



The
ERISA
Industry
Committee

June 10, 2014

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

RE: RIN 1210–AB08 (Proposed Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure)

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the request of the U.S. Department of Labor (“DOL”) for comments on the Proposed Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure (the “Proposed Amendment”).¹

ERIC’S INTEREST IN THE PROPOSED AMENDMENT

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

OVERVIEW

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

In the Proposed Amendment, the DOL is proposing to revise the 408(b)(2) regulations to require a guide to accompany the disclosures in certain circumstances. Covered service providers who made the initial disclosures in multiple or lengthy documents would need to provide plan fiduciaries with a guide that identified the document and/or the page on which each of the disclosures were made.

¹ U.S. Department of Labor, *Proposed Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure*, 79 Fed. Reg. 13949 (Mar. 12, 2014).

The DOL has also issued an Information Collection Request to evaluate the information on ERISA section 408(b)(2) that fiduciaries have been receiving from covered service providers. ERIC filed a comment letter with the DOL on its Information Collection Request.²

SUMMARY

ERIC appreciates the efforts of the DOL in the Proposed Amendment. The following is a summary of ERIC's comments, which are described in greater detail below:

- Very large plans should be treated differently from small and medium-sized plans for purposes of any guide requirement.
- The guide requirement should not apply to very large plans and it appears to be inconsistent with the President's Executive Orders for these plans.
- The DOL should define very large plans for purposes of the guide as those retirement plans having **5,000** or more participants or at least **\$100 million** in assets. ERIC recommends that the DOL direct service providers to use plans' Form 5500s that were filed for the prior year to determine if it is a very large plan. Covered service providers making initial disclosures to a plan could review the DOL's online Form 5500 database for this purpose.

DETAILED COMMENTS

I. Very large plans should be treated differently from small and medium-sized plans for purposes of any guide requirement.

A. Small plans have different issues from large plans with respect to the guide.

The DOL indicates in the preamble to the Proposed Amendment that it expects the guide requirement to be most helpful for fiduciaries of small to medium-sized plans. The DOL states:

“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.”³

Similarly, the DOL has stated in its Information Collection Request relating to the 408(b)(2) regulations that it intends to conduct focus groups with small pension plans (i.e., plans with fewer than 100 participants).⁴ The Information Collection Request indicates that the DOL is planning to

² The ERISA Industry Committee, *Proposed Information Collection Request Submitted for Public Comment; Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements* (May 12, 2014), available at http://www.eric.org/uploads/doc/retirement/ERIC_CmntLtr_FeeDiscl_Guide_051214.pdf.

³ 79 Fed. Reg. at 13951. The DOL also states in the preamble that “The Department believes that plan fiduciaries, especially in the case of small plans, need a tool to effectively make use of the required disclosures”. 79 Fed. Reg. at 13950.

⁴ U.S. Department of Labor, *Proposed Information Collection Request Submitted for Public Comment; Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements*, 79 Fed. Reg. 14085 (Mar. 12, 2014).

explore the current practices and effects of the 408(b)(2) regulations and gather information from small plan sponsors about the need for a guide.

ERIC agrees that small and medium-sized plans, unlike very large plans, are likely to benefit from the guide. For this purpose, we use the term “very large plans” to refer to retirement plans with at least 5,000 participants or at least \$100,000,000 in plan assets. As ERIC noted in our comment letter on the DOL’s proposed 408(b)(2) regulations that were issued in 2007,⁵ there is a tremendous range in the resources and information available to responsible plan fiduciaries when evaluating plan fees.

ERIC agrees that small and mid-sized plans have different needs with respect to the guide requirement and urges the DOL to recognize these differences.

