



April 11, 2014

FILED ELECTRONICALLY

Office of Information and Regulatory Affairs
ATTN: OMB Desk Officer for DOL - EBSA
Office of Management and Budget, Room 10235
725 17th Street NW
Washington DC 20503

Re: OMB Control Number 1210-0133 – 408(b)(2) Guide Requirement

Dear Sir/Madam:

The undersigned organizations appreciate the opportunity to comment on the proposed amendment to the Information Collection Request (“ICR”) included within the Department of Labor’s (“DOL”) March 12, 2014 notice of proposed rulemaking, *Amendment Relating to Reasonable Contact or Arrangement Under Section 408(b)(2) – Fee Disclosure* (the “Proposed Rule”).¹ The Proposed Rule would amend the final 408(b)(2) service provider disclosure regulation (the “Regulation”) under the Employee Retirement Income Security Act of 1974 (ERISA) to require covered service providers to furnish a guide to assist plan fiduciaries in reviewing the required disclosure documents provided pursuant to 408(b)(2), unless the covered service provider furnishes the required disclosures in a single summary document that does not exceed a yet-to-be-determined number of pages.²

¹ 79 Fed. Reg. 13949 (March 12, 2014).

² 77 Fed. Reg. 5632 (Feb. 3, 2012).

Collectively, our organizations represent the interests of the vast majority of retirement plan service providers, including record keepers, banks, mutual fund companies, insurance companies and advisors of defined contribution retirement plans. Our organizations strongly support effective disclosure to plan fiduciaries that assist them in fulfilling their ERISA obligations. Many of our members are “covered service providers” as that term is defined in Section 2550.408b-2 (c)(1)(iii) of the Regulation and therefore will likely be the entities responsible for furnishing the guide contemplated by the Proposed Rule.

Pursuant to notice in the Proposed Rule, OMB, in accordance with its obligations under the Paperwork Reduction Act (“PRA”),³ requests comments relating to the collection of information associated with the Proposed Rule. Specifically, OMB seeks comments that will assist it in evaluating whether the proposed collection of information is necessary for the proper performance of the functions of DOL, including whether the information will have practical utility. Additionally, OMB requests comments that evaluate the accuracy of DOL’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used.⁴

As explained below, DOL is using the issuance of the Proposed Rule as an opportunity to collect information from the public in order to make findings necessary to adequately demonstrate that the guide (*i.e.*, the proposed data collection) contemplated by the Proposed Rule is (i) necessary for the proper performance of the functions of the agency, and (ii) will have practical utility. Accordingly, DOL has not completed the threshold steps of determining whether the guide is in fact needed or will be useful to plan sponsors, nor has it developed a realistic estimate of the total time required for effected service providers to prepare the guide. DOL has provided a 90-day period, or until June 10, 2014, for receiving comments on the Proposed Rule and will simply not be in a position to certify compliance with the PRA, if at all, until it has, at a minimum, completed its information collection contemplated by the Proposed Rule. Similarly, it is unlikely that the public will be in a position to sufficiently inform OMB of its concerns within the 30-day comment period specified by OMB.⁵ Given the unique circumstances here, where the agency proceeded with a notice of proposed rulemaking without a sufficient basis with respect to need or a realistic estimate of the total time required to comply with the

³ See Paperwork Reduction Act, Pub. L. 104-13, codified at 44 U.S.C. §§ 3501-3520 (1994).

⁴ 77 Fed. Reg. at 13960.

⁵ The undersigned organizations have significant concerns that the guide requirement represents a “one-size-fits-all” standard that ignores the reality that disclosure materials vary significantly for each service provider by product lines, investment products, plan design and plan sponsors’ needs and preferences. While the undersigned organizations intend to submit comments to DOL on the Proposed Rule, the information and data requested by DOL’s extraordinarily detailed and comprehensive request will impose significant costs on our respective members and will take, at a minimum, the 90 days provided by DOL to collect, assemble, and analyze. Until such work has been completed, the undersigned organizations will not be in a position to provide fully informed conclusions to OMB that would assist it in evaluating the ICR.

proposed data collection, OMB would not appear to have the ability to conduct its PRA analysis within the required timeframe.⁶ The lack of evidence as to need and cost is intertwined with the PRA analysis, and thus we believe OMB is handicapped in its ability to complete a sufficient review. Consequently, OMB should hold off on conducting the ICR analysis until DOL develops a record as to the need (and associated costs) for the guide. In the event that OMB concludes that it does not have the authority to delay its ICR analysis, we would urge OMB to disapprove the ICR and direct DOL to resubmit it after an adequate record is developed.

