



Financial Security...for Life.

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Submitted Electronically

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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: 408(b)(2) Cross Reference Guide Proposal, RIN 1210-AB53

Dear Sir or Madam:

On behalf of the American Council of Life Insurers, we write in response to the Department of Labor's ("Department's") proposed amendment to 29 CFR § 2550.408(b)(2), published in the *Federal Register* on March 12, 2014 (79 FR 13949), (the "Proposal" or "Proposed Rule"). The proposed amendment would require that disclosures required to be furnished to plan fiduciaries under 29 CFR § 2550.408(b)(2) (77 FR 5632, February 3, 2012) (the "Final Rule") be accompanied by a cross reference guide that enables plan fiduciaries to "quickly and easily find" the information delineated in the Final Rule, unless the required disclosures are otherwise contained in a single document of some yet-to-be-determined length.

The American Council of Life Insurers represents more than 300 legal reserve life insurer and fraternal benefit society member companies operating in the United States. These member companies represent over 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including both defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

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In the preamble to the interim final rule (75 Fed. Reg. 41600, July 16, 2010) (“Interim Final Rule”), the Department discussed requiring a summary disclosure statement, “for example limited to one or two pages that would include key information intended to provide an overview for the responsible plan fiduciary of the information required to be disclosed. The summary also would be required to include a roadmap for the plan fiduciary describing where to find the more detailed elements of the disclosures required by the regulations.” The Department asked for comments regarding the likely cost and burden to covered service providers, the anticipated benefits to responsible plan fiduciaries, whether due to time savings, cost savings or other factors, and how to most effectively construct the requirement for a summary disclosure statement to ensure both its feasibility and its usefulness in helping the Department achieve its objectives.

In our August 30, 2010 letter on the Interim Final Rule, ACLI noted that it is critical that providers retain reasonable flexibility to provide the information required in a manner and format that conforms to the particular product/service offering. It is also critical that covered service providers have sufficient flexibility to develop and use a summary, guide or reference table that works appropriately with their 408(b)(2) disclosure. For example, in order to make a reasonable assessment of a service arrangement, it may be best for the fiduciary to obtain information in documents which provide a complete description of compensation as well as the services and other benefits offered with the arrangement. We urged the Department not to prescribe a summary or guide.

The Department now proposes a cross reference guide to save plan fiduciaries time, shifting work to plan service providers. The Department argues that the economic benefit gained by saving fiduciaries time will exceed the increased cost of having providers prepare and distribute a cross reference guide due to “efficiencies.” It should be noted that it is common for plans to arrange for the cost of plan services to be borne directly by plan participants. Thus, plan participants will likely pay the cost to save fiduciaries time. The Department has severely underestimated the increase in costs to provide plan services to comply with a new standardized cross reference requirement.

ACLI and its member companies have long supported efforts designed to provide meaningful and effective disclosures to plan fiduciaries. In this regard, tens of millions of dollars have already been invested in the design and distribution of disclosures and related educational materials intended to ensure a positive customer experience in satisfying the recently effective 408(b)(2) requirements. As discussed in more detail below, however, we are concerned that the compliance costs and challenges imposed on covered service providers and plan fiduciaries far outweigh any identifiable need for the new proposed additions to the existing rule. Further, we are concerned that the Proposal lacks the specificity and clarity necessary to frame meaningful comments on either the compliance implications or the costs, as requested by the Department. Finally, we are concerned that the Department has failed to meet long-established procedural requirements applicable to the publication of agency rules. For these reasons, discussed more fully below, ACLI requests that the Department withdraw the subject Proposal and, in the alternative, consider conducting a statistically valid survey or publishing a Request for Information to identify what, if any, problems plan fiduciaries may be encountering in conjunction with the receipt of their 408(b)(2) disclosures and cost-effective solutions to address those specific problems.

