Plan Sponsor Council of America
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June 10, 2014

Via Email (e-ORI@dol.com)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB08; 408(b)(2) Guide
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Amendments to Section 408(b)(2) Fee Disclosure Rules

Dear Sir or Madam:

The Plan Sponsor Council of America ("PSCA") appreciates the opportunity to comment on the Department of Labor's ("DOL") proposed amendments to the final rule concerning disclosures under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"). PSCA strongly supports DOL's continuing efforts to ensure that meaningful and effective disclosures are made available to plan fiduciaries so they can better assist plan participants in making well-informed decisions. At the same time, PSCA is mindful of the need to offer effective assistance to fiduciaries without imposing undue burdens and costs on plan service providers, which could ultimately harm plan participants. While we applaud DOL's intentions, we believe it is premature to offer the proposed amendment at this time.

PSCA is a national, non-profit association that advocates on behalf of 1,200 companies and their six million employees for increased retirement security through profit sharing, 401(k), and related savings and incentive programs. PSCA was established in 1947 and its member companies include both large and small employers ranging in size from Fortune 100 firms to small, entrepreneurial businesses. Our members include both plan fiduciaries *and* plan service providers, working together to improve the defined contribution landscape. It is from this dual perspective that PSCA expresses concerns about the proposed changes to plan service provider disclosure requirements under Section 408(b)(2).

After surveying our members on this topic, we believe it is premature to require plan service providers to produce a guide for the purpose of assisting plan fiduciaries with locating and understanding initial disclosures under Section 408(b)(2) when such disclosures are "contained in multiple or lengthy documents." In addition, we are concerned that if this proposal moves forward before all relevant information can be gathered, it could result in unnecessary and

burdensome policies that ultimately fail to enhance plan sponsors' abilities to meet their fiduciary obligations and would do little to help plan participants. Our concerns stem largely from the lack of evidence to support the "guide" approach outlined in the proposal — especially because the information-gathering process is ongoing and has not yet produced a clear picture of a specific problem.

Accordingly, we believe it is inappropriate to consider any proposed rulemaking until the potential problem is thoroughly understood and its most suitable solution can thus be identified. In addition, we believe the guide requirement could result in burdens and costs for service providers that may ultimately harm plan participants. Thus, we encourage DOL to continue gathering and analyzing feedback from plan fiduciaries and plan service providers regarding the effectiveness of the current regulatory regime under Section 408(b)(2) before requiring additional methods for enhancing disclosures.

Background on Proposed 408(b)(2) Fee Disclosure Guide

DOL issued a final rule on February 3, 2012, requiring that certain service providers to employee pension benefit plans disclose information about their compensation and potential conflicts of interest.[1] The disclosures were designed to ensure that plan fiduciaries have the information they need to meet their fiduciary obligations to select and monitor service providers, enabling them to prudently protect plan assets, including participants' retirement savings.

Neither the final rule nor any of the proposals preceding it require service providers to use any specific format for the required disclosures. In fact, the preamble to the interim final rule specifically noted that covered service providers could use different documents from separate sources, so long as all of the required disclosure information was contained in the provided documents.[2] DOL also stated in the preamble that it had not determined whether it was feasible to provide specific and meaningful formatting standards, and it requested comments on whether it should amend the final rule to include a summary disclosure or other specific formatting requirement.[3]

Many commenters to the interim final rule, and its preceding proposals, expressed concerns about requiring any particular format for the disclosures, stating that a "one-size-fits-all" approach could not accommodate the wide variety of current pension plan service arrangements and likely changes in the future. They also expressed serious concerns about the resulting costs to pension plans, which would ultimately harm plan participants and beneficiaries. The need to maintain flexibility for plan providers by not mandating any particular format, language or page limits was a recurring theme throughout many of the comments.

Other commenters supported an additional requirement to help plan fiduciaries — especially for small to medium sized plans — better organize and understand the disclosure information.