DOL Seeks Public Comment Necessary To Meet Its Paperwork Reduction Act Burdens

The PRA governs executive agency ICRs. Regulations promulgated to implement the provisions of the PRA include within the definition of “Collection of Information” the requirement to disclose information to third parties.⁷ Therefore, the Proposed Rule’s requirement that covered service providers furnish a guide, summary, or other tool to the disclosures required by the Regulation is governed by the PRA.

Regulations promulgated to implement the provisions of the PRA require the agency requesting information from the public to review each collection of information prior to its submission to OMB. The agency’s review is to include (among other items) an evaluation of the need for the collection of information and a specific objectively supported estimate of the burden of the collection.⁸ As is discussed below, based upon the preamble to the Proposed Rule, as well as DOL’s Supporting Statement for Paperwork Reduction Act Submissions (the “Supporting Statement”), DOL prematurely has used the Proposed Rule to request public comment necessary to develop the record OMB needs beforehand to conduct its review of the ICR.

A. DOL’s Evaluation of the Need for Collection

DOL states in the Supporting Statement that it believes that the Proposed Rule “will increase the accessibility of information and enhance plan fiduciaries’ understanding of the information already received from covered service providers” and the purpose of the proposed ICR is to “help plan fiduciaries access information already being disclosed to them.”⁹ However, nowhere in the Supporting Statement or Proposed Rule does DOL cite to published sources or otherwise support its position that

⁶ See 5 C.F.R. §1320.11.

⁷ 5 C.F.R. §1320.3(c).

⁸ 5 C.F.R. §1320.8(a).

⁹ See “Supporting Statement for Paperwork Reduction Act Submissions, - 408(b)(2) Guide Requirement”, OMB Control Number 1210-0133, February, 2014, page 3.

plan fiduciaries currently have problems accessing information within the disclosures currently provided,¹⁰ or that the Proposed Rule will resolve any purported problems plan fiduciaries may have accessing information contained within the disclosures. Indeed, as discussed in the preamble to the Proposed Rule, DOL seeks comment on the likely benefits (and costs) of requiring that covered service providers furnish *any* required tool (whether a guide, summary, or other tool) in a specified format.¹¹

Although the preamble to the Proposed Rule states that “[a]necdotal evidence 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,”¹² DOL provides *no data or factual evidence* to support this statement. Elsewhere in the preamble, DOL discusses a series of focus groups it intends to conduct to provide information regarding the need for a guide, summary or similar tool to help responsible plan fiduciaries understand the disclosures.¹³ DOL also acknowledges 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 guide in circumstances where a guide is required. Surprisingly, DOL’s estimate of the time savings associated with the Proposed Rule appears to be based solely on an informal study involving two groups of *internal DOL staff*. Presumably DOL is now soliciting comment on the need for a guide and plans to conduct focus groups to determine if a guide will have practical utility, prior to demonstrating the need and support for a guide requirement.¹⁴

B. DOL’s Specific Objectively Supported Estimate of the Burden of the Collection

With respect to the DOL’s provision and review of a specific objectively supported estimate of the burden of the collection, we note that, in the preamble to the Proposed Rule, DOL encourages commenters to provide specific suggestions or data concerning the structure of the guide, as proposed, and whether its requirements are feasible and cost effective. DOL further acknowledges in several places that it lacks data or information regarding the components necessary to assess the costs associated

¹⁰ Further, as the undersigned organizations discussed with OMB during a November 14, 2013 meeting, our members have informed us that they have received few, if any, questions from plan sponsors about where to find information in the disclosures required by the Regulation or the ability to access such information.

¹¹ 79 Fed. Reg. at 13953.

¹² 79 Fed. Reg. at 13951.

¹³ We note that the focus groups are to be conducted with fiduciaries of small pension plans (those with less than 100 participants) but the proposed rule is not limited in its applicability to such small pension plans.