Procedural Issues

Failure to Comply with Executive Order 12866 and Circular A-4

As noted above, ACLI is concerned that the Department, in connection with its publication of the Proposed Rule, did not satisfy the procedural requirements long applicable to agency rulemaking. In this regard, we note that Executive Order (EO) 12866 has governed the rulemaking process since 1993 and was reaffirmed by this Administration in March 2009, through Executive Order 12497. We also note that

the Office of Management and Budget supplemented EO 12866 with guidance on the preparation of agency regulatory impact analyses through Circular A-4 (issued September 17, 2003). Relevant to our procedural concerns, we note that Circular A-4, section B, entitled *The Need for Federal Regulatory Action*, provides that:

Before recommending Federal regulatory action, an agency must demonstrate that the proposed action is necessary. ... Executive Order 12866 states that “Federal agencies should promulgate only such regulations as are required by law, necessary to interpret law, or are made necessary by **compelling public need**, such as a material failure of private markets to protect or improve the health and safety of the public, the environment, or the well being of the American people”

Executive Order 12866 also states that “Each agency shall identify the problem that it intends to address (including, where applicable, **the failures of private markets** or public institutions that warrant new agency action) as well as assess **the significance of that problem.**”

(Emphasis supplied)

Clearly the Proposed Rule is neither required by law or necessary to interpret law; accordingly, the standard applicable to the Department and the Proposed Rulemaking is a demonstrable “compelling public need” and, in our opinion, a demonstrable “material failure of private markets.” ACLI is concerned that nowhere in the discussion of its Proposed Rule does the Department represent, or provide support for, a “compelling public need” or a “failure of the private markets.”

To the contrary, the Department makes reference to “anecdotal evidence” that “suggests [not demonstrates] that small [not all or many] 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.” Unfortunately, the Department provides no information as to the specific nature or scope of the “anecdotal evidence,” but merely references its existence. In addition, the Department has provided no basis for its assumption that the degree of specialized expertise and bargaining power it believes small plan sponsors have are the causes of these problems. Accordingly, it is difficult to assess whether or to what extent the solution being pursued by the Department through the subject Proposal is the best or most cost-effective approach to addressing the perceived problem.

ACLI understands that the Office of Enforcement has been collecting and reviewing 408(b)(2) disclosures as part of its audits/investigations of service providers and plans. If our understanding is correct, we encourage the Department to share the findings of this review as the beginning of a public dialogue on the nature and scope of any problems with the current 408(b)(2) disclosure regime and what solution(s) (e.g., informal guidance, enforcement, regulation) is (are) most appropriate for addressing such problems.

With regard to the foregoing rationale for the rule, it is difficult to understand why the Proposal would apply to all plans when the perceived problem is with small plan fiduciaries. It is also difficult to understand, given the structure of the Final Rule itself, why fiduciaries of any size plan would lack – or even need - bargaining power in terms of obtaining the information or assistance they need to either understand or locate information. The Final Rule itself is effectively an exemption from ERISA’s prohibited transaction provisions, with respect to which noncompliance can result in excise tax liabilities for both covered service providers and plan fiduciaries. The regulation clearly imposes an affirmative obligation on covered service providers to furnish and plan fiduciaries to receive the information delineated in the regulation. This obligation exists without regard to plan size. The fiduciaries of even the smallest plans therefore are required to be furnished the 408(b)(2) disclosures and, pursuant to the

regulation, have a corresponding obligation to ensure that they have received such disclosures – which necessarily requires locating the required information – in order to avoid excise tax liability. For these reasons, the stated need for the Proposal is questionable and, in any event, appears far less than the required “compelling public need” or “failure of private markets” standards for publication of a regulation. Moreover, as previously noted, our members invested substantially in the development and distribution of 408(b)(2) disclosures designed to assist plan fiduciaries in locating and reviewing the required information and, thereby, reduce the possibility of a prohibited transaction and excise tax liability.

