June 9, 2014

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5665
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1210-AB08: 408(b)(2) Guide

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for comments on the proposed Amendment Relating to Reasonable Contract or Arrangement Under ERISA section 408(b)(2)—Fee Disclosure issued by the Department of Labor ("Department") on March 12, 2014.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Introduction

Throughout the implementation of the fee disclosure rules, the Chamber has worked with the Department to bring greater transparency into fee schedules and to ensure that the notice requirements are meaningful without being unduly burdensome. In the proposed amendment, we are concerned that additional burdens will be introduced into the fee disclosure regime without any demonstrated need for the additional information. Although the Department will be

conducting focus groups to garner additional information, the results of those focus groups will not be released until after the comment period for the proposed amendment. Consequently, we recommend that the proposed amendment be withdrawn and re-issued after the focus group studies. At the very least, the comment period for the proposed amendment should be extended to allow for additional comment that includes information learned from the focus groups.

The proposed amendment would require covered service providers to furnish a guide if the initial disclosures are contained in multiple or lengthy documents. The guide would identify the document and page number of specific information. The Department asks for comments on a number of parameters including: whether a page number requirement is an appropriate standard; whether standards must be included to prevent formatting or other manipulation of the page number requirement; what number of pages should be included as the standard; and whether any alternative standards exist that would be more beneficial to responsible plan fiduciaries reviewing lengthy documents. The stated purpose of the guide is to assist responsible 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.[1]

Comments

The need for an additional disclosure requirement is unclear. The Department makes several statements in the preamble indicating that it believes additional disclosures are required but does not offer any proof of a widespread desire or need for such information. In addition, the number of questions posed by the Department for comment demonstrates that additional fact-finding is necessary to determine whether additional disclosures are necessary and, if so, the appropriate format.[2]

In the preamble, the Department makes reference to "anecdotal evidence" that "suggests that small plan fiduciaries in particular often have difficulty obtaining required information in an understandable format, because such plans lack the bargaining power and specialized expertise possessed by large plan fiduciaries."[3] However, the Department provides no information as to the specific nature or scope of the "anecdotal evidence." In addition, the Department has provided no basis for its assumption that the degree of specialized expertise and bargaining power it believes small plan sponsors have are the causes of these problems. Accordingly, it is difficult to assess whether or to what extent the solution being pursued by the

[1] 79 Fed. Reg. 13949 at 13951.

[2] In August of 2010, the Chamber submitted comments on the interim final rule on Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure issued by the Department of Labor ("Department") on July 16, 2010. https://www.uschamber.com/comment/plan-fee-disclosure-interim-final-rule. At the time, the Chamber commented that disclosures should be made in a single document. Our comments were based on speculation and fear that plan sponsors would be overwhelmed with information; however, we have not since heard from plan sponsors that the disclosure of required information in separate documents has been problematic. In addition, our comments stated that "[t]he requirement to provide disclosures in a manner that is understood by responsible plan fiduciaries requires satisfying a subjective criterion that cannot be determined without input from plan sponsors and service providers." As such, we believe that it is much more important to get input from the interested parties than to base additional requirements on speculation.

[3] 79 Fed. Reg.13951.

Department through the subject proposal is the best or most cost-effective approach to addressing the perceived problem.

Moreover, the number of issues for which the Department seeks comment raises questions about the need for the proposed amendment. The proposed amendment requires a guide but asks for input on almost every aspect of the guide including parameters for when it must be provided, how it should look, and what information should be included. Part C of the preamble reveals the extent of information that the Department is questioning and makes clear that a number of details that would likely be addressed in a final rule are still undecided.[4] Given the absence of meaningful and reliable information or data in support of either the costs or benefits of the proposed amendment, the need for the proposal remains unclear at best and unnecessary at worst.

The results of the focus group research should be made public before the Department issues a proposed rule. In May of this year, the Chamber commented on a proposed Information Collection Request Submitted for Public Comment; Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements issued by the Department on March 12, 2014.[5] As we stated in those comments, the scheduling of the information collection research after the issuance of the notice of proposed rulemaking is improper.

While the proposed information collection is an example of the sort of research that Executive Orders 12866 and 13563 intend that agencies conduct as part of the overall regulatory impact analysis effort, the Executive Orders envision that such research would inform decision makers before decisions are made. In this case, critical regulatory decisions seem already to have been made (evidenced by the publication of the proposed amendment). The Executive Orders direct agencies to conduct rulemaking as a rational process wherein decisions about whether to regulate or how to regulate are based on facts, not prejudice or supposition. To achieve a fact-driven regulatory decision making process, the needed facts must be collected first and then analyzed in relation to each of several regulatory alternatives (including the alternative of no regulation) to identify the relative social costs and social benefits associated with each alternative. Only after the relevant facts and benefit/cost analyses have been completed can the policy decision maker properly select an alternative to propose to be adopted. Public comment becomes a more meaningful part of the regulatory process when the public has the benefit of seeing laid before it the full detail of the decision maker's proposal and the facts and analyses on which it is based. When the public is fully informed in this way, the public can better assist the process by identifying omitted or incorrect items in the factual basis or errors in the analysis on which the proposed policy decision is based.

[4] 79 Fed. Reg. at 13593.

[5] https://www.uschamber.com/comment/comments-proposed-information-collection-request-submitted-public-comment-evaluating. The proposed information collection will survey 70 to 100 plan fiduciaries through a focus group, guided discussion format. The research plan is to interview plan fiduciaries representing small pension plans (with less than 100 participants).

The proposed amendment should be withdrawn and re-issued after the release of the focus group results. Without information collected from the focus groups, the Chamber cannot properly determine the necessity or impact of the proposed amendment. Moreover, it seems that the Department still has several areas where it needs additional information in order to create a complete proposal. As such, we recommend that the Department withdraw the proposed amendment and re-issue it after the focus group studies.

In the alternative, the Department could re-designate the proposed amendment as an Advanced Notice of Proposed Rulemaking (or Request for Information). As such, the Department could collect public comment on the agency's preliminary ideas, information needs, and open questions and still allow for an additional comment period when the Department's proposal is more clearly detailed.

The Department's statement that it "may" reopen the comment period subsequent to compilation of information collection results is inadequate.[6] The Department should, at the very least, unequivocally state that it will reopen the comment period. The Department should also state that it will revisit the preliminary decisions that are reflected in the present NPRM, and which have been made without the benefit of the necessary facts, which the information collection may reveal, and that it will publish a revised NPRM at that time.

Conclusion

We appreciate the Department's concerns about transparency but, without sufficient evidence, we cannot support the Department's efforts to require additional disclosure notices. As the Department has already committed to conducting focus groups to determine the need for additional disclosure requirements, issuing a proposed rule seems premature. Rather, we encourage the Department to re-issue guidance in proposed form after the focus group testing to include the information gleaned from the studies.

We look forward to working with you and thank you for your consideration of these comments.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits
U.S. Chamber of Commerce

Aliya Wong
Executive Director
Retirement Policy
U.S. Chamber of Commerce

[6] 79 Fed. Reg. at 13953.