



AMERICAN BENEFITS
COUNCIL

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**Re: RIN 1210 – AB53; 408(b)(2) Guide
Comment on Amendment Relating to Reasonable Contract or Arrangement
Under Section 408(b)(2) – Fee Disclosure**

Dear Sir or Madam:

The American Benefits Council (“Council”) appreciates the opportunity to comment on the Department of Labor’s (“DOL” or “Department”) proposed amendment to the final regulation under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (“ERISA”). The proposed amendment (the “proposal”) would newly require certain service providers to furnish plan fiduciaries with a “guide” to the disclosures required by the Section 408(b)(2) regulation if the disclosures are provided in multiple documents or a single document that exceeds a to-be-specified number of pages.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

The Council and its membership support the DOL’s efforts to ensure that plan fiduciaries are provided with transparent, meaningful information about plan-related fees, compensation, and services, to help them determine whether a contract or

arrangement is “reasonable,” as is required by Section 408(b)(2). To this end, the Council was and remains supportive of the information that “covered service providers” are required to provide under the Section 408(b)(2) regulation.¹ This regulation, which was finalized in 2012, requires covered service providers to disclose to plan fiduciaries information such as the providers’ direct and indirect compensation.

Although we continue to support the disclosure of information required by the 408(b)(2) regulation, the Council has very strong concerns with regard to the proposed amendment, which would require the addition of a “guide” to the 408(b)(2) disclosures in many cases. More specifically, the Council is concerned that the guide would result in substantial costs and burdens (which will likely be passed along to plans and participants) while providing only minimal value to plan sponsors and fiduciaries.

SUMMARY OF THE COUNCIL’S COMMENTS ON THE PROPOSAL

As explained in more detail below, the Council has the following comments regarding the Department’s proposal.

1. There is no demonstrated need for a plan sponsor “guide” to the 408(b)(2) disclosures. Feedback from plan sponsors regarding their receipt and use of the 408(b)(2) disclosures is inconsistent with a conclusion that a guide is needed, and the DOL has not offered evidence to the contrary.
2. The Department has issued the proposal before gathering information to identify potential problems with the 408(b)(2) regulation and before assessing the significance of any problems relative to the cost of a proposed solution. Issuing a proposal before determining whether there is a problem to be addressed is not appropriate, particularly in light of Executive Order 12866. The first step should have been to issue a request for information regarding the need for a guide and the most cost-effective ways to structure a guide, if needed. The Department could remedy this problem by withdrawing the proposal and issuing a request for information.
3. The guide proposal contains difficult rules with a substantial cost. Any benefits of the proposal, *to the extent that it is even possible to implement in its current form*, are far outweighed by the inordinate expense that service providers will face in implementing and updating their guides because the proposal will in many cases require the use of manual processes.

¹ See Comment Letter from American Benefits Council to Office of Regulations and Interpretations (August 26, 2010), available at <http://www.dol.gov/ebsa/pdf/1210-AB08-0017.pdf>.

4. The very large new costs created by the current proposal will be passed on to large plans and participants, while producing, at best, only marginal benefits for large plans. In the small plan market, the large cost increase could force service providers to withdraw from the market or severely limit their offerings in that market in order to avoid a guide requirement that small plans cannot afford to pay for. Even large plan sponsors would likely experience more limited investment and service offerings as providers may be effectively compelled to avoid the guide requirement due to its unworkability, even where the cost could be passed along to the large plan.
5. If the Department moves forward with any guide requirement, any amendment should be implemented on a prospective basis only for newly entered into service arrangements, and DOL should address the proposal's difficult and unclear standards. Also, DOL should consider whether simply requiring a service provider to supply its contact information to plan sponsors for assistance would better serve the Department's goals than a guide, especially in light of the wide variety of ways in which plan sponsors elect to set up their plans' investment and service arrangements.

COMMENTS ON THE PROPOSAL

1. There is no demonstrated need for a guide to the 408(b)(2) disclosures.

As noted above, in 2012 the DOL finalized the regulation under Section 408(b)(2) of ERISA that requires covered service providers to disclose substantial information to plan fiduciaries. These disclosures are required in order to provide fiduciaries with the information they need to ensure that a service contract entered into by a plan is reasonable and that no more than reasonable compensation is paid for the services received by the plan.

