

June 22, 2017

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Interpretative Guidance under ERISA §408(b)(2)

Dear Mr. Canary:

The American Retirement Association (“ARA”) is writing to request interpretative guidance with respect to the obligation of a covered service provider to disclose a change in the information required to be provided under ERISA Section 408(b)(2) as a result of the June 9, 2017, applicability date for the Fiduciary Rule and related prohibited transaction exemptions (collectively, the “Rule”). The ongoing review of the Rule by the Department of Labor (“DOL” or the “Department”) has caused a great deal of uncertainty among plan sponsors and providers. ARA recommends that the Department issue guidance acknowledging that the review of the Rule coupled with the potential for significant change constitute “extraordinary circumstances beyond the covered service provider’s control” which would qualify for relief under ERISA Regulation §2550.408b-2(c)(1)(v)(B)(1). Additional recommendations are also provided.

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”) and the ASPPA College of Pension Actuaries (“ACOPA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

SUMMARY

ARA recommends that Department issue interpretative, sub-regulatory guidance that recognizes the Department’s ongoing review of the Rule, the associated uncertainty as to the final

parameters of the Rule and related exemptions and the potential for confusion by plan sponsors are extraordinary circumstances beyond the control of covered service providers which would preclude the immediate distribution of an updated 408(b)(2) notice; and

ARA further recommends that the Department’s guidance indicate that as a result of these extraordinary circumstances, a covered service provider who provides an updated 408(b)(2) notice no later than the first calendar quarter of 2018 will be deemed to have provided the notice as soon as practicable; and

ARA further recommends that the Department’s guidance clarify that even in the absence of extraordinary circumstances, a covered service provider is not “informed” of a change in the information required by ERISA Reg. §2550.408b-2(c)(1)(iv)(A) through (D) and (G) until such time as a recommendation is actually given that constitutes “fiduciary investment advice”; and

ARA further recommends that Department’s guidance provide that the omission of an updated 408(b)(2) notice may be corrected through the provisions of Reg. §2550.408b-2(c)(1)(vii).

BACKGROUND

The Rule was published in final form on April 8, 2016, with an effective date of June 7, 2016, and an applicability date of April 10, 2017. On February 3, 2017, the President directed the Department to review the Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.¹

On March 2, 2017, the Department issued a proposed regulation to extend the applicability date by 60 days.² In addition, the notice of proposed rulemaking requested comment on the Regulation and issues raised by the Presidential memorandum. On April 7, 2017, the Department issued a final regulation extending the applicability date 60 days until June 9, 2017. The April 7, 2016, guidance also provided for a transition period for the BIC Exemption during which satisfaction of the Impartial Conduct Standards will be the only requirement to gain exemptive relief.³ The BIC Exemption transition period is slated to be in effect until January 1, 2018, during which time the Department will perform the examination directed by the President.

ERISA §408(b)(2) provides a statutory exemption from the prohibited transaction rules for service contracts or arrangements between a plan and a party in interest if certain requirements are satisfied. An amendment to the underlying regulation that became effective on July 1, 2012, requires disclosure of certain information by “covered service providers” to the “responsible plan fiduciary” in order to qualify for the prohibited transaction exemption.⁴ Among the items of

¹ Presidential Memorandum Fiduciary Rule – February 3, 2017, 82 Fed Reg 9675 (February 7, 2017).

² Proposed Regulation - Definition of the Term Fiduciary, 82 Fed Reg 12319 (March 2, 2017).

³ Definition of the Term Fiduciary, section E, 82 Fed Reg 16902, 16917 (April 7, 2017).

⁴ Reasonable Contract or Arrangement – Fee Disclosure, 77 Fed Reg 5632 (February 3, 2012).

information required to be disclosed is whether the service provider will provide (or reasonably expects to provide) services as a fiduciary to the plan.⁵

Under the 408(b)(2) regulation, an initial disclosure must be provided to the responsible plan fiduciary “reasonably in advance of the date the contract or arrangement is entered into.”⁶ If, after the initial disclosure, there is a change in the information, a covered service provider must update the disclosures in a timely fashion. If the change is with respect to the services offered under the contract or arrangement (including fiduciary services), the new information must be provided to the responsible plan fiduciary:

“...as soon as practicable but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to circumstances beyond the covered service provider’s control, in which case the information must be disclosed as soon as practicable.”⁷

Application of these provisions in the context of the current circumstances is the subject of this letter.

DISCUSSION

I. Application of the “Extraordinary Circumstances” Exception in ERISA Regulation §2550.408b-2(c)(1)(v)(B)(1) in the Context of the Department’s Examination of the Fiduciary Regulation.