The questionable need for the Proposal is further reinforced by the Department’s indication that it intends to engage focus groups that “... may provide information about the need for a guide, summary, or similar tool ...” (79 FR 13953). Not only does this statement raise questions about the need for the Proposal, it also raises questions as to whether the Department itself believes the proposed guide requirement is the appropriate response to the problem (however the problem is ultimately defined), leaving open the possibility that, with respect to a final regulation, a “summary, or similar tool” might be substituted for a guide requirement,” with respect to which the public will not have had an opportunity to consider and comment on prior to adoption. Further, the proposed focus group project misses an opportunity to explore how small plans access retirement plan products and services, with the likely result that its findings will lack actionable context.

The Department’s uncertainty surrounding the nature and scope of any problems relating to the 408(b)(2) disclosures and the extent to which a guide is an appropriate response is not surprising. Our members have invested significant time, effort and funds into the development and distribution of customer-friendly, compliant 408(b)(2) disclosures, as well as educational materials for both plan sponsors and intermediaries. Tens of thousands of these disclosures were furnished to our members’ customer plan fiduciaries and, while as expected and desired the disclosure prompted provider and fiduciary discussions about the substance of those disclosures, no members indicated the receipt of customer inquiries relating to the location of specific information. Thus, we question whether the locating of information is a real problem and, even if some plan fiduciaries have or do encounter a problem, there is a serious question as to whether resolution of that problem warrants adoption of a regulation replete with cost and compliance challenges for both covered service providers and plan fiduciaries, without regard to the characteristics of the disclosure packages provided.

In summary, the Department has failed to establish or demonstrate a “compelling need” or “market failure” for the Proposal and, therefore, has failed to comply with the Administration’s minimum threshold for moving forward with a final rulemaking.

*Inadequate Regulatory Impact Analysis*¹

ACLI has concerns about the regulatory impact analysis prepared in support of the Proposal. The Department appears to have failed to satisfy its burden under EO 12866 to demonstrate a meaningful assessment of all costs and benefits of available regulatory alternatives, including non-regulatory alternatives. Section 1 of EO 12866 provides, in relevant part, that:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits

¹ Without restating, we also incorporate by reference the April 11, 2014 comments of the ALCI, ICI, SIFMA, ABA and SPARK Institute on the Information Collection Request attendant to the subject proposal.

We note that the Department, in framing its justification under the Executive Order, did not consider such non-regulatory alternatives as enforcement actions to address perceived deficiencies or the publication of tips or other informal guidance to encourage voluntary correction of perceived deficiencies. In addition, the Department failed to consider targeted regulatory solutions, such as an “on-request” requirement that would enable fiduciaries of all plan sizes who encounter challenges locating information to request assistance from the covered service provider.

ACLI is also concerned that the Department is pursuing a proposed regulation with respect to which, according to the preamble, the Department appears to have no reasonable basis on which to assess costs and benefits of the Proposal, contrary, in our opinion, to the requirements of EO 12866. Of note, the preamble states that “the Department lacks information on the time required by covered service providers to create a guide” and “lacks complete data and empirical evidence to estimate the costs for covered service providers to create the guide.” (79 FR 13958). Despite the lack of such information, the Department indicates that it “generally is skeptical that a guide and page number requirement is unreasonably burdensome” (79 FR13955). We do not understand the basis of the Department’s skepticism in this regard, given its stated lack of information on which to base such a conclusion, and in the presence of consistent feedback from the provider community on the limitations inherent in the data systems used for account administration, participant recordkeeping, and customer billing as well as the manner in which contracts are prepared and managed.

On March 20, 2012, Cass R. Sunstein, then Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, directed Agencies to consider the cumulative effect of regulations on regulated communities (the “Memorandum”). In this regard we note that the Proposal is an amendment to an “economically significant” regulation (29 CFR § 2550.408(b)(2)) within the meaning of EO 12866. Accordingly, rather than finding the proposed amendment “not economically significant”, we believe that the cumulative effects of the amendment should have been considered in conjunction with the economic effects of the regulation that it is amending. There is no indication in the Proposal’s preamble that the Department has undertaken such a review, as appears to be required by the Memorandum. The Memorandum also states that, to promote consideration of cumulative effects, Agencies should consider, among other things: the “[u]se of Requests for Information and Advance Notices of Proposed Rulemaking to obtain public input on . . . rulemakings that may have significant cumulative effects.”