The Council's service provider membership spent considerable time, effort, and money to comply with the 408(b)(2) disclosure regulation. Relatedly, the Council's plan sponsor membership spent considerable time – as they always have – reviewing their plans' services and fees. At no time since the effective date of the regulation has any sponsor asked us to seek a change in the law to require a guide to be provided. Whereas there have been indications that a guide might be helpful to some, that help is clearly very marginal, since substantially all of the plan sponsor members we reached out to reported that they were able to find the information they needed without a lot of work. In short, our members have sent us a clear message that this is not an area in need of reform.

In fact, our members have shared their concern that any amendments to the regulation not limit the flexibility that service providers and plan sponsors currently

have to determine how the 408(b)(2) disclosures may best be shared with a particular plan sponsor. The flexibility currently allowed by the regulation in terms of how and in what format the disclosures are provided appears to be working well and is appreciated by the parties involved. It is important that plan sponsors retain this flexibility in working with their service providers to make changes to services and agreements as needed to best meet the needs of their plans, yet the proposal will likely hinder this flexibility from both a content and timing standpoint.

Under the proposal, the Department would amend the 2012 regulation to require a service provider to provide a “guide” if the 408(b)(2) disclosures are either (1) contained in multiple documents, or (2) contained in a single document that exceeds a page limit. In the preamble to the proposal, the DOL explained that at the time the 408(b)(2) regulation was finalized in 2012, the DOL was not prepared to implement a guide or similar requirement because it lacked specific suggestions or data on how to best structure such a requirement. Furthermore, the Department lacked information on what the real costs of such a requirement would be. Now, two years later, the DOL has not set forth any new information or evidence regarding the need for a guide, the right way to structure it, or the cost of its implementation, and yet the Department has issued a proposed amendment to the regulation requiring a guide.

2. The Department should establish a need for a guide before moving forward.

As stated above, DOL has proposed a guide requirement for the 408(b)(2) regulation without having first demonstrated the need for such a guide. At the same time that the Department proposed the guide requirement, it also announced that DOL would be conducting focus groups with small plan sponsors to inquire about the effectiveness of the 408(b)(2) disclosures. DOL noted that the results of the focus groups would likely not be made available until after the comment period for the guide proposal closes on June 10, 2014.

The Council supports efforts to collect feedback regarding the effectiveness of the 408(b)(2) disclosures through the use of broad-based focus groups and other similar means. Conducting such focus groups – especially if the groups are expanded to include large plan sponsors and the questions are designed to explore all aspects of the rule and all perspectives – may help service providers learn how to better serve plan fiduciaries under the current regulatory regime. And, such activities may provide DOL with the information it needs to truly determine (1) whether a guide or other amendments to the regulation are necessary, and (2) if so, how best to structure such amendments to most efficiently achieve the desired results. However, proposing the guide requirement prior to collecting and analyzing the focus group results can very naturally lead to costly requirements that are either not needed or not well targeted to address any issues that are discovered.

We respectfully suggest that DOL first conduct focus groups with small and large plan sponsors in addition to service providers, analyze the feedback obtained, and only then determine whether it is appropriate to require a guide or make other amendments to the 408(b)(2) regulation. In addition, the DOL should issue a request for information on the need for a guide, the cost of the guide proposed, and suggestions as to how to structure any guide in a way that makes it workable and cost-effective. Executive Order 12866 states that agencies “shall identify the problem that it intends to address...as well as assess the significance of that problem.” This Executive Order reflects a fundamental point that should guide all regulatory efforts: new burdens should not be imposed without a careful fact-based review of whether the benefits of the new rules justify the costs. Until the DOL identifies a problem with the 408(b)(2) regulation, determines its significance, and evaluates the cost of addressing it, the Department should withdraw its proposal for the guide.

3. The guide proposal contains difficult rules at a substantial expense.

Any benefits of the current proposal to require a 408(b)(2) guide will be far outweighed by the inordinate expense that service providers will face in creating and updating the guides. The proposal’s primary cost driver is the requirement that, if the 408(b)(2) disclosures are not contained in a single document or if the document exceeds a to-be-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” (emphasis added).²

The Council’s service provider members have indicated to us that the contracts or arrangements they enter into are highly customized according to the plan sponsor’s preferences and selection of services. This is consistent with our plan sponsor members’ experience. As a result, the information contained within such documents is neither standard in content nor standard in format. For example, the same 408(b)(2) disclosure may be provided in Section 4.4 on page 8 of one contract, but is located in Section 5.4 on page 10 of another contract concerning a different plan. The nature of these documents means that *a manual process will often be required* in order to fulfill the proposed guide requirement. Technology will be of little use in these cases.

