

MEMO# 27960

March 14, 2014

DOL Issues Proposed 408(b)(2) Guide Rule and Focus Group Information Collection Request

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TO: PENSION MEMBERS No. 10-14
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 11-14
BROKER/DEALER ADVISORY COMMITTEE No. 12-14
OPERATIONS COMMITTEE No. 11-14 RE: DOL ISSUES PROPOSED 408(b)(2) GUIDE RULE AND FOCUS GROUP INFORMATION COLLECTION REQUEST

On March 12, 2014, the Department of Labor (DOL) issued a proposed regulation (proposed rule) that would amend the final 408(b)(2) service provider disclosure regulation to require covered service providers who meet their obligations under 408(b)(2) by use of multiple or lengthy documents to furnish a guide to assist plan fiduciaries in reviewing the required disclosures. [\[1\]](#) Comments on the proposed rule are due on or before June 10, 2014.

Concurrent with the issuance of the proposed rule, DOL issued an Information Collection Request (ICR) disclosing its intent to conduct a series of focus groups to explore current practices and effects of the final 408(b)(2) regulation and to gather information about the need for a guide, summary, or similar tool to help plan fiduciaries navigate and understand the disclosures. [\[2\]](#) Comments on the ICR are due on or before May 12, 2014.

Notably, as is further discussed below, although issued as a proposed rule, DOL seeks comment on various significant aspects of the proposal, including the type of locator(s) (e.g., a document and page or section reference that would enable the fiduciary to quickly and easily locate the specified disclosure information) the final rule should require, whether a summary of “key” specified disclosures is preferable to a guide requirement, and the economic assumptions DOL used in its cost and benefit analysis.

I. The Proposed Rule

Background

The final rule setting out the information that plan service providers must furnish before plan fiduciaries enter into, extend, or renew contracts or arrangements in order for the contract or arrangement to be considered “reasonable” under ERISA section 408(b)(2) was

issued in February 2012. When issued, the final rule did not include a format requirement and allowed covered service providers to satisfy their disclosure obligations using different documents from various sources as long as the documents, collectively, contained the required disclosures. [3] Further, although the interim final rule, issued in July, 2010, sought comment on whether the final rule should include a guide or similar tool to accompany the disclosures to assist fiduciaries in locating disclosure information provided in multiple documents, [4] the final rule did not require a guide or similar tool. However, the final rule did reserve a place for future development of a guide or similar tool, and DOL stated that it intended to issue a separate proposal for such a guide or similar tool in the future.

The proposed rule would implement a guide requirement. The preamble to the proposed rule states that DOL recognized that allowing the disclosure requirements to be satisfied through multiple documents could make it difficult and time consuming for plan fiduciaries to find and analyze particular disclosures. DOL is proposing to amend the 408(b)(2) disclosure requirements to require a guide to the disclosures as it believes that a guide will enable plan fiduciaries to find needed compensation and other information and will reduce the costs they otherwise would incur searching for such information when the disclosures are contained in multiple or lengthy documents.

Effective Date

DOL proposes to make the guide requirement effective 12 months after publication of the final amendment in the Federal Register and seeks comment on whether the amendment, as finalized, should be effective on a different date.

Minimum Compliance Requirements

The proposed rule requires covered service providers who make their disclosures in more than one document or who use a single document that is longer than a yet to be determined number of pages include a guide with the disclosure materials provided to the responsible plan fiduciary. The guide must be furnished as a separate document. [5] In the proposed rule, DOL seeks comment on the number of pages that would trigger the guide requirement even if the disclosures are made in a single document. Further, DOL seeks comment on whether such a page number requirement is an appropriate standard, whether standards must be included to prevent formatting or other manipulation of the page number requirement (such as reducing font size or margins), and whether any alternative standards exist that would be more beneficial to plan fiduciaries in reviewing lengthy disclosure materials.

Alternate Locator Compliance Methods

The proposed amendment requires a specific locator to find the required information included within the disclosures and seeks comment on the use of two alternate locators, each of which is equally weighted under the proposal. The first possible locator is a document and page requirement. The second is a “sufficiently specific” locator (such as a section locator) that would enable the plan fiduciary to quickly and easily find the required information. The preamble states that the proposal’s reference to “section” is meant as an example and not a safe harbor, and that section references, whether by name or number or some other method, would be acceptable locators only if they are sufficiently specific to enable plan fiduciaries to quickly and easily find the relevant information.

A similar standard would apply for electronic disclosures. A covered service provider may not merely furnish the link to a separate contract or prospectus, but would be required to furnish either a more specific link directly to the required information, or a page or other sufficiently specific locator, such as a section reference, in addition to the electronic hyperlink.

