

# Fact Sheet



U.S. Department of Labor  
Employee Benefits Security Administration  
March 2014

## Proposed Regulation to Require a Guide to Assist Plan Fiduciaries in Reviewing 408(b)(2) Disclosures

*Regulations under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), require covered pension plan service providers to furnish detailed disclosures to plan fiduciaries before entering into, extending or renewing contracts or arrangements for services. The Department is proposing to amend these regulations to require covered service providers to furnish a guide along with the required disclosures, if the disclosures are contained in multiple or lengthy documents.*

### Background

- ERISA's fiduciary provisions require plan fiduciaries, when selecting and monitoring service providers and plan investments, to act prudently and solely in the interest of the plan's participants and beneficiaries. Responsible plan fiduciaries also must ensure that arrangements with their service providers are "reasonable" and that only "reasonable" compensation is paid for services. Fundamental to the ability of fiduciaries to discharge these obligations is obtaining information sufficient to enable them to make informed decisions about an employee benefit plan's services, the costs of such services, and the service providers.
- Arrangements for how services are provided to employee benefit plans and how services providers are compensated (e.g., through revenue-sharing and other arrangements) have become increasingly complex, making it difficult for many plan sponsors and fiduciaries to understand how, and how much, service providers are compensated.
- In 2012, the Department published final regulations under section 408(b)(2) of ERISA requiring specific disclosures from plan service providers to ensure that responsible plan fiduciaries are provided the information they need to meet their fiduciary obligations when selecting and monitoring service providers for their plans. These regulations allow covered service providers the flexibility to satisfy their disclosure obligations using different documents from various sources as long as the documents, collectively, contain the required disclosures. The preamble to the final regulations notes concern with this flexibility and the Department's intent to publish a notice of proposed rulemaking in the future, under which covered service providers would be required to furnish a guide or similar tool to assist responsible plan fiduciaries' review of initial disclosures.

### Overview of Proposed Amendment to 408(b)(2) Regulation

- Since publication of the final rule, the Department has been reviewing service providers' disclosures and plan fiduciaries' experiences in receiving the disclosures. The Department also has been reviewing comments on the guide issue submitted in connection with the interim final rule under section 408(b)(2). Based on these reviews, the Department now proposes to require covered service providers who make their disclosures through multiple

or lengthy documents to furnish a guide to such documents. The guide must specifically identify the document, page, or, if applicable, other sufficiently specific locator, such as section, that enables the responsible plan fiduciary to quickly and easily find the specified information, as applicable to the contract or arrangement. The proposed provision requires a specific locator, including the identity of the document and where the information is located within the document.

- If a guide is required, the covered service provider must direct the fiduciary to the place in the disclosure documents where the fiduciary can find:
  - The description of services to be provided;
  - The statement concerning services to be provided as a fiduciary and/or as a registered investment adviser;
  - The description of: all direct and indirect compensation, any compensation that will be paid among related parties, compensation for termination of the contract or arrangement, as well as compensation for recordkeeping services;
  - The required investment disclosures for fiduciary services and recordkeeping and brokerage services, including annual operating expenses and ongoing expenses, or if applicable, total annual operating expenses.
- The guide will assist responsible plan fiduciaries by ensuring that the location of all information required to be disclosed is evident and easy to find.

## Public Notice and Comment on the Proposal

The Department published the proposal in the **Federal Register** on March 12, 2014. The proposal is contained in a Notice of Proposed Rulemaking (NPRM) that invites public comments from interested persons on a guide requirement generally as well as on specific elements of such a guide. For instance, the NPRM specifically seeks comments on the use of the two alternate locators, as well as whether and why other locators may be preferable. The NPRM also invites comments and suggestions as to other alternative solutions and whether and how such alternatives would be more, or less, beneficial to plan fiduciaries, as compared to the proposed guide. Commenting parties are asked to take into account the costs and burdens to covered service providers, and possibly other parties, to prepare such tools. For instance, the NPRM specifically invites comments on whether an amendment instead should require that covered service providers furnish a summary of specified “key” disclosures. Comments can be submitted electronically by email to [e-ORI@dol.gov](mailto:e-ORI@dol.gov) or by using the Federal eRulemaking portal at [www.regulations.gov](http://www.regulations.gov). All comments will be available to the public, without charge, online at [www.regulations.gov](http://www.regulations.gov) and [www.dol.gov/ebbsa](http://www.dol.gov/ebbsa), and at the EBSA Public Disclosure Room.

## Focus Group Testing

Elsewhere in the same version of the 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 the 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) 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 furnished 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, 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.

## **Costs and Benefits of the Proposed Regulation**

EBSA estimates that significant benefits will result from the reduced time needed for fiduciaries to obtain compensation and related information needed to fulfill their fiduciary duties. 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.

EBSA estimates that the amendment will not be economically significant. The Department's low-range estimate of the cost covered service providers would incur to create their guides is approximately \$6.7 million annually and its high-range estimate is \$22.2 million annually.

The proposed regulation also includes a request for public comments on the Department's regulatory impact analysis.

## **Effective Date**

The Department proposes that the amendment to the final rule become effective 12 months after publication of a final amendment in the Federal Register.