B. In a variety of other contexts, the DOL has treated large plans differently from small plans.

The DOL has recognized the value of treating plans with 100 or more participants (“large plans”) differently from plans with fewer than 100 participants (“small plans”) in a number of contexts. For example, DOL regulations provide that small pension plans:

- Have a safe harbor for when participant contributions are considered plan assets;⁶
- Have a lower maximum penalty under the Delinquent Filer Voluntary Compliance Program (DFVCP);⁷
- Have simplified annual reporting requirements;⁸
- Have simplified requirements regarding the translation of summary plan descriptions into foreign languages;⁹ and
- Are not required to obtain an examination and report of an independent qualified public accountant under certain circumstances.¹⁰

The DOL also applies special rules for welfare plans with small numbers of participants, including differences in the rules for annual reports, examinations and reports of independent qualified public accountants, and COBRA continuation coverage.

ERIC urges the DOL to recognize that it can treat very large plans differently in the context of the Proposed Amendment as it has for other purposes.

⁵ ERISA Industry Committee (ERIC), College and University Professional Association for Human Resources (CUPA-HR), National Association of Manufacturers (NAM), Profit Sharing/401k Council of America (PSCA), Society for Human Resource Management (SHRM), U.S. Chamber of Commerce, *Letter to Department of Labor regarding Proposed Rule under 29 CFR Part 2550, Reasonable Contract or Arrangement under Section 408(b)(2) – Fee Disclosure* (Feb. 11, 2008), available at <http://www.dol.gov/ebsa/pdf/Ugoretz021108.pdf>.

⁶ 29 CFR § 2510.3-102.

⁷ Dep’t of Labor, *Delinquent Filer Voluntary Compliance Program*, 78 Fed. Reg. 6135, 6139 (Jan. 23, 2013).

⁸ 29 CFR § 2520.104-41.

⁹ 29 CFR § 2520.102-2.

¹⁰ 29 CFR § 2520.104-46.

II. The guide requirement should not apply to very large plans and it appears to be inconsistent with the President's Executive Orders for these plans.

The guide requirement contained in the Proposed Amendment should not apply with respect to very large plans as it would generate additional costs to plans, participants, and service providers without a corresponding benefit to participants. Furthermore, the guide would be inconsistent with the President's Executive Orders for these plans.

A. *The DOL's guide requirement would generate additional costs for plans and their participants without a corresponding benefit.*

The guide requirement would cause fiduciaries of very large plans to have to expend resources with respect to the guide without a corresponding benefit to the plan or its participants. Service providers to very large plans will have to spend resources to generate the guide, and, as a result, will either offer fewer additional services to plans or charge the plan for generating the guide. For example, to offset the increased cost of generating the guide, the service provider may generate fewer targeted communications to participants or provide fewer participant seminars. If the costs for the guide are passed through to the plan, some plans will pass through these costs to participants. Thus, a requirement that is intended to reduce the fees will actually result in additional fees being paid by some plans and plan participants.

Very large plans will not benefit from the guide. As ERIC noted in our comment letter on the DOL's proposed 408(b)(2) regulations that were issued in 2007, sponsors and fiduciaries of large plans typically have sophisticated professionals and experts to assist them.¹¹ Fiduciaries of very large plans have sophisticated professionals and advisors which enable them to obtain and analyze the relevant information to properly evaluate their service providers.

Fiduciaries of very large plans can use the multitude of resources available to them to analyze their plans' arrangements with their service providers. They typically also have relationships with their service providers that enable them to get clarification and additional details, as needed. As a result, a guide or summary would result in an additional expense to service providers that would ultimately harm the plan participants as the additional costs that the service provider incurs to prepare the guide will likely be passed through to the plan and, in many cases, to the plan's participants, and the service provider will provide the guide in lieu of providing some other service or disclosure that is more beneficial to plan participants.

Additionally, the proposed guide requirement would unnecessarily increase the responsibilities and liability of fiduciaries of large plans without any corresponding benefit to participants. If fiduciaries receive a guide, they will need to devote time and resources to make sure that they receive it, to review it, and to correct any ambiguities, inconsistencies or errors in order to ensure that they have acted prudently.