DOL seeks comment on whether a final rule, assuming it were to include a guide requirement, should permit a choice of locators (as proposed) or whether the rule should allow for only one type of locator to be used, and why. Further, DOL seeks comment on whether page numbers and sections are effective and feasible locators, whether individually or as alternatives, and whether and why other locators may be preferable. Additionally, DOL seeks comment on other mechanisms which could be used in a guide to quickly identify relevant information for fiduciaries, and comment on the benefits and costs of the two alternative compliance methods.

With respect to the cost of including a specific page or other locator, DOL states in the preamble that some interested parties have suggested that a guide requiring inclusion of a specific page or other locator could be very costly to covered service providers and plans and DOL indicated that it is particularly interested in comments on this issue. DOL seeks comments specifically identifying such challenges and the anticipated cost of addressing them, how currently available technology can or cannot reduce such costs, and whether web-based approaches with hyperlinks allowing a reader to move back and forth between related information in a summary document and the more detailed document from which the summary was derived could provide an effective alternative for disclosures provided electronically.

Guide Content Requirements

The guide must specifically identify the document and page, or, if applicable, another specific locator (such as a section number) that would enable the plan fiduciary to quickly and easily locate the following disclosures required by the 408(b)(2) regulation:

- The description of services to be provided;
- The statement concerning services to be provided as a fiduciary and/or as a registered investment advisor;
- The description of all direct and indirect compensation;
- The description of any compensation that will be paid among related parties;
- The description of any compensation for termination of the contract or arrangement;
- The description of all compensation (and/or a reasonable estimate of the cost to the plan) for recordkeeping services; and
- The required investment disclosures applicable where fiduciary services or recordkeeping or brokerage services are provided – i.e., annual operating expenses, ongoing expenses (or if applicable, total operating expenses) and any compensation charged directly against an investment.

The guide must also identify a person or office, including contact information, that the plan fiduciary may contact to the extent he or she has difficulty locating any information referenced in the guide or has questions regarding the disclosures.

Sample Guide

The proposed rule does not include a model or sample guide. However, in the preamble,

DOL notes that it had previously published a sample guide [\[6\]](#) as an appendix to the final rule and it is an example of what DOL believes guides to initial disclosures may look like in practice.

Delivery

The preamble states that nothing in the regulation limits the ability of covered service providers to furnish information required by the regulation via electronic media, for example on a website. However, unless the information disclosed by a covered service provider on a website is readily accessible to the plan fiduciary, and the plan fiduciary has clear notification on how to gain such access, the information on the website will not be regarded as having been “furnished” within the meaning of the regulation.

Changes to the Guide

Under the proposed rule, changes to the guide must be disclosed at least annually to the plan fiduciary. In the preamble, DOL states that it believes that a periodic requirement to disclose any changes to the information contained in the guide will be more beneficial to plan fiduciaries and less burdensome to covered service providers than ongoing and sporadic disclosure each time a change to one component of the guide occurs. DOL seeks comment on whether it would be more effective to require that the entire guide (rather than only changes to information contained in the guide) be disclosed on an annual basis if changes occurred during the prior year.

Guide Requirement versus Summary Requirement

The preamble to the proposed rule seeks comment on other alternative tools that may assist plan fiduciaries in reviewing the initial disclosures and whether such tools would be more or less beneficial to plan fiduciaries as compared to the proposed guide, taking into account the costs and burdens to covered service providers associated with production of the guide.

Additionally, DOL seeks comment on whether the proposed amendment should instead require a summary of specified key disclosures. DOL seeks comment on various issues associated with providing a summary of key disclosures, including what “key” information warrants inclusion in the summary, how costly it would be to prepare a summary (and who would bear the cost), what liability and other legal issues might arise for covered service providers and others from summarizing key information, and how such liability issues would be managed. The preamble also requests comment on general issues regarding a guide or summary, such as whether a guide or other tool is likely to increase the probability that plan fiduciaries review the initial disclosures because the required information would be easier to locate.

Benefits and Costs

The proposed rule includes a lengthy and detailed economic analysis in which DOL makes various estimates and assumptions regarding the benefits and costs of the proposed rule. DOL states that it is not aware of any information that currently exists that could be used to measure the time savings that would result from the availability of the guide in circumstances where a guide would be required. As a result, DOL conducted an informal study, apparently with two groups of internal DOL staff, to produce an estimate of possible time savings. Utilizing various assumptions, DOL estimates that the value of the annual

time saved by requiring a guide would be \$40.3 million. [\[7\]](#)

With respect to costs, DOL states that it lacks “complete data and empirical evidence to estimate the cost for covered service providers to create the guide.” However, using assumptions regarding the number of products offered by financial firms and an estimate of the time required to create the guide, DOL provides low (\$6.8 million), medium (\$13.3 million) and high (\$22.2 million) estimated costs to prepare and deliver the guide. DOL also conducted a threshold analysis, which it believes demonstrates the reasonableness of the assumption that the cost of requiring covered service providers to create a guide is less than the estimated annual \$40.3 benefit of providing a guide.