[1] 77 Fed. Reg. 5632 (February 3, 2012).
[2] 75 Fed. Reg. 41600 (July 16, 2010). "[T]he covered service provider could disclose using different documents from separate sources as long as the documents, collectively, contained all of the required information." *Id.* at 41607.
[3] *Id*.

These commenters believe that any costs associated with additional formatting requirements would be outweighed by the benefit of increased clarity to responsible plan fiduciaries.

After reviewing these comments, DOL proposed an amendment to the final rule under Section 408(b)(2) that would require that covered service providers furnish a guide along with the initial disclosures required by the rule, "if the disclosures are contained in multiple or lengthy documents."[4]

DOL states that the proposed guide requirement reflects "an effort to strike an appropriate balance between the need to facilitate a responsible plan fiduciary's review of information important to a prudent decision-making process and the costs and burdens attendant to the preparation of a new summary disclosure document."[5]

The guide, according to the DOL, is meant to assist plan fiduciaries by "ensuring that the location of all information required to be disclosed is evident and easy to find among other information that is provided."[6] Specifically, paragraph (c)(1)(iv)(H) provides that, if the information that must be disclosed pursuant to paragraph (c)(1)(iv)(A) through (G) of the final rule is not contained in a "single document," or if the document is in excess of a specified number of pages, the service provider must furnish to the plan fiduciary a guide that specifically identifies the document and page or other sufficiently specific locator to "quickly and easily" find the required information.

Comments Requested

Along with the proposed amendment, DOL requested comments on several issues related to the fee disclosure guide, including comments on the structure of the guide, as proposed, and whether its requirements are "feasible and cost-effective." DOL asked that commenters provide specific suggestions or data concerning these issues.

DOL also asked commenters to provide suggestions for alternative tools that would assist plan fiduciaries and whether the amendment should instead require a summary of only specified "key disclosures." Importantly, DOL also asked for comments on the likely benefits and costs of requiring covered service providers to furnish any required tool (whether a guide, a summary or other tool) in a specified format and whether a guide or any other tool is "likely to increase the probability that responsible plan fiduciaries review the initial disclosures because the required information is easier to find."[7]

Lastly, DOL asked for commenters to weigh in on what innovations in the preparation and delivery of disclosures currently exist in the marketplace, and how a formatting requirement might take advantage of these innovations.

[4] 79 Fed. Reg. 13949 (March 12, 2014).
[5] *Id*. at 13950.
[6] *Id*. at 13951.
[7] *Id*. at 13953.

Need to Understand Concerns that Proposed Rule is Intended to Address

PSCA is concerned that the underlying need for requiring a guide has not been established and that the DOL still needs to gather information to further assess whether or not a problem even exists. In the preamble to the proposed rule, the DOL announced its intention to conduct focus group sessions with approximately 70 to 100 fiduciaries to small pension plans to explore current practices and effects of the final rule.[8] The preamble further provides that it is DOL's hope that these focus groups will provide information about the need for a guide, summary, or similar tools to help responsible plan fiduciaries navigate and understand the required disclosures.[9] Clearly, based on these actions, the DOL is itself not certain that these tools are necessary to provide plan fiduciaries with meaningful and effective disclosures.

The DOL has proceeded with both this proposal and the focus group information-gathering techniques simultaneously, rather than consecutively, in order to avoid further, and unnecessary, delay. While we appreciate the DOL's desire to move quickly, we believe that the information that will be gathered from these focus groups is critical to determining whether a problem exists and how to approach the problem if it does. The DOL should consider studying the impact that this proposal may have on large and medium-size employee pension benefit plans as well.

In looking at the impact of this proposal, the DOL should give careful consideration to gathering information that will identify the different costs associated with this proposal and any alternatives that the DOL may consider as appropriate. Only then can the costs be weighed against the benefits, and a determination made as to whether the benefits of such a requirement outweigh the costs. We strongly encourage the DOL to complete this information gathering and then publish the results. Once this information is published, and assuming a need for reform has been established, the DOL should then re-propose a solution supported by the gathered information and solicit comments at that time.