Needless to say, a great deal of attention remains focused on the Rule. Secretary Acosta indicated in a May 22, 2017, Wall Street Journal op-ed that the Department has concluded that additional public input is needed. Recently released FAQs relating to transitional issues indicate the Department intends to issue a Request for Information (“RFI”) to solicit public input on specific ideas for possible new exemptions or regulatory changes.⁸ The Office of Management and Budget (“OMB”) website indicates that on June 6, 2017, the Department submitted an RFI pertaining to the Rule for OMB review. All of this is happening as the Rule became applicable on June 9, 2017.

ARA supports the Department’s examination of the Rule as directed by the President. It creates, however, the very real possibility that service providers and plan sponsors will be facing a “whipsaw” effect due to changing compliance standards. Obviously, the Rule (and the modified

⁵ Reg. §2550.408b-2(c)(1)(iv)(B).

⁶ Reg. §2550.408b-2(c)(1)(v)(A).

⁷ Reg. §2550.408b-2(c)(1)(v)(B).

⁸ Conflict of Interest Transition FAQs Part III, Q&A 4.

Best Interest Contract Exemption) became applicable on June 9, 2017. However, the preamble to the final regulation that extended the Rule’s applicability date notes:

“[B]etween now and January 1, 2018, the Department will perform the examination required by the President. Following the completion of the examination, some or all of the rule and PTEs may be revised or rescinded, including the provisions scheduled to become applicable on June 9, 2017. This document’s delay of the applicability dates as described above should not be viewed as prejudging the outcome of the examination.”⁹

Unfortunately, the current environment has proven to be very challenging for service providers and the plan sponsors with whom they work. For many, it is unclear whether their status as a fiduciary under the Rule (as it became effective on June 9, 2017) will be permanent or short-lived because of future changes. Similarly, there is uncertainty as to what exemptive relief may be available given the re-examination of the Best Interest Contract Exemption and the potential for a new “streamlined” exemption (as was alluded to in the Department’s transitional FAQs).¹⁰ This has caused compliance concerns, particularly with regard to the obligation to update information previously provided to responsible plan fiduciaries by covered service providers as required by ERISA §408(b)(2).

At the present time, service providers, plan sponsors and even the Department are uncertain as to what will be the outcome of the examination directed by the President. These are extraordinary, unprecedented circumstances given the Rule is likely the most significant regulatory initiative of the DOL since the enactment of ERISA; yet it is slated for a detailed review and revision (that was announced even before it became applicable). Covered service providers are being asked to provide updated 408(b)(2) information that is essentially a moving target because of the potential for changing compliance standards. It raises the prospect of multiple updated notices as the examination and regulatory review move forward.

The Department seemingly recognized the potential confusion the current environment causes by suspending the specific disclosure requirements of the Best Interest Contract Exemption until at least January 1, 2018.¹¹ In the interim, the impartial conduct standards simply require that any statements made by an adviser or financial institution must not be misleading.¹² In contrast, there has been no delay in the obligation of a covered service provider to update the required 408(b)(2) information as a result of the Rule becoming applicable. This alone could put covered service providers in the untenable position of having to provide a 408(b)(2) notice that itself may be misleading if it fails to disclose that there is a reasonable expectation that terms under which fiduciary services will be offered may change as a result of modifications to the Rule.

ARA believes that the current environment surrounding the Rule and its examination creates unprecedented uncertainty. The very real potential that the Department will make significant changes to existing compliance standards creates “extraordinary circumstances beyond the

⁹ Definition of the Term Fiduciary, 82 Fed Reg 16902, 16906 (April 7, 2017).

¹⁰ Conflict of Interest Transition FAQs Part III, Q&A 4.

¹¹ Best Interest Contract Exemption, Section IX, 81 Fed Reg 16902, 16918 (April 7, 2017).

¹² Conflict of Interest Transition FAQs Part III, Q&A 1.

covered service provider's control" sufficient to preclude the immediate distribution of updated 408(b)(2) information.

ARA recommends that Department issue interpretative, sub-regulatory guidance that recognizes the Department's ongoing review of the Rule, the associated uncertainty as to the final parameters of the Rule and related exemptions and the potential for confusion by plan sponsors are extraordinary circumstances beyond the control of covered service providers sufficient to preclude the immediate distribution of an updated 408(b)(2) notice.

II. Timing of Updated 408(b)(2) Notice

If disclosure of updated 408(b)(2) information is precluded due to circumstances beyond the covered service provider's control, the regulation directs that the revised information must be provided "as soon as practicable."¹³ This standard, by its very nature, is highly dependent on the relevant facts. In light of the unprecedented circumstances discussed above, the Department should apply a very broad standard and provide a "safe harbor" extension for covered service providers who otherwise act in good faith and with reasonable diligence.