DOL seeks comment regarding its estimates of the benefits and costs of the proposed rule. DOL is specifically interested in information and data regarding the potential for time savings to plan fiduciaries, the number of products, services, contracts, or arrangements for which a guide would be required, the costs required to create the guide (including costs for systems changes and costs relating to placing page or section number references in the guide), the potential for economies of scale in constructing the guide, and current best practices in the pension plan service provider industry for providing guides or summaries to clients.

II. The Information Collection Request

As noted above, concurrent with the issuance of the proposed rule, DOL issued an ICR disclosing its intent to conduct approximately 8 to 10 focus groups with approximately 70 to 100 fiduciaries to small pension plans (those with less than 100 participants). Focus group participants will be asked to provide the following information:

- Their role with respect to their plan;
- The number of service providers hired by the plan;
- Whether they are aware of and understand the disclosures required by the 408(b)(2) final regulation;
- Their experience with receiving the disclosures;
- Whether they were able to find information regarding the services that would be provided and the costs of those services;
- Whether their review of the disclosures impacted their decision-making process with regard to hiring, monitoring, or retaining services providers or changing plan investment options;
- Whether their covered service providers provide a guide or similar organizational tool to help find specific information within the disclosures; and
- 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.

DOL intends to use information collected from the focus groups to:

- Assess plan fiduciaries’ experience in receiving the 408(b)(2) disclosures;
- Assess the effectiveness of the disclosures in helping plan fiduciaries make decisions;
- Determine how well plan fiduciaries understood the disclosures, especially in the small plan marketplace; and
- Evaluate whether, and how, a guide, summary, or similar tool would help fiduciaries understand the disclosures.

The results of the focus group testing will be made available to the public after the testing has been completed. As this will not occur until after the close of the proposed rule’s 90-

day comment period, DOL states that it may decide to reopen the proposed rule's comment period to solicit comments on the focus group results.

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endnotes

[1] A copy of the proposed rule is available here:
<http://www.gpo.gov/fdsys/pkg/FR-2014-03-12/pdf/2014-04868.pdf>. For a description of the final rule, see Memorandum to Pension Members No. 8-12 [25876], dated February 7, 2012.

[2] A copy of the ICR is available here:
<http://www.gpo.gov/fdsys/pkg/FR-2014-03-12/pdf/2014-04867.pdf>.

[3] In the preamble to the original 408(b)(2) disclosure proposal, issued in December, 2007, DOL stated that a covered service provider could use different documents from separate sources, as long as all of the documents, collectively, contained the required information. See 72 F.R. 70988.

[4] For a description of the interim final rule, see Memorandum to Pension Members No. 29-10, Bank, Trust and Recordkeeper Advisory Committee No. 21-10, Operations Committee No. 18-10, Transfer Agent Advisory Committee No. 37-10 [24432], dated July 16, 2010. For the Institute's comment letter on the interim final rule, see Memorandum to Pension Members No. 36-10, Bank, Trust and Recordkeeper Advisory Committee No. 30-10, Transfer Agent Advisory Committee No. 52-10, Operations Committee No. 24-10 [24520], dated August 30, 2010.

[5] The preamble states that DOL's goal, in requiring that the guide be a separate document, is to ensure that it is brought to the attention of the plan fiduciary and prominently featured, so the plan fiduciary can use it effectively in his review of the required disclosures. DOL seeks comment on whether the separate document requirement, by itself, is likely to ensure that the plan fiduciary adequately understands both the existence and purpose of the guide, or whether other conditions are needed. Further, DOL seeks comment on whether the guide should include specific language, such as an introductory statement regarding its purpose. DOL also seeks comment regarding electronic disclosure of the guide and whether a plan fiduciary would benefit from a separate notice comparable to the notice to participants required at the time a document is furnished electronically apprising the participant of the significance of the document when it is not otherwise reasonably evident as transmitted.

[6] The sample guide is available on the DOL website:
<http://www.dol.gov/ebsa/pdf/408b2sampleguide.pdf>.

[7] DOL notes that the amount of time savings is uncertain and that the \$40.3 million is based on a 30 minute time savings. DOL states that if the time savings were 20 minutes, the value would be \$26.9 million and if the time savings were 45 minutes the value would be \$60.4 million. DOL acknowledges that time savings will also depend on the sophistication and abilities of the individual fiduciary reviewer.

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