Adding further complexity and expense to the proposed guide is the fact that required disclosures, especially those concerning a plan’s investment options, may be contained in a third-party’s document such as a mutual fund prospectus. Third-party documents similarly lack a uniform structure and will also require a manual process to provide a “locator” within the guide. There is currently no single depository for these

² 79 Fed. Reg. 13,949, 13,951 (Mar. 12, 2014).

documents that makes them readily available. Even more challenging, there is no requirement on the part of a third party to inform a service provider when the information contained in its disclosure document or the location of such information has changed. As a result, service providers will be forced to manually monitor and continually review all third-party documents (including all prospectuses or similar information from non-registered investment options) that contain required 408(b)(2) disclosures in order to determine whether the information contained in a guide must be updated.

In some cases, this challenge with respect to the requirement to disclose information contained in third-party documents could render the proposal literally impossible to implement in its current form. This is especially true where a plan offers an extensive number of investment options.

In addition, despite these daunting compliance challenges, the proposed amendment does not provide relief for service providers who act in good faith or who commit merely a *de minimis* error. We ask that the DOL consider providing such relief regardless of the final form of the proposal, should the Department move forward with a guide requirement in any form.

4. The enormous cost of the proposal will force service providers to withdraw from the small plan market or severely limit their offerings to small and large plans.

How will service providers deal with these very material additional costs of producing a guide? Generally, this will be done in two ways. First, with respect to larger plans, service providers will be forced to pass on the cost in the form of higher administrative costs or fewer services. With increasing numbers of plans passing on administrative costs to participants, it is the participants who will suffer from the added cost of the guide. These cost increases for participants go directly against the broad and important policy objectives of increasing retirement security through cost-effective plans.

In the case of small plans, there is very little capacity for plans to pay higher fixed costs. Because the guide adds a new fixed cost on a per plan basis, small plans will not be able to easily absorb the additional cost of the guide, and this could make the thin profit margins disappear in a market that is already vulnerable. (Compare this likely result to the Department's requirements for the Form 5500, which includes a streamlined process for smaller plans to reduce the cost burden on those plans least able to spread the cost among participants.) In fact, many service providers have already been moving away from the smallest markets due to rising costs and the low capacity of the plans to pay.

In this context, faced with the prospect of resorting to manual processes and incurring substantial additional expense, service providers will need to seek to minimize their costs by avoiding being subject to the guide requirement in the first place. Because the proposal would only require a guide where the 408(b)(2) disclosures are located in multiple documents or in a single document that exceeds a certain number of pages, the proposal will encourage providers to use all available means to provide the disclosures within one document that falls under the to-be-specified page limit. This could entail reducing the amount of helpful (but not technically required) information provided, or utilizing less user-friendly fonts, formats, and designs. Plan sponsors may also lose materials that are not required, but that they view as helpful, if service providers are required to shift their resources into creating the required guide. These responses will likely have an adverse effect on both large and small plan sponsors, because if a service provider makes basic formatting changes to how it presents certain information, it is likely to adopt these changes for all sizes of plans.

Perhaps of greatest concern is the fact that service providers have another option – they can simply withdraw from the small plan market or limit the number of offerings they make available to small and large plans to avoid the costs and potential uncertainties of the new rule. In fact, many of our service providers have indicated to us that if this rule went into effect, they might be forced to do exactly this in order to avoid triggering the guide requirement.

The Council notes the irony of amending a regulation aimed at helping plan sponsors monitor and reduce plan fees in a way that itself creates material, excess costs for plans, encourages sparse, less helpful content, and discourages plan offerings. The current proposal will result in unjustifiable cost increases (and likely fewer service and investment options) for plans and their participants because of the proposal's difficult rules that require extensive manual intervention.

It is critical for DOL to understand the implications of moving forward with the proposal in its current form. The proposal would result in guides being provided to employers who do not need such a guide, and it will cause small employers in particular – the ones who can least afford the increased costs – to lose access to services and options. The Council urges DOL not to disadvantage participants by raising the costs in large plans or forcing the elimination of services for small and large plans by moving forward with the guide requirement.

