service providers. In 2012, there were a total of 16,380 mutual funds, closed-

end funds, exchange traded funds, and unit investment trusts.[14] There also were 776 financial service firms that provided investment management services in the U.S. Seventy-six percent of these firms were independent fund advisors and the rest were brokerage firms, banks and thrifts, insurance companies, or non-U.S. fund advisors.

Due to the uncertainty regarding the number of products and services that would be subject to the guide requirement, the Department has created low-range, medium-range, and high-range estimates. The Department calculated these estimates by multiplying the number of products offered by financial service firms (16,380) by three, four and five resulting in a low-range estimate of 49,140 products and services, a middle-range estimate of 65,520 products and services, and a high-range of 81,900 products and services.

In order to estimate the costs associated with the guide requirement, the Department also must estimate the time required to create a guide for each unique product or service. The Department lacks information on the time required by covered service providers to create a guide. The Department believes it is reasonable to assume that it will take a covered service provider no more than one-half hour to locate the required information in its own document. Once the information is found and the appropriate document, page, and (if applicable) section number is noted, the covered service provider can construct the guide. The Department estimates that the relevant information could be found and the guide could be constructed using a total of three hours of a financial professional or similar professional's time with a labor rate of

[14] 2013 Investment Company Fact Book, http://www.icifactbook.org/, retrieved 11 September 2013.

$67.76 per hour, including time to review the document for accuracy.[15] The Department constructs a low-range estimate using two hours, a medium-range estimate using three hours, and a high-range estimate using four hours.

Based on the foregoing, the Department's low-range estimate of the cost covered service providers would incur to create their guides for the products and services is approximately $6.7 million annually (3x16,380 products and services x 2 hours[16] x $67.76), its medium-range estimate is $13.3 million annually (4x16,380 products and services x 3 hours[17] x $67.76), and its high-range estimate is $22.2 million annually (5x16,380 products and services x 4 hours[18] x $67.76).

The Department also conducted a threshold analysis in the Uncertainty section, below, which demonstrates the reasonableness of the assumption that the cost of requiring covered service providers to create a guide is less than the estimated benefit of $40.3 million annually.

The required disclosures, including the guide, can be delivered electronically at minimal costs, because material and mailing costs are not incurred for guides that are delivered electronically. Similar to the final rule, this regulatory impact analysis assumes that about 50 percent of the guides will be sent electronically (1.1 million guides representing 50 percent of the approximately 2.2 million contracts or arrangements) with minimal associated cost. The

[15] The Department estimates 2013 hourly labor rates include wages, other benefits, and overhead based on data from the National Occupational Employment Survey (June 2012, Bureau of Labor Statistics) and the Employment Cost Index (September 2012, Bureau of Labor Statistics); the 2012 estimated labor rates are then inflated to 2013 labor rates.
[16] The total associated hour burden is 98,300 hours.
[17] The total associated hour burden is 196,600 hours.
[18] The total associated hour burden is 327,600 hours.

Department expects guides that are distributed on paper will be one to two pages in length, and that no additional postage will be required, because the guide will be included with the other disclosures being sent to the responsible plan fiduciary. If the guide is two pages, the associated material and printing cost will be $108,000 (1.1 million guides x 2 pages x $0.05 per page).

8. *Uncertainty*

The Department lacks complete data and empirical evidence to estimate the cost for covered service providers to create the guide. However, the Department believes that the costs to produce the guide will be less than the benefit derived from providing it to responsible plan fiduciaries for several reasons. For example, the burden will be on the covered service provider to provide the location of the required disclosures. This should reduce overall search time, because the covered service provider is more familiar with the documents than the responsible plan fiduciary. In addition, economies of scale will further reduce the costs, since service providers frequently offer multiple products that use similar documents and service multiple clients with the same products. Therefore, a single or very similar guide could be used for many similar products and clients with little or no marginal cost impact. In addition, the Department expects reduced costs to result, because, on average, responsible plan fiduciaries are expected to have higher wages than the financial professional the Department anticipates will construct the guides.

There are several ways covered service providers can develop guides. With respect to guides that include information about investment products (e.g., mutual funds, bank collective

funds, or insurance products), the Department believes that over time, the market will evolve such that the issuers of investment products will furnish product-specific investment-related fee and expense information and other material needed to create a guide directly to covered service providers or to a third party electronic data base containing such information, because the issuers can prepare and disseminate the data in the most cost-effective manner. Covered service providers, such as recordkeepers that offer a platform of designated investment alternatives to a covered plan, will receive the fee and expense information and incorporate it into the guides they prepare for responsible plan fiduciaries.