Survey Results and Accompanying Comments

In developing this comment, PSCA conducted a membership survey and received responses from 50 plan fiduciaries representing both large and small employers. The PSCA survey results found that existing defined contribution plan disclosures are generally meeting plan sponsor's needs. On a scale of 1 (poor) to 5 (very good), the median score for comprehensiveness, ease of understanding and ease of use was a 4. Furthermore, 90% of the respondents reported that the present disclosures received from defined contribution service providers are already accompanied by an informational guide or document to assist with disclosures. In addition to a "guide," service providers are presently enhancing disclosures with other tools as well; including, but not limited to: providing a direct contact person or e-mail box for questions (54% of respondents), webinar presentations and in-person meetings (17%), and other methods such as conference calls and bench-marking materials (12.2%). Because the survey respondents represent employers and plans of various sizes, the type and size of the plan and resources of service providers may dictate some of the differences in the information provided in addition to

[8] *Id*.
[9] *Id.*

the fee disclosure; however, it is clear that flexibility is helpful and different strategies are already being employed.

Our survey asked respondents who found disclosures to be difficult to review to indicate what types of information would be most helpful to overcome that difficulty. While about 30% of respondents stated that a guide would be helpful, other responses were provided, such as "contact information" (24%), executive summaries, standard terminology and uniformity. Again, this underscores that a "one-size-fits-all" approach may not be desired by or useful to plan fiduciaries. Those respondents identifying a guide, index, or other accompaniment as potentially useful, did so in the absence of any information/data regarding costs that would be shouldered by service providers, but inevitably passed to plan sponsors and participants. Accordingly, to the extent that the cost attendant to compliance with a guide or index requirement is significant, and potentially reduces plan assets or participant retirement savings, any assessment of potential usefulness would have to be weighed against such costs.

Roughly 30% of our survey respondents were able to compare service provider disclosures from large providers against smaller service providers. Out of those 30%, 15.6% stated that the disclosures were about the same, 11.1% stated that small service provider disclosures were more comprehensive and/or easier to use, while 2.2% stated that larger providers had more comprehensive or easier to use disclosures.

Anecdotally, the responses for why a disclosure was "better" included a lack of "jargon and legalese," "shorter documents," "simple," and "offer of more support to assist." Many of the respondents stated that a fee disclosure was contained as part of the service provider's service contract or in multiple documents.

While the proposed rule to provide a guide may aid fiduciaries, without further extrapolation on what a "single document" may be, or what constitutes "quick and easy" access to information, the concerns expressed by these fiduciaries may still be present even with a guide.

Furthermore, our service provider members have advised that they do not currently possess or know of the availability of any technology able to access archived documents referenced in disclosure materials, or locate specific information in those documents, and return placement information to a one-size-fits-all guide. They have explained that while their archiving systems allow for a quick retrieval of client specific documents, there is currently no known way of doing this in an automated fashion for all clients. Rather, this would require a manual retrieval of each individual document and a review of its unique contents to identify the page placement of the item in question. This effort would impose a significant time and funding impact on service provider businesses that would likely result in disruption of client services and an increased cost to serve their plans and participants.

Conclusion

We appreciate and share DOL's desire to empower plan fiduciaries to best meet their obligations to plan participants. However, we respectfully request that this proposal be withdrawn until more information is gathered — especially because such information-gathering efforts are currently underway by DOL and the results will not be known until this comment period has closed.

In surveying our own members, including plan sponsors (large and small) *and* plan service providers, it is clear that there is no consensus on whether a problem even exists. Even if a problem could be clearly identified, it is evident from our own internal survey and from DOL's ongoing research on these topics that there is a lack of agreement on the most effective approach for dealing with such purported problems. Certainly, there is much ground left to cover to better understand alternative methods, if needed, that could assist fiduciaries in locating and understanding the required disclosures under 408(b)(2).

We appreciate the opportunity to comment and look forward to productive discussions with DOL in the future.

Respectfully submitted,

Plan Sponsor Council of America