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

Furthermore, generating a guide would require service providers to create new systems, even if they only service very large plans that would not benefit from the guide. The DOL states in the preamble to the Proposed Amendment that it believes that small and large plans use the same service providers.¹² However, ERIC members have indicated that many of their vendors do not provide services to small or medium retirement plans. A report on the defined contribution plan market explains that “While some recordkeepers clearly dominate across plan sizes, several recordkeepers have found a niche among a certain market segments.”¹³ Furthermore, the report states that “Who a plan sponsor defers to for investment insight varies by plan size—smaller plans are more likely to use financial advisers and recordkeepers while larger plans are more likely to use investment consultants and investment managers.”¹⁴

ERIC’s members are very familiar with the significant challenges requirements like the guide would impose on a company’s Information Technology (IT) resources. Although our plan sponsor members would not be required to generate the guide, they have had to comply with other requirements from the DOL that impose significant burdens on IT resources. Companies have a limited number of IT professionals available to work on the myriad of projects needed by the company. All of a company’s departments (including the Human Resources department) work diligently to justify the need for and timing of their projects. When a new project requires immediate attention, such as when new regulations are issued, the IT professionals are no longer available to work on the other projects that have been awaiting their attention. ERIC urges the DOL to recognize that changes that require the use of IT resources are particularly challenging and that it can be a significant period of time before IT professionals may be available to work on new projects.

Because of the additional burdens the guide would place on very large plans and their participants and fiduciaries, ERIC urges the DOL to exclude very large plans (that is, retirement plans with 5,000 or more participants or \$100 million in assets) from any guide requirement.

B. The guide requirement is also inconsistent with the President’s Executive Orders as it applies to very large plans.

The guide requirement does not advance the government’s objectives for very large retirement plans and would be unduly burdensome. Executive Orders direct agencies to refrain from issuing unnecessary regulations and balance the additional costs that regulations impose on companies with a corresponding benefit to the system. They also direct agencies to maximize net benefits, promote flexibility and reduce regulatory burdens on companies.

Executive Order 12866 directs the agencies to analyze the costs and benefits of regulatory alternatives, including the alternative of not regulating, and to choose an approach that maximizes net benefits.¹⁵ Similarly, Executive Order 13610 directs the agencies to consider the cumulative effects of regulations and give priority to reforms that would reduce burdens.¹⁶

¹² 79 Fed. Reg. at 13956.

¹³ Strategic Insight, *DC Market Review: Segmentation and Plan Sponsor Relationships* 6 (Dec. 2011), available at <http://c.ymcdn.com/sites/www.trustivo.com/resource/resmgr/dc-market.pdf>.

¹⁴ *Id.* at 9-10.

¹⁵ *Executive Order 12866: Regulatory Planning and Review* (Sep. 30, 1993). See also, *Executive Order 13497: Revocation Of Certain Executive Orders Concerning Regulatory Planning And Review* (Jan. 30, 2009) (revoking certain

Furthermore, the Office of Management and Budgets (“OMB”), in a memo to the heads of the Executive Agencies, directed them to demonstrate that a proposed action is necessary before recommending regulatory action.¹⁷ The memo includes language from Executive Order 12866, which states “Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need...”

As discussed above, the guide would create additional costs for very large plans without any additional benefit to the plan or its participants. Service providers would need to expend time and resources to create the guide, plans would incur additional expenses and fiduciaries would need to take the time to review the guide and address any ambiguities and errors, while the plan and its participants would receive no benefits from the additional cost and effort. Although the preamble to the Proposed Amendment indicates that the guide would be beneficial for small and medium sized plans, the DOL does not demonstrate that there is a compelling need for the imposition of the guide requirement for very large plans. ERIC urges the DOL to consider the impact on very large plans consistent with Executive Orders and the OMB directive.

III. The DOL should define very large plans for purposes of the guide as those retirement plans having 5,000 or more participants or at least \$100 million in assets.