ARA recommends that the Department issue interpretative guidance that provides, with respect to changes in the 408(b)(2) information caused by or reasonably related to the Rule becoming applicable on June 9, 2017, disclosure of the changes within the first calendar quarter of 2018 will be considered "as soon as practicable" for purposes of Regulation §2550.408b-2(c)(1)(v)(B)(1).¹⁴ This "safe harbor" will provide additional time for covered service providers to consider potential modifications to the Rule (and related exemptions) and how those modifications may affect their service offerings. It would also reduce the costs and burdens associated with implementation of the Rule consistent with the President's Executive Order.¹⁵ It would do so because it would allow the updated 408(b)(2) notice to be "bundled" with the disclosure of changes with regard to the plan's investments, which is required to be distributed annually.¹⁶ This would result in a significant reduction in the costs and burdens of regulatory compliance. Typically, covered service providers provide updated investment information within the first three months of the calendar year, which would coordinate with the recommended safe harbor.

III. What it Means to be "Informed" of a Change under Regulation §2550.408b-2(c)(1)(v)(B)(1).

As described above, a covered service provider, in the absence of extraordinary circumstances, must disclose changes to the information required to be disclosed under ERISA §408(b)(2) (other than the investment information), as soon as practicable, but not later than 60 days from the date on which the covered service provider is "informed of such change."¹⁷ It is unclear what

¹³ Reg. §2550.408b-2(c)(1)(v)(B)(1).

¹⁴ If the Department's review of the Rule is extended beyond January 1, 2018, a further extension of the safe harbor may be warranted.

¹⁵ Presidential Executive Order 13771 - January 30, 2017, 82 Fed Reg 9339 (February 3, 2017).

¹⁶ Reg §2550.408b-2(c)(1)(v)(B)(2).

¹⁷ Reg §2550.408b-2(c)(1)(v)(B)(1).

it means for a service provider to be “informed” of a change, particularly in the context of a change resulting from or reasonably related to the Rule becoming applicable.

As discussed above, many covered service providers are facing challenges and uncertainty in complying with the Rule because of the ongoing review and the significant potential for modification. ARA believes these to be extraordinary circumstances. Nevertheless, greater clarity is needed with regard to what it means to be “informed of a change” in the context of a covered service provider who, as a result of the Rule becoming applicable, may now be classified as providing fiduciary services.

The word “inform” is defined, as relevant here, to mean “to communicate knowledge to; to impart information or knowledge.”¹⁸ Applying this definition in the context of a change in status caused by a new regulation becoming applicable is less than clear. It would appear that the earliest possible date one could be “informed” of the change is the Rule’s applicability date of June 9, 2017. With that said, a better approach would be to recognize that until there is a recommendation that would constitute fiduciary investment advice under the Rule, there has been no actual change in status. Given the ongoing review of the Rule and reconsideration of service offerings by providers, ARA believes the Department should acknowledge that one cannot be “informed” of a change in status until a “recommendation” is made.

ARA recommends that the Department’s interpretative guidance clarify that when relevant and in the absence of extraordinary circumstances, a covered service provider is not “informed” of a change in the information required by ERISA Reg. §2550.408b-2(c)(1)((iv)(A) through (D) and (G) until such time as a recommendation is actually given that constitutes “fiduciary investment advice.”

IV. Correction of Omission under Regulation §2550.408b-2(c)(1)((vii).

Another consideration in the context of disclosing changes to the initial information provided under ERISA §408(b)(2) is the potential for an error or omission in an updated notice. The regulation provides:

“No contract or arrangement will fail to be reasonable under this paragraph (c)(1) solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to paragraph (c)(1)(iv) of this section (or a change to such information disclosed pursuant to paragraph (c)(1)(v)(B) of this section) or paragraph (c)(1)(vi) of this section, provided that the covered service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service knows of such error or omission.”¹⁹

Of particular import is the parenthetical clause, which was added in the final regulation to clarify that the ability to correct errors or omissions is also available with respect to the disclosure of

¹⁸ The Merriam-Webster On-line Dictionary at <https://www.merriam-webster.com/dictionary/inform>

¹⁹ Reg. §2550.408b-2(c)(1)(vi).

changes to the initial information.²⁰ In the context of a change in status resulting from the Rule becoming applicable on June 9, 2017, this provision is particularly applicable. It is quite possible that a covered service provider who is otherwise acting in good faith and with reasonable diligence will omit providing an updated 408(b)(2) notice. This is especially true in the context of today's environment where the Rule is subject to review and likely modification.

ARA recommends that Department's guidance specifically clarify that the omission of an updated 408(b)(2) notice may be corrected through the provisions of Reg. §2550.408b-2(c)(1)(vii).

ARA looks forward to working with the Department on this important issue. We would welcome the opportunity to discuss these comments further with you. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/
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²⁰ Preamble, Reasonable Contract or Arrangement under Section 408(b)(2) – Fee Disclosure, 77 Fed Reg 5632, 5644 (February 3, 2012).