



**The Department of Labor's Pending 408(b)(2) Guide Proposal**  
**Summary of Critical Issues and Concerns**

**November 14, 2013**

1. Executive Summary

- a. We are concerned that the Department does not have adequate information to prepare a regulatory impact analysis that justifies moving forward with a new rule that would impose significant costs of compliance on service providers, plan sponsors and participants. Such an analysis must precede its proposal.
- b. We know of no evidence to suggest that the Department can meet its obligation of showing a compelling need for a new guide requirement, in particular given plan sponsors' experience with the disclosures under section 408(b)(2) of ERISA, which has only been operational for one year.
- c. Service providers have spent a significant amount of money and resources developing, preparing and delivering disclosures to comply with the existing 408(b)(2) regulations. Much of those efforts would need to be replicated due to what we understand is required by the proposed guide.
- d. The pending guide proposal, as we understand its format, is expected to require a high degree of customization necessitating a manual process to prepare each plan's custom guide. Automation will be costly if at all possible.

2. Plan Sponsors' Experience with 408(b)(2) Does Not Support the Need for Additional Regulation in the Form of a Prescribed Guide, Summary or Index

- a. Information disclosed pursuant to the existing 408(b)(2) regulations is meaningful. It has been little over a year since the regulations have been operational. During that time, service providers have received few, if any, questions from plan sponsors about where to find information or about the ability to access needed information. Moreover, service providers have responded to any such questions to the satisfaction of their clients.
- b. The types of questions received from plan sponsors would likely not have been resolved by what we understand is required by the proposed guide.

3. OMB Should Ensure a Compliant and Robust Regulatory Impact Analysis

- a. We are concerned that the Department does not have the information or data necessary to develop a regulatory impact analysis for a guide requirement that is consistent with the standards of Executive Order 12866 or OMB Circular A4.

- i. Executive Order 12866 provides that in absence of a legal requirement for a regulation or a necessity to interpret the law, agencies should publish “only” such regulations that “are made necessary by a compelling public need.”
  - ii. Executive Order 12866 further provides that “each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public instructions that warrant new agency actions), as well as the significance of that problem.”
- b. The pending guide proposal, as we understand what it may involve, is anticipated to be economically significant because it is likely to have an annual effect on the economy of \$100 million or more.
- c. In July 2010, the Department specifically stated in the preamble to the interim-final regulation that it “does not want to unnecessarily increase the cost and burden for service providers to furnish required information, especially to the extent such costs may be passed along to plan participants and beneficiaries, unless it is clear that the benefit to plan fiduciaries outweighs such cost and burdens.”
- d. With regard to the costs of compliance, two types of costs should be factored into any regulatory impact analysis:
- i. The costs of preparing, furnishing and maintaining customized guides for every plan in the absence of cost-effective technological solutions.
  - ii. The costs to participants and beneficiaries resulting from the allocation of compliance costs to them by plan sponsors. Such costs will reduce, to some extent, their retirement savings.

#### 4. Complexities and Costs of Preparing Customized Guides for Every Plan

- a. Plan agreements and disclosure materials vary significantly for each service provider by product lines, investment products, plan design and plan sponsors’ needs and preferences. They are often individually negotiated on a client-by-client basis. Service providers do not have the ability to automate the creation of a guide that would comply with what we understand is required by the pending proposal.
- b. Certain agreements and materials that would have to be referenced in the guide may be third party documents that are not within the control of the service provider. For many service providers, there are likely thousands of investment-related documents and agreements (e.g., fund prospectuses) that would have to be identified and cited in the guide.

#### 5. Technological Challenges and Costs of a Guide Requirement

- a. Service providers do not have the automated systems and capabilities to create and maintain the proposed guide, as we understand its format, and we are concerned that the Department has assumed they do.
- b. Developing, providing, maintaining and updating an automated solution will be cost-prohibitive, and may not even be possible.

**Requested Action** - We respectfully request that the OMB return the pending guide proposal to the Department for further review, until such time that it can establish a compelling need for guidance and that any proposed guidance is the least costly approach to responding to any identified need, consistent with the requirements of Executive Order 12866.

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We are committed to assisting the Department in addressing problems relating to compliance with the 408(b)(2) disclosure requirements. We appreciate your consideration of our views and concerns.