As stated earlier, we believe that, given the absence of meaningful and reliable information or data in support of either the costs or benefits of the subject Proposal, the Department, pursuant to current standards and guidance governing the rulemaking process, is obliged to withdraw the current Proposal and consider other approaches to obtaining the information it needs to appropriately assess the need for and costs and burdens of a regulation in this area.

We believe a complete and accurate analysis of costs is particularly important here when, in the case of individual account plans, the cost of a rule intended to benefit plan fiduciaries likely will be borne by the plan’s participants and beneficiaries and, thereby, serve to reduce retirement savings. The Department recognized this likelihood in the preamble to the Interim Final Rule (75 FR 41607) when it stated that it “does not want to unnecessarily increase the cost and burden for service providers to furnish required information, especially to the extent such costs may be passed along to plan participants and beneficiaries, unless it is clear that the benefit to plan fiduciaries outweighs such costs and burdens.” We believe the Department was correct in being cautious in July 2010, and we recommend similar caution as it considers whether to move forward with the current Proposal. Further, given the Department’s recognition that compliance costs may be passed along to participants, we believe it is incorrect, as the Department appears to do in its analysis, to assume that all costs will be borne by covered service providers. Rather, the Department’s analysis, consistent with its own

assumption, should assume costs will be borne by the party that is paying for plan services. As it is common for the plan – and by extension, its participants - to pay for plan services, the Department’s analysis should have included a calculation of impact on retirement savings with respect to both implementation and on-going service provider compliance expenses.

As the costs to prepare and maintain cross reference guides are predominately fixed rather than variable, the size of a plan will likely have little effect on the overall cost. However, it is important to note that these compliance costs will likely have a disproportionately large impact on small plans and plan participants due to a lack of scale. For example, consider the effects of a \$1,000 charge on two plans, one with \$1 million in assets and 200 participants and another with \$50,000 in assets and 10 participants. For the larger plan, such a charge represents 0.10% of asset or \$5 per participant. For the smaller plan, such charge would represent 2.00% of assets or \$100 per participant. From a small plan perspective, adding additional expense to small plans will have an adverse affect on plan adoption rates and has the potential to result in plan terminations. From a provider perspective, the effect of both the expense and its effect on customer behavior may lead to fewer, less robust, and less flexible product offerings.

Current Practices Are Sufficient and Effective

ACLI members are confident that their disclosure practices have effectively communicated the fee and service information required by ERISA 408(b)(2). Our members provide fiduciaries with key customer contacts for questions and support under their service arrangements. To date, they have received relatively few inquiries from customers regarding the 408(b)(2) disclosures and no requests for cross reference guides.

The retirement services marketplace remains a highly competitive marketplace. Our members value their customers as well as their own time and resources. They work hard to ensure that communications with customers are effective. Had there been a significant number of inquiries, our members would have taken steps to mitigate any inconvenience to their customers and burdens on their staffs.

Our members offer a variety of products and service arrangements and prepare a variety of disclosures to comply with 408(b)(2). These vary significantly as a result of a number of factors, including but not limited to the market served, distribution arrangement, platform selected by the plan sponsor, number and type of products available and selected by the plan sponsor, and the extent to which the plan sponsor has contracted for customized services. As a result, from a service provider’s perspective, complying with 408(b)(2)’s current disclosure requirements comprises the entire range of elements independently selected by hundreds or thousands of plan sponsors. In some situations, a single comprehensive document is used: when an arrangement is comprised of multiple documents, typically a single comprehensive summary is used or a guide is prepared to help facilitate a review. However, none of our members include the cross references in the manner prescribed in the Proposal for reasons we will explain later in this letter.