In order to estimate the total cost associated with the guide requirement, the Department must estimate the total number of services and products for which a guide must be prepared. The Department lacks sufficient data to make this estimate. However, the Department believes that the total number of products offered by financial services firms exceeds the total number of services provided by other service providers. In 2012, there were a total of 16,380 mutual funds, closed-end funds, exchange traded funds, and unit investment trusts.[19] There also were 776 financial service firms that provided investment management services in the U.S. Seventy-six percent of these firms were independent fund advisors and the rest were brokerage firms, banks and thrifts, insurance companies, or non-U.S. fund advisors.

In order to create a reasonable upper bound for the total number of products and services that will have to be disclosed in a guide, the Department assumes that five times the number of products offered by financial service firms or 81,900 products and services (16,380 x 5) would

[19] 2013 Investment Company Fact Book, http://www.icifactbook.org/, retrieved 11 September 2013.

require a guide. This estimate accounts for all products and services subject to the guide requirement, and includes circumstances in which the content necessary to create the guide is provided directly to a covered service provider who incorporates it into its own guide for the products and services it provides to the covered plan. For example, recordkeepers often provide a variety of services to plans, including maintaining a platform of designated investment alternatives, as well as administration and monitoring of participant and beneficiary transactions (e.g., enrollment, payroll deductions and contributions, offering designated investment alternatives, and other covered plan investments, loans, withdrawals and distributions). When a recordkeeper enters into a contract or arrangement with a covered plan to provide such services and the designated investment alternatives consist of mutual funds, the recordkeeper may receive investment-related fee and expense data from a mutual fund company, or a third-party electronic database, and the recordkeeper will incorporate this information into the guide for its contract or arrangement with the covered plan.[20]

As stated earlier, the mid-range estimate of the benefits to be derived from creating and providing the guide was $40.3 million. If the Department assumes that an individual with a labor rate of $67.76 per hour creates the guide, then the use of, on average, 7.4 hours[21] to create the guide for each product or service would cause the costs of the proposed rule to equal its estimated benefits. This 7.4-hour total would entail finding all the required information, noting the page and section number, and entering the information on the guide. The Department

[20] The estimate also accounts for the situations when covered service providers must include content in the guide regarding indirect compensation received in connection with services described pursuant to paragraph (c)(1)(iv)(A) of the rule.

[21] This number was derived by dividing the $40.3 million mid-range estimate of the cost of the guide by $67.76 per hour and dividing this quotient by the estimated 49,140 products and services that will require a guide.

believes that nearly seven hours is more than adequate time to perform this function and thus the rule's costs are likely to be less than or equal to its benefits.

The Department performed a sensitivity analysis by increasing the estimate of the total number of products. This estimate was obtained by multiplying the number of financial services products (16,380) by seven and ten and then calculating the break-even average number of hours associated with preparing a guide. As the total number of hours to be allocated stayed the same, the associated average hours per product were 5.3 and 3.7 hours respectively as the number of products increases. As implied by the upper bound of four hours for guide creation mentioned in the Cost section, above, the Department 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, and thus, even using an extremely high assumption regarding the number of affected products per financial services firm, the rule's costs are likely to be less than or equal to its benefits.

The Department's estimates assume that costs to create the guide would remain constant over time. However, the Department expects there will be a downward trend for such costs in future years, because covered service providers (i) already will have guides for most products and services and only would need to update them as appropriate, and (ii) already will have created a template for the guide and will be familiar with how to incorporate information regarding new products and services into the template.

The Department welcomes public comments regarding its estimates of the benefits and costs of the proposed rule. The Department is particularly interested in information and data regarding the potential for time savings to plan fiduciaries, the number of products, services, contracts and arrangements for which a guide would be required, the costs required to create the guide (including costs incurred for system changes and costs related to placing page or section number references in the guide), the potential for economies of scale in constructing the guide, and current best practices in the pension plan service provider industry for providing guides or summaries to clients.

9. *Regulatory Flexibility Analysis*

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551, et seq.) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have such an impact, section 604 of the RFA requires that the agency present a regulatory flexibility analysis (RFA) describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities. Small entities include small businesses, organizations and governmental jurisdictions.

a. *Need for and Objectives of the Rule*

Service providers to pension plans increasingly have complex compensation arrangements that may present conflicts of interest. Thus, small plan fiduciaries face increasing difficulty in carrying out their duty to assess whether the compensation paid to their service providers is reasonable. This proposed rule is designed to help both large and small plan fiduciaries identify and locate the information they need to negotiate with and select service providers who offer high quality services at reasonable rates and to comply with their fiduciary duties. The Department's requirement for covered service providers to provide a guide to responsible plan fiduciaries will be especially important to small plan fiduciaries as they review and analyze the required disclosures.

