



April 16, 2012

The Honorable Phyllis Borzi
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Madam Secretary:

As you know, our members were very concerned about the delay in the issuance of the final rule under ERISA section 408(b)(2). Throughout last fall, and early this year, we strongly urged the Administration to release the regulation, explaining that in the absence of a final rule, our members could not complete all of the systems and process work needed to be able to comply. As a result, much of this work had to wait until the final rule was released in February. We had been assured that as soon as the regulation was published, Department staff would be available to visit trade group meetings, engage in other public dissemination of clarifications, and FAQ's would be issued promptly. Those assurances and the Department's apparent understanding that it would be necessary to engage with the industry to quickly resolve ambiguities and interpretive issues made us hopeful that a 5-month transition period might be workable.

Unfortunately, the hoped for interaction with the Department has not happened, in part because of disagreements within the agency regarding how the final rule applies to different industries and types of service providers. For example, there is substantial confusion around such fundamental terms in the final regulation as "responsible plan fiduciary," "subcontractor" and "indirect compensation." We also understand that the Department has received hundreds of questions and inquiries, suggesting that, although people are attempting to comply with the regulation, there is widespread confusion regarding exactly what is required in certain circumstances.

Nor is debate regarding the exact requirements of the regulation limited to plan fiduciaries and service providers. Indeed, practitioners are in the same place, meaning clients are receiving potentially conflicting advice on fundamental aspects of the regulation. Adding to the frustration is that although there have been informal suggestions that FAQs would be issued "soon," there is no real sense as to when the FAQs will be issued to clarify some (if not all) of the questions that have been raised.

The various areas of confusion and the delay on issuance of FAQs are reminiscent of the Schedule C experience. However, the stakes here are far higher than they were for Schedule C. Unlike with Schedule C, under ERISA section 408(b)(2) rescission and a severe excise tax penalty hang over the heads of service providers. Moreover, responsible plan fiduciaries are required to terminate plan service provider relationships if they determine that the final rule is not complied with. It is still more than 60 days until the effective date, yet many plan sponsors already are asking when they will see the disclosure, no doubt in part because of a concern that they need time to analyze the information provided to them, see how it may apply to participant-fee disclosure under ERISA section 404(a)(5), and then possibly having to find alternative

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vendors or take other appropriate action. Realistically we believe we have less than 6 weeks to finalize the disclosure so that they can be distributed in a timely fashion by mail, which requires additional time for printing, or e-mail. Please note that we have been informed that a number of service providers will be sending out hard copies of disclosure documents and having to make a last minute change will result in additional costs and the possibility that the mailing deadline cannot be met.

Notwithstanding the questions that remain regarding the exact requirements of the regulation, our members have been working to provide what they believe are the required disclosures in anticipation of the upcoming compliance dates. We are concerned that even if the FAQs are issued tomorrow, it would not be feasible to address them at this point. There simply is not enough time to review the FAQs and then reprogram and/or modify disclosure notices (or to reach out to third parties for further disclosure) to reflect any changes in them and meet the compliance dates. Indeed, we believe that publishing the FAQs in the next few weeks could have the unintentional consequence of creating chaos rather than helping, which we do not believe is the Department's intent.

Accordingly, we respectfully request that the Department provide "good faith compliance" relief from the penalties imposed under ERISA and the excise taxes imposed under the Code through 2013, unless a longer period of time is appropriate as a result of new interpretations reflected in the FAQs. We also believe that, as the Department has already recognized, the new participant fee disclosure requirement relates back to the ERISA section 408(b)(2) information, and plan sponsors/administrators should also have the benefit of a good-faith compliance standard during this transition period. This compliance relief will give providers and plan sponsors time to adjust if changes need to be made. We are hopeful that the Department will announce that service providers will be deemed to be in compliance with ERISA section 408(b)(2), Code section 4975(d)(2) and, to the degree applicable, participant fee disclosure under ERISA section 404(a)(5), if disclosure is provided to plans by the current due date under a reasonable good faith interpretation of the rule.

We would be happy to offer our assistance in drafting such good faith relief. Thank you in advance.

Sincerely,

A handwritten signature in cursive script, reading "Lisa J. Bleier". The ink is dark and the signature is fluid, with a large initial "L" and a stylized "B".

Lisa J. Bleier
Managing Director, Public Policy and Advocacy
Securities Industry and Financial Markets Association