Cost To Establish And Maintain Cross Reference Information For Guide

The costs necessary to enable our members to comply with a regulation that requires the degree of individualization and specificity contemplated by the Department’s Proposal will be substantial. While contracts, service agreements, prospectuses and other documents relevant to the disclosure of information under the Final Rule may be in some instances furnished electronically, neither the technology nor form of customer agreements enable electronic cross-referencing of sections or page numbers or any other sufficiently specific locators. At present, our members do not have internal or

external data sources from which to create the guide contemplated by the Proposal, nor are we aware of any forthcoming solutions. In this regard, we note that there is a significant difference between automating the substance of a 408(b)(2) disclosure document(s) for purposes of furnishing information and automating the creation of a cross reference guide with specific locators.

To comply with the Proposed Rule in the most efficient manner possible, our members will need to take the steps outlined below, each of which will take time and incur expenses which will drive up the cost of providing services to employee benefit plans as they represent work that is additive, rather than replacing current service tasks.

Purchase new or revise existing data systems – Existing data systems maintain the applicable fees and charges applied directly against plan assets. Some data systems include information regarding fees and charges applicable to plan investments. As noted, there has not been a reason to develop code to input and maintain cross reference information to contracts, service agreements, prospectuses and other documents that form the basis of the service arrangement. Thus, these systems do not include this information. To comply, service providers will need to replace or modify existing systems to include this information in a manner that ties a specific cross reference to a particular fee and/or service element.

Document Forms – The underlying documents that comprise a service arrangement are generally not stored in a single location nor are they all in an electronic form. It is common for source material such as insurance contracts and amendments thereto to be in paper files, in storage, or on microfiche. A member reports they have a retirement plan customer relationship that goes back to the 1920s.

Data Entry/Risks - It will require a manual effort to gather and input cross reference information. Whether input manually or, to the extent practicable, through the use of scan and tag technology, it is of the utmost importance that service providers carefully review the accuracy of the cross reference information. As proposed, a single mistake on the part of a service provider will lead to a prohibited transaction.

Staff Training/System Maintenance – Implementing new or revised technology will require staff training. In addition, it will be imperative that the new data sets be kept up to date. New workflows will need to be established to ensure that any change to the required cross reference information is immediately incorporated into the data system and disclosure process.

To put this in perspective, a somewhat analogous requirement might be to mandate that the Department of Labor produce a guide for each electronically filed Form 5500, including schedules and attachments (e.g., accountant's opinion), that identifies the page number on which each financial and other required reporting item is located. While the Department has a system for the electronic receipt and processing of reported information, we suspect that the system is not designed to produce such a guide. Similarly, while providers have systems for the electronic distribution of documents, such systems are not capable of producing the guides contemplated by the Department's Proposal. Moreover, we suspect that the ability of the Department to develop such a system would be cost prohibitive, just as production of the proposed guide will be for major covered service providers, even though a guide for each filed 5500 might facilitate the review of annual reporting information and data for some members of the general public. We further note that, just as the Department would have to invest significant time and money into estimating the costs and time required to develop such a guide for annual reports, so do covered service providers in estimating the required compliance costs and time required for the Department's Proposal, thus precluding any specific estimates at this juncture, particularly given the uncertainty and ambiguities of the Proposal.

Further, while providers may use a standardized form or agreement as a starting point, such agreements are frequently modified and amended on a customer-by-customer basis to accommodate the differing requests of each customer. As a result, over time, each customer's documents differ significantly from what started as a standardized form. Additionally, the standardized template used by providers also change over time to reflect changes in services available. Customers who hire a provider today will likely sign a very different document than one issued in prior years. As a result, the required information may reside on various pages, even across similar customers. As a practical matter there also is no standard location in investment documents where investment expense ratios can be found. The location varies by the type of document (e.g., prospectus, summary prospectus, participation agreement) and by distributor or manager. In many instances the cross-referenced documents may not be in the control of the covered service provider and, in the absence of a substantive change, the covered service provider may, in many instances, have no way of knowing that a section or page has changed. The most common example is prospectuses for registered funds, which we note are very common if not universal in small retirement plans.

The fact is, and contrary to the Department's working assumption, the individual most familiar with the location of information relating to services and fees with respect to any particular plan is most likely the responsible plan fiduciary, not the covered service provider that is responsible for thousands, if not tens of thousands, of different agreements. As discussed earlier, each responsible plan fiduciary has not only an obligation to act prudently, but a specific obligation under the Final Rule to ensure that they received the information required by the regulation with respect to which a failure to do so can result in significant excise tax liabilities. Based on the experience of our members, plan fiduciaries of all plan sizes have taken this obligation seriously.

Compliance with any rule that requires the degree of individualization and customization contemplated by the Proposed Rule would be substantial. Compliance would require the establishment of processes and procedures for reviewing documents, identifying section and page numbers for each agreement and monitoring each agreement on an on-going basis to identify page and/or section changes. As indicated earlier, given the unique nature of each service and fee arrangement, the fiduciaries of the plan, not the covered service provider, are best positioned to locate the information critical to their plan and the discharge of their fiduciary duties.

To build a technological capability that would accommodate the Proposed Rule also would be substantial and would, in all likelihood, take a number of years to develop. At this juncture, we are unaware of any way to leverage technology to overcome the manual work that is required to develop and maintain an accurate, reliable system on an on-going basis, particularly with regard to the type of unstructured data necessary to comply with the Proposed Rule.

Given the significant compliance challenges and costs, which the Department agrees will likely be passed on to participants and, therefore, reduce retirement savings, the Department should first explore more targeted actions such as those identified above, which would provide information about specific problems and the degree to which they were systemic and for why, and perhaps most importantly, could directly address particular situations identified.

Substantive Issues

Single document. The Proposal, at § 2550.40b-2(c)(1)(iv)(H)(1), would provide an exception from the guide requirement for disclosures in the form of a single document of a yet-to-be-determined size and, taking into account the preamble discussion, using a yet-to-be-determined font size. The Department invited comments on the appropriate size for such a document, as well as on other considerations that should be taken into account, such as font size.

The uncertain nature of this provision and breadth of possible issues and answers prevents us from providing any meaningful response and, in our view, is more appropriate for a survey or Request for Information (RFI), not a proposed rule. Moreover, we are concerned that, given the breadth of possible positions the Department might take in defining a single document for purposes of a final regulation, the regulated community will be foreclosed from providing meaningful comment on both the determination and the regulatory impact analysis in support of that determination. In any case, our members' experiences with designing the basic disclosures is that number of pages is a likely a poor indicator of complexity. We firmly believe that the regulated community should have the opportunity to comment on both the Department's determination and its support for that determination in advance of any final rule.

Guide. For plans that fail to satisfy the yet-to-be-defined single document exception, the Proposal, at § 2550.40b-2(c)(1)(iv)(H)(1), would require 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 delineated 408(b)(2) information.

As with the “single document” provision, the issues presented by this section challenge the ability of the regulated community to provide meaningful comment. To begin, the Department invites comments on whether the rule should permit choice of locators or whether the final rule should only require one. The Department further invites comments on whether page and section numbers are effective and feasible locators and what other locators may be preferable. In other words, the Department, in addition to raising the possibility that a guide may not be required by the final rule, raises the possibility that the final rule could be more restrictive and include locator requirements not vetted through the public comment process, but determined to be appropriate in the sole discretion of the Department.² As with the *single document* provision, the varying possible positions the public might address and the Department might take are numerous and, therefore, defy defining any reasonable starting point. Again, we suggest that the Department would benefit from a survey or RFI to better understand current practices and capabilities, technological and otherwise, prior to considering publication of a proposed rule and certainly in advance of any final rule, and prior to assuming that location of information in the prepared disclosures is a problem that could be remedied by cross references to underlying documents.