b. *Affected Small Entities*

The Department has limited data on the number of small entities affected by the rule. Using the Schedule C data from the Form 5500 the Department estimates that 11,800 service providers listed on the Schedule C have fees reported that total less than $7 million. This estimate of the number of small entities should be viewed as an upper bound as these service providers most likely have other sources of revenue besides pension plans, and fees from the vast majority of small plans are also not captured in this estimate. These service providers generally consist of professional service enterprises that provide a wide range of services to plans, such as investment management or advisory services for plans or plan participants, and accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, legal, recordkeeping, brokerage, third party administration, or valuation services. Many of these service providers

have special education, training, and/or formal credentials in fields such as ERISA and benefits administration, employee compensation, taxation, actuarial science, law, accounting, or finance.

c. *Compliance Requirements*

The classes of small service providers subject to the proposed rule include service providers who are ERISA fiduciaries (for example, because they manage plan investments or are fiduciaries to investment vehicles holding plan assets in which the covered plan has a direct entity investment), who provide services as registered investment advisers to plans, who receive indirect compensation (or certain compensation from related parties) in connection with provision of specified services (namely, accounting, auditing, actuarial, appraisal, banking, certain consulting, custodial, insurance, participant investment advisory, legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services) or who provide recordkeeping or brokerage services involving a platform of investment options for participant-directed individual account plans.

These small covered service providers are required to disclose certain written information to responsible plan fiduciaries in connection with their service contracts or arrangements with covered plans. These proposed regulations require that covered service providers furnish the responsible plan fiduciary with a guide specifically identifying the document, page, and (if applicable) number where the required information is located. Such information includes a description of the services included in the arrangement and what direct and indirect compensation will be received in connection with the arrangement. Service providers whose

arrangements include making investment products available to plans additionally must disclose specified investment-related information about such products. The required disclosures must be provided to the responsible plan fiduciary reasonably in advance of the parties entering into the contract or arrangement for covered services. Preparing compliant disclosures often will require knowledge of financial products and services and related compensation and revenue sharing arrangements.

As noted earlier in the impact analysis, there are economies of scale in the creation of guides. It would follow that, per product or service, small service providers would experience a cost of guide creation that is higher than the average discussed in section F.7, above.

d. *Agency Steps to Minimize Negative Impacts*

The Department took a number of steps to minimize any negative impact of the proposed rule on small service providers. One of the main reasons the Department chose to require covered service providers to provide a guide to responsible plan fiduciaries, rather than a summary, was that a guide would help small plan fiduciaries locate important information disclosed in multiple, often long and complex documents at a lower compliance cost to covered service providers.

The policy justification for these requirements includes benefits to plan fiduciaries, who will realize savings in the form of reduced search costs more than commensurate to the compliance costs shouldered by covered service providers. Small plan fiduciaries are likely to

benefit most. Small covered service providers, while shouldering the cost of providing disclosure, likely will often pass these costs on to their plan clients, who, in turn, are estimated to reap a net benefit, on average, that will more than offset this shifted compliance cost.

10. *Paperwork Reduction Act*

As part of its continuing effort to reduce paperwork and respondent burdens, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in this proposed rule, which would amend OBM Control Number 1210-0133, Contracts or Arrangements under Section 408(b)(2) – Fee Disclosure**.** A copy of the ICR may be obtained by contacting the individual identified below in this notice. The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be submitted to the addresses listed in the ADDRESSES section at the beginning of this Notice and received by the Department on or before [INSERT DATE THAT IS 90 DAYS FOLLOWING FEDERAL REGISTER PUBLICATION]. Comments also may be submitted to the Office of Management and Budget at the following address: Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-EBSA, Office of Management and Budget, Room 10235, 725 17th Street, N.W., Washington, DC 20503; by Fax: 202-395-6881 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration. A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=[201208-1210-001] or by

contacting G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N 5647, Washington, DC 20210. Telephone (202) 219-8410; Fax: (202) 219 4745. These are not toll free numbers.

The information collection requirements of the proposed rule are contained in paragraph (c)(1)(iv)(H), which requires covered service providers to provide responsible plan fiduciaries with a guide specifically identifying the document, page number, and (if applicable) section number where the required data is located within multiple or complex documents.

The Department requested comments regarding a guide requirement when the interim final regulation was published. Although no public comments were received that specifically addressed the paperwork burden analysis of the information collections at the interim final rule stage, the comments that were submitted and described earlier in this preamble, contained information relevant to the costs and administrative burdens attendant to this proposal. The Department took such public comments into account in connection with developing this proposed rule and the paperwork burden analysis summarized below.