In order to ensure that the plans that would benefit from the guides receive them, the DOL should only exclude very large plans with 5,000 or more participants or at least \$100 million in assets from the guide requirement.

The DOL has classified plans by size in other regulations. For example, DOL regulations provide that pension plans with fewer than 100 participants have simplified requirements regarding annual reporting,¹⁸ summary plan descriptions¹⁹ independent qualified public accountant reports,²⁰ and deposits of participant contributions.²¹ Additional special rules apply for welfare plans where there are special rules for: annual reports; examinations and reports of independent qualified public accountants; and COBRA continuation coverage.

For purposes of any guide requirement, the DOL should provide that it does not apply to very large plans with at least 5,000 participants or at least \$100 million in assets. These thresholds are used in a variety of contexts involving retirement plans. For example, the 5,000 participant threshold is used in reports published by the government, industry professionals, and academics, including the DOL, Government Accountability Office (GAO), and Pension Benefit Guaranty Corporation (PBGC).²² In fact, the GAO stated in its report on rollovers, that it “defined small plans as those with

amendments to Executive Order 12866) and *Executive Order 13610: Identifying and Reducing Regulatory Burdens* (May 10, 2012) (requiring agencies to issue guidance in accordance with Executive Order 12866).

¹⁶ *Executive Order 13610: Identifying and Reducing Regulatory Burdens* (May 10, 2012).

¹⁷ Office of Management and Budget, *Circular A-4: Regulatory Analysis* (Sep. 30, 2003).

¹⁸ 29 CFR § 2520.104-41.

¹⁹ 29 CFR § 2520.102-2.

²⁰ 29 CFR § 2520.104-46.

²¹ 29 CFR § 2510.3-102.

²² See, e.g., Dep’t of Labor, *Private Pension Plan Bulletin* (Jun. 2013); PBGC, *Pension Data at a Glance* (1975-2011); Gov’t Accountability Office, *Labor and IRS Could Improve the Rollover Process for Participants* (Mar. 2013); Gov’t Accountability Office, *Plan Freezes Affect Millions of Participants and May Pose Retirement Income Challenges* (Jul. 2008).

under 100 participants, medium plans as those with 100-4,999 participants, and large plans as those with 5,000 or more participants”.²³

Similarly, the \$100 million in plan asset threshold has also been frequently used by the government, industry professionals, and academics, including the DOL, Government Accountability Office (GAO), and Congress.²⁴ For example, the Pension Protection Act provides a statutory exception from ERISA’s prohibited transaction rules for cross-trading under certain circumstances for plans with at least \$100 million in plan assets.

Additionally, data from the DOL reflects that the number of plans that would be impacted by an exclusion for very large plans would not be over-inclusive. The DOL’s analysis of the annual reports filed by retirement plans sponsored by private employers reflects that in 2011, only 3,596 plans had 5,000 or more participants and that only 6,526 plans had \$100 million or more in assets.²⁵ Additionally, most of these plans with \$100 million or more in assets will also have 5,000 or more participants, however, the DOL does not provide data on plans that satisfied both thresholds.

ERIC recommends that the DOL direct service providers to use plans’ Form 5500s that were filed for the prior year to determine if it is a very large plan. Covered service providers making initial disclosures to a plan could review the DOL’s online Form 5500 database for this purpose.

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

Sincerely,



Kathryn Ricard
Senior Vice President, Retirement Policy

²³ Gov’t Accountability Office, *Labor and IRS Could Improve the Rollover Process for Participants* (Mar. 2013).

²⁴ See, e.g., Dep’t of Labor, *Private Pension Plan Bulletin* (Jun. 2013); Gov’t Accountability Office, *Increased Educational Outreach and Broader Oversight May Help Reduce Plan Fees* (Apr. 2012); Pension Protection Act of 2006, Pub. L. 109–280 (Aug. 17, 2006).

²⁵ Dep’t of Labor, *Private Pension Plan Bulletin* (Jun. 2013).