¹⁴ DOL acknowledges in the preamble that it may decide to reopen the comment period on the Proposed Rule to solicit comments on the focus group results.

with the information collection mandated by the Proposed Rule. For example, DOL states that, in order to estimate the total cost associated with the guide requirement, it must estimate the total number of services and products for which a guide must be prepared, but it lacks sufficient data to make this estimate. Additionally, DOL states that it lacks complete data and empirical evidence to estimate the cost for covered service providers to create the guide.¹⁵

Additionally, while acknowledging that some covered service providers have expressed concern that it would be prohibitively expensive and unreasonably burdensome for them to comply with a guide requirement (especially if such a requirement resembles the sample guide developed by DOL and made available on its website), DOL states that the public record neither supports nor refutes this position and DOL is not independently aware of any research or studies bearing one way or another on this issue.¹⁶ As a result, the preamble states that DOL intends to use the Proposed Rule as “the vehicle to solicit specific comments and build a robust public record on this issue.”¹⁷

Significantly, DOL has not provided specific and objective data with respect to several key elements and seeks comment on a long list of significant cost issues associated with the Proposed Rule, including:

- The number of arrangements that will require a guide;
- Data on the incremental costs of pagination relative to other identifiers;
- The challenges associated with preparing a guide and the anticipated cost of addressing them;
- How currently available technology can or cannot reduce such costs;
- Whether economies of scale exist such that the guide service providers prepare for one product can be used for multiple clients;
- An estimate of the costs associated with preparing the guide, including costs incurred for system changes and costs relating to placing page or section number references in the guide;
- Whether such costs can be broken down by the type of covered service provider;
- Whether such costs can be broken down as applied to each of the specific content requirements of the proposed guide; and

¹⁵ 79 Fed. Reg. at 13958.

¹⁶ 79 Fed. Reg. at 13955. DOL fails to acknowledge that it has been informed by the retirement services industry that the concerns expressed regarding the prohibitive costs associated with the guide stems from the high degree of customization needed to prepare and maintain a guide, nor does it give any indication as to whether it has attempted to verify these valid industry concerns.

¹⁷ *Id.* at 13955.

- The costs of requiring that covered service providers furnish any required tool (whether a guide, summary, or other tool) in a required format.

Finally, DOL states in the preamble that it believes that the costs to provide a summary likely would be higher for many service providers than the cost incurred to provide a guide or roadmap, but provides no analysis or basis for this conclusion. Based on DOL's lack of data regarding the cost of alternatives contained in the preamble to the Proposed Rule, it appears that DOL did not attempt to conduct an assessment of the cost of alternatives to mandating a guide to the disclosures, and further, does not plan to conduct this assessment until after comments are received on the Proposed Rule.

Given the volume and specificity of comment sought by DOL on the costs associated with the preparation of the guide, as well as DOL's statements in the preamble to the Proposed Rule regarding its lack of data and the imprecision of its estimates, it is clear that DOL is using the Proposed Rule itself to obtain data (from those it seeks to regulate) necessary for it to estimate the cost burden associated with the Proposed Rule.

OMB Should Delay Reviewing the ICR Until an Adequate Record is Developed

Regulations promulgated to implement the provisions of the PRA provide that, in circumstances where an ICR is contained in a notice of proposed rulemaking, within 60 days of the publication of the notice of the proposed rulemaking, OMB may file public comments on the collection of information provisions in the form of an OMB Notice of Action.¹⁸ The recipient agency is then required to explain in the final rule how any collection of information contained in the final rule responds to any comments received from OMB and the public, including any identification or modifications made to the final rule, or an explanation of why it rejected the comments.¹⁹ Here, DOL proceeded with the Proposed Rule without a sufficiently identifiable basis with respect to need or a realistic estimate of the total time required to comply with the proposed information collection. Further, DOL is using the notice of proposed rulemaking to obtain the required information and data. On this basis, we believe it would be premature for OMB to comment on the necessity of the information request or DOL's estimate of the associated cost burdens before the public has had a realistic opportunity to provide OMB with its comments on the utility and cost burdens associated with the guide. Under these circumstances, OMB should not act on the ICR pursuant to 5 C.F.R. Section 1320.11 until a record is developed. In the event that OMB concludes that it does not have the authority to delay its ICR analysis, we request that OMB disapprove the ICR and ask that it be resubmitted for OMB review after an adequate record is developed.

¹⁸ 5 C.F.R. §1320.11(c).

¹⁹ 5 C.F.R. §1320.11(f).

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We appreciate your consideration of these comments. We are available to meet with you to discuss our comments or to provide additional information or clarification.

American Bankers Association

American Council of Life Insurers

Investment Company Institute

Securities Industry and Financial Markets Association

The SPARK Institute, Inc.

cc: Howard Shelanski, Administrator
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