Annual Hour Burden

As stated earlier in this preamble, the Department estimated an hour burden range for the guide requirement of: 98,300 hours with an equivalent cost of $6.7 million annually (low-estimate), 196,600 hours with an equivalent cost of $13.4 million annually (medium-estimate),

and 327,600 hours with an equivalent cost of $22.2 million annually (high-estimate). The Department's methodology for estimating the hour burden is discussed in detail in the Costs section of the Regulatory Impact Analysis, above.

Annual Cost Burden

As stated earlier in this preamble, the Department estimated that the material and printing cost burden associated with creating the guide would be $108,000 annually. The Department's methodology for estimating the cost burden is discussed in detail in the Costs section of the Regulatory Impact Analysis, above.

These paperwork burden estimates are summarized as follows:

Type of Review: Revision of existing collection

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure.

OMB Control Number: 1210-0133.

Affected Public: Business or other for-profit; not-for-profit institutions.

Estimated Number of Respondents: 12,000 annually.

Estimated Number of Responses: 2.2 million.

Frequency of Response: Annually; occasionally.

Estimated Annual Burden Hours: 196,600 hours annually.

Estimated Annual Burden Cost: $108,000 annually.

11. *Congressional Review Act*

The proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, if finalized, will be transmitted to Congress and the Comptroller General for review. The proposed rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

12. *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, the proposed rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments in the aggregate of more than $100 million, adjusted for inflation, or increase expenditures by the private sector of more than $100 million, adjusted for inflation.

13. *Federalism Statement*

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. The proposed rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the proposed rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and, as such, have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Reporting and recordkeeping requirements, and Securities.

For the reasons set forth in the preamble, the Department of Labor proposes to amend chapter XXV, subchapter F, part 2550 of title 29 of the Code of Federal Regulations as follows:

SUBCHAPTER F – FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for part 2550 is revised to read as follows:

Authority: 29 U.S.C. 1135 and Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a-1 also issued under sec. 657, Pub. L. 107-16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c-5 also issued under 29 U.S.C.1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972, and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.412–1 also issued under 29 U.S.C.1112.

2. Amend 2550.408b-2 by:

a. Adding paragraph (c)(1)(iv)(H):

b. Revising paragraph (c)(1)(v)(B)(2) to read as follows:

§ 2550.408b-2 General statutory exemption for services or office space.

* * * * *

(c) *

(1) *

(iv) *

(H) *Guide to initial disclosures*.

(*1*) If the information that must be disclosed pursuant to paragraph (c)(1)(iv)(A) through (G) of this section is not contained in a single document, or if the document is in excess of [RESERVED] pages, the covered service provider shall furnish the responsible plan fiduciary with a guide specifically identifying the document and page or other sufficiently specific locator, such as a section, that enables the responsible plan fiduciary to quickly and easily find the following information, as applicable to the contract or arrangement:

(*i*) The description of services to be provided to the covered plan, as required by paragraph (c)(1)(iv)(A) of this section;

(*ii*) The statement concerning services to be provided as a fiduciary and/or as a registered investment adviser, as required by paragraph (c)(1)(iv)(B) of this section;

(*iii*) The description of all direct compensation, as required by paragraph (c)(1)(iv)(C)(*1*) of this section;

(*iv*) The description of all indirect compensation, as required by paragraph (c)(1)(iv)(C)(*2*) of this section;

(*v*) The description of any compensation that will be paid among related parties, as required by paragraph (c)(1)(iv)(C)(*3*) of this section;

(*vi*) The description of any compensation for termination of the contract or arrangement, as required by paragraph (c)(1)(iv)(C)(*4*) of this section;

(*vii*) The description of all compensation (and/or a reasonable estimate of the cost to the covered plan) for recordkeeping services, as required by paragraph (c)(1)(iv)(D) of this section; and

(*viii*) For covered service providers described in paragraphs (c)(1)(iii)(A)(*2*) or (c)(1)(iii)(B) of this section, the description of any compensation, annual operating expenses, and ongoing expenses (or, if applicable, total annual operating expenses) set forth in paragraph (c)(1)(iv)(E)(*1*) and (*2*), as required by paragraphs (c)(1)(iv)(E)(*1*) and (*2*) and (c)(1)(iv)(F)(*1*) of this section.

(*2*) The guide described in paragraph (c)(1)(iv)(H)(*1*) of this section shall identify a person or office, including contact information, that the responsible plan fiduciary may contact regarding the disclosures provided pursuant to this section.

(*3*) The covered service provider shall furnish the guide described in paragraph (c)(1)(iv)(H)(*1*) of this section in a separate document .

* * * * *

(v) * * *

(B) * * *

(*2*) A covered service provider must, at least annually, disclose any changes to the information required by paragraph (c)(1)(iv)(E), (F), and (H) of this section.

* * * * *

Signed at Washington, D.C., this 27th day of February, 2014.

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Phyllis C. Borzi

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

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