

January 5, 2015

By Email (OIRA_submission@omb.eop.gov)

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

The undersigned organizations submit this letter in response to the Department of Labor’s Information Collection Request (ICR) entitled “Focus Groups for Evaluating the Effectiveness of Employee Retirement Income Security Act Section 408(b)(2) Disclosure Requirements.” Some of the undersigned organizations previously commented on the proposed ICR,¹ and all of the undersigned organizations have submitted comments expressing concern regarding the Department of Labor’s proposed 408(b)(2) “guide.”²

The comment period for this ICR is only 30 days, falling during the holiday season, when gathering the views of the members of the undersigned organizations is particularly difficult.³ Accordingly we write briefly to summarize and reiterate prior comments and to continue to express concern about the process the Department of Labor has in place regarding this 408(b)(2) “guide” proposal.

- We support the Department of Labor doing real-world testing of its rules, and have encouraged the Department to collect information from plan sponsors, participants, and service providers before determining if new regulations are needed.
- The Department should put its 408(b)(2) “guide” proposal on hold until it determines whether any changes to the disclosure regulation are needed. Feedback from plan sponsors regarding their receipt and use of the 408(b)(2) disclosures is inconsistent with a conclusion that a guide is needed, and the Department has not offered evidence to the contrary.
- The focus group research should be conducted and results made public **before** the Department issues a proposed rule. The Department should first gather information needed to determine whether there is a fundamental gap in the 408(b)(2) requirements, determine if

¹ See comment letters regarding the Department’s Proposed Information Collection Request, Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements, from U.S. Chamber of Commerce, Investment Company Institute, the ERISA Industry Committee, and joint letter of American Bankers Association, American Council of Life Insurers, Securities Industry and Financial Markets Association, and the SPARK Institute (all dated May 12, 2014); available at <http://www.dol.gov/ebsa/regs/cmt-1210-AB53a.html>.

² See comment letters from the undersigned organizations on the Department’s Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2)–Fee Disclosure, Proposed Rule, available at <http://www.dol.gov/ebsa/regs/cmt-1210-AB53.html>.

³ We believe that the Department and the Office of Management and Budget should not rush this project, but should act deliberately and only after gathering sufficient information and input from interested parties.

the costs of a “guide” justify the benefits, and only then, if both predicates demonstrate the need, propose a new “guide” requirement. Unfortunately, the Department’s semi-annual regulatory agenda suggests that the Department *has already decided* it will promulgate a final rule. That would be unwise and inappropriate. We therefore reaffirm that it is crucial that after the results of the focus group are made public, the Department *release a new proposal or reopen the comment period on its current proposal*.

- While not repeating all the comments that have already been made regarding the focus group testing, we reiterate the following substantive concerns:
 - The supporting materials suggest that the Department has responded to concerns that the focus groups also must include large plan sponsors. We appreciate those changes, but we are still concerned that the sample is not representative. While most plans are small, most *participants are in large plans*.⁴ Thus, to represent the actual plan experience for retirement plan participants, significant input from large plan sponsors is also necessary.
 - We continue to have concerns that the focus group script may introduce unwanted bias. For example, the script continues to use the term “hidden fees,” which essentially suggests an assumption that the current 408(b)(2) disclosure leaves information concealed, which could bias the focus group participants’ answers.

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We recommend that the Department put the proposed 408(b)(2) “guide” regulation *on hold* until the testing has been completed and its results made available for public comment and consideration. The Department should not move forward proposing changes to the section 408(b)(2) regulation without substantive and compelling evidence of a need for changes.

Respectfully,

American Bankers Association
American Benefits Council
American Council of Life Insurers
The ERISA Industry Committee
Financial Services Institute
Insured Retirement Institute
Investment Company Institute
Plan Sponsor Council of America
Securities Industry and Financial Markets Association
The SPARK Institute
U.S. Chamber of Commerce

⁴ Department of Labor Private Pension Plan Bulletin, Abstract of 2012 Form 5500 Annual Reports, Table B4 (Oct. 2014) (only about 5% of participants are in plans with fewer than 50 participants).

cc: Department of Labor-OASAM, Office of the Chief Information Officer
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