Adding to the uncertainty of the *guide* provision is the fact that compliance with the Proposal hinges on whether a plan fiduciary – or from a covered service provider's perspective, every plan fiduciary - can “quickly and easily” locate required information. This compliance standard is particularly significant because, as noted earlier, the Final Rule is in effect an exemption from ERISA's prohibited transaction provisions and compliance with a guide requirement will be an additional condition for exemption relief under that regulation. A failure to comply with the guide requirement, therefore, can result in significant excise tax liabilities for both covered service providers and plan fiduciaries. For this reason, clarity and certainty regarding any prohibited transaction exemption compliance standard is essential.

Unfortunately, a standard that conditions compliance on the ability of a fiduciary to act “quickly” and “easily” is anything but clear or certain. Such a standard only raises questions concerning how easily, how quickly, and who will be making that determination – the covered service provider, the plan fiduciary, the Department of Labor, or the Internal Revenue Service as they seek to impose and collect excise taxes for a violation of the regulation? As with other provisions of the Proposal, it is difficult to provide meaningful comments on the substance of the rule without significantly more guidance, including answers to the foregoing questions.

² 79 FR 13951, 13953. The Department states “[i]ndividuals are encouraged to comment on whether a final rule, **assuming it were to include a guide requirement**, should permit a choice of locators” (Emphasis supplied).

Separate document. The Proposal would require that the guide be furnished as a separate document. The Department explains that the separate document requirement is intended to ensure that the guide is brought to the attention of the responsible plan fiduciary. The Department further invites comments on whether a separate document is enough or whether the guide should be required to include – again yet-to-be-determined – specific language, such as an introductory statement explaining the purpose of the guide.

It is not clear – and the Department provides no explanation - why providing a guide as a separate document ensures that it is brought to the attention of the responsible plan fiduciary. Further, the practical utility of a guide with cross references provided separately from the documents that are cross referenced for fiduciaries is questionable and untested. As with other provisions of the Proposal, meaningful analyses and comment are difficult without more insight into the Department’s thinking on the issue.

Effective date

The Department proposes that the amendment to the Final Rule will be effective 12 months after the publication of a final amendment in the *Federal Register*.

As discussed above, there are so many unanswered questions and issues raised by the Department’s proposed amendment that, it is impossible to comment on what period of time would be required for reasonable implementation without resolution of those questions and issues. What we do know is that, given the absence of uniform contracts and agreements and the absence of technological solutions capable of enabling compliance with the Department’s current Proposal, it will take many, if not most, of our members considerably longer than 12 months to establish the processes and procedures necessary to ensure compliance, for both themselves and their customers, with the regulation and avoid the significant excise tax liabilities attendant to engaging in a prohibited transaction.

Recommendation

Given the foregoing issues and concerns regarding the subject Proposal, not the least of which are the significant compliance costs and possible reduction of retirement savings for plan participants and beneficiaries, we encourage the Department to withdraw the Proposal and undertake the research necessary to determine whether there is a compelling public need for action by the Department and, if so, whether there is a cost-effective solution – regulatory or non-regulatory - to addressing that defined need.

If, despite the foregoing, the Department determines to move forward with a regulation, ACLI strongly encourages the Department to abandon the costly and burdensome guide requirement in favor of a requirement similar to that set forth in paragraph (2) of § 2550.408b-2(c)(1)(iv)(H) of the Proposal. Such a provision would require covered service providers, as part of their 408(b)(2) disclosures, to identify a point of contact to assist requesting fiduciaries in locating information required by the regulation. Such an approach would appear to address the Department’s concerns by providing all plan fiduciaries, without regard to size, an equal and affirmative right to assistance in locating information, while avoiding the costs, burdens and other issues attendant to the Proposal. The Department should consider such an approach as an alternative and in conjunction with any additional future regulatory impact analysis as it considers whether or how to move forward with this initiative.

On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss them with the Department.

Sincerely,



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