5. Any guide requirement must be implemented on a prospective basis only and contain clear standards.

If the Department moves forward with its proposed amendment to require a “guide,” the Council has the following comments and suggestions for improving the proposal in order to reduce its cost and improve the clarity of its requirements.

First, any requirement to provide a guide should be implemented on a *prospective basis only* for service contracts and arrangements entered into after the regulation is effective. Although it is not clear, it appears from the proposal that the DOL may intend for existing contracts and arrangements to be subject to the guide requirement. The Council urges the Department not to apply the amendment to contracts or arrangements entered into prior to the effective date of a final amendment. Neither the documents nor the systems being used to administer and update the documents were designed with the requirements necessary to produce the proposed guide.

Second, even if the amendment is imposed on a prospective basis only, the proposed twelve-month implementation period may well be insufficient. This will be especially likely for service providers facing extensive manual processes and variations in documents.

Third, any finalized amendment requiring a guide must contain clear, administrable standards that enable service providers to implement the guide efficiently and with confidence that they have complied with the regulation. To this end, the Council offers the following comments in addition to those already stated throughout this letter:

- ***Administrable locator.*** As discussed above, the proposed regulation requires the use of a page number or other specific locator. This is the heart of the problem, which makes the proposal so unworkable and costly, since there is no way in many instances for service providers to automate the production of guides that contain specific locators. We urge the Department to issue a request for information regarding how to create a workable guide that is administrable. The request for information could cover this issue, as well as whether there is a need for a guide, and, if so, how the guide should be structured.
- ***Locator other than page number.*** In the event that the Department does not go in the direction recommended above, more clarity is needed regarding the locator requirement. If a guide refers to the location of the 408(b)(2) disclosures using something other than a page number, the proposal requires that the locator enable “the responsible plan fiduciary to quickly and easily find” the required information. Service providers will have no way of knowing whether they have satisfied this “quickly and easily” standard. Because the failure to comply with 408(b)(2) potentially creates both a fiduciary breach and an excise tax on “any disqualified person who participates in the prohibited transaction,”³ plan sponsors must need be able to demonstrate that they were able to find the disclosure

³ Internal Revenue Code Section 4975(a).

information “quickly and easily,” presenting very real compliance concerns. In addition, this requirement seems to assume that plan fiduciaries cannot find the information they need to adopt a service arrangement or investment option in the first instance, which is a conclusion inconsistent with our plan sponsor members’ experience as well as basic fiduciary requirements.

- ***Change notices as “multiple” documents.*** Under the current 408(b)(2) regulation, the service provider generally must disclose changes in information to the plan fiduciary no later than 60 days after the service provider is informed of the change. These “change” notices usually do not repeat the entire 408(b)(2) disclosure but rather simply inform the plan fiduciary of the change. As previously described, a guide would be required when the 408(b)(2) disclosures are contained in multiple documents or in a single document that exceeds a specified page limit. If, prior to issuing a change notice, the 408(b)(2) disclosures were contained in a single document under the to-be specified page limit, will the change notice itself be considered a second document triggering the requirement for a guide? Clearly, the answer should be no.
- ***Meaning of “separate” document.*** When a guide is required, the proposal states that the guide must be in a “separate” document. A blanket requirement for a separate document appears to be unnecessary, especially where a guide is required simply because a document containing all of the required 408(b)(2) disclosures exceeds the specified page limit. A guide – or even a simple table of contents – at the beginning of a document would be as or more useful. Also, the meaning of “separate” is not clear. May the guide be provided in a single email that contains additional documents as attachments? May the guide be included in the same envelope with other documents? What if the guide is attached by a paper clip to another document?

In closing, the Council observes that the proposal would require covered service providers to identify a person or office, including contact information, whom the responsible plan fiduciary may contact regarding the disclosures. We ask that DOL consider whether simply adding this piece of information as a required element of the 408(b)(2) disclosures would accomplish the Department’s goals motivating the proposal. The Council’s plan sponsor members take their fiduciary duties seriously, which includes reviewing documents that contain the 408(b)(2) information and asking questions if they need more information. Although many providers already supply their contact information, doing so is not currently a requirement under 408(b)(2). Adding this information could be done at a minimal cost and would allow any plan fiduciary who is uncertain of the content or location of the disclosures to receive personal assistance with his or her question – almost certainly a far better outcome than any guide could provide.

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Again, we appreciate the opportunity to provide comments on the subject of the proposed 408(b)(2) guide. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy