DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB07

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

AGENCY: Employee Benefits Security Administration.

ACTION: Final rule.

SUMMARY: This document contains a final regulation under the Employee Retirement Income Security Act of 1974 (ERISA) that requires the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans (e.g., 401(k) plans). This regulation is intended to ensure that all participants and beneficiaries in participant-directed individual account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. This document also contains conforming changes to another

regulation relating to plans that allow participants to direct the investments of their individual accounts. These regulations will affect plan sponsors, fiduciaries, participants and beneficiaries of participant-directed individual account plans, as well as providers of services to such plans.

DATES: *Effective Date.* [INSERT 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date. Notwithstanding the effective date, the final rule and amendments will apply to individual account plans for plan years beginning on or after November 1, 2011.

FOR FURTHER INFORMATION CONTACT: Michael Del Conte, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

1. *General*

According to the Department of Labor's (Department) most recent data, there are an estimated 483,000 participant-directed individual account plans, covering an estimated

72 million participants, and holding almost $3 trillion in assets.[1] With the proliferation of these plans, which afford participants and beneficiaries the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants and beneficiaries are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants and beneficiaries may not have access to or, if accessible, may not be considering, information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses.

Under ERISA, the investment of plan assets is a fiduciary act governed by the fiduciary standards in ERISA section 404(a)(1)(A) and (B), which require plan fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries. When a plan assigns investment responsibilities to the plan's participants and beneficiaries, it is the view of the Department that plan fiduciaries must take steps to ensure that participants and beneficiaries are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan, including its fees and expenses and designated investment alternatives, to make informed decisions about the management of their individual accounts. To some extent, disclosure of such information already is required by plans that elect to comply with the requirements of ERISA section 404(c) (see section 2550.404c-1(b)(2)(i)(B)). However, compliance with section 404(c)'s disclosure

[1] 2007 Form 5500 Data, U.S. Department of Labor. The estimated 483,000 plans include plans that permit participants to direct the investment of all or a portion of their individual accounts.

requirements is voluntary and does not extend to participants and beneficiaries in all participant-directed individual account plans.

The Department believes that all participants and beneficiaries with the right to direct the investment of assets held in their individual plan accounts should have access to basic plan and investment information. For this reason, the Department is issuing this regulation under ERISA section 404(a), with conforming amendments to regulations under section 404(c). This regulation under ERISA section 404(a) establishes uniform, basic disclosures for such participants and beneficiaries, without regard to whether the plan in which they participate is a section 404(c) plan. In addition, the regulation requires participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among a plan's investment alternatives.

2. *Request for Information and Proposed Regulation*

To facilitate development of the regulation, the Department first published, on April 25, 2007, a Request for Information (RFI) in the Federal Register[2] requesting suggestions, comments and views from interested persons on a variety of issues relating to the disclosure of plan and investment-related fee and expense and other information to participants and beneficiaries in participant-directed individual account plans. Following its review of over 100 public comment letters submitted in response to the RFI, the Department next published a notice of proposed rulemaking in the Federal Register on

[2] 72 FR 20457 (April 25, 2007).

July 23, 2008.[3] Interested persons were again invited to submit comments on the proposal, and, in response to this invitation, the Department received over 90 written comments from a variety of parties, including plan sponsors and fiduciaries, plan service providers, financial institutions, and employee benefit plan and participant representatives. These comments are available for review under "Public Comments" on the "Laws & Regulations" page of the Department's Employee Benefits Security Administration Web site at http://www.dol.gov/ebsa.

In addition to publishing an RFI and a proposed regulation, the Department engaged ICF International (ICF) to conduct a series of focus group studies concerning how participants generally make choices among their employee benefit plan's investment alternatives, and, specifically, how participants would react to the Model Comparative Chart for plan investment alternatives that was published as an appendix to proposed section 2550.404a-5. ICF issued a report to the Department concerning the results of these focus group studies, and these results, where appropriate, have been incorporated below in the Department's discussion of comments on the proposed regulation and Model Comparative Chart.

Set forth below is an overview of the final regulations and a discussion of the public comments received on the proposal.

B. Final Rule § 2550.404a-5 Concerning Fiduciary Requirements for Disclosure

[3] 73 FR 43014 (July 23, 2008).

In general, the final regulation retains the basic structure of the proposal. Paragraph (a) of § 2550.404a-5 sets forth the general principle that, where documents and instruments governing an individual account plan provide for the allocation of investment responsibilities to participants and beneficiaries, a plan fiduciary, consistent with ERISA section 404(a)(1)(A) and (B), must take steps to ensure that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including plan fees and expenses, and regarding the designated investment alternatives available under the plan, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts. Paragraph (b) addresses the disclosure requirements that must be met by plan fiduciaries for plan years beginning on or after the applicability date. Under this paragraph, plan fiduciaries must comply with the requirements of paragraph (c), dealing with plan-related information, and paragraph (d), dealing with investment-related information. Paragraph (e) describes the form in which the required information may be disclosed, such as via the plan's summary plan description, a quarterly benefit statement, or the use of the provided model, depending on the specific information. Paragraph (e) recognizes the various acceptable means of disclosure; it does not preclude other means for satisfying the disclosure duties under this final regulation. Fiduciaries that meet the requirements of paragraphs (c) and (d) will have satisfied the duty to make the regular and periodic disclosures described in paragraph (a) of this section. As indicated in the preamble to the proposal, the Department believes, as an interpretive matter, that ERISA section 404(a)(1)(A) and (B)

impose on fiduciaries of all participant-directed individual account plans a duty to furnish participants and beneficiaries information necessary to carry out their account management and investment responsibilities in an informed manner. In the case of plans that elected to comply with section 404(c) before the applicability of this final rule, the requirements of section 404(a)(1)(A) and (B) typically would have been satisfied by compliance with the disclosure requirements set forth at 29 CFR Sec. 2550.404c-1(b)(2)(i)(B). However, the Department expresses no view with respect to plans that did not comply with section 404(c) and the regulations thereunder as to the specific information that should have been furnished to participants and beneficiaries at any time before this regulation is finalized and applicable.

Pursuant to Executive Order 12866, the Department evaluated the benefits and costs of the final regulation, and concludes that the net present value of the rule's benefits is estimated at nearly $12.3 billion. The Department estimates that the regulation will affect 72 million participants in 483,000 participant-directed individual account plans containing assets valued at nearly $3.0 trillion.[4] Over the ten-year period 2012-2021, the Department estimates that the present value of the benefits provided by the final rule will be approximately $14.9 billion and the present value of the costs will be approximately $2.7 billion.[5] A significant benefit of this regulation is that it will reduce the amount of time participants spend collecting fee and expense information and organizing the information in a format that allows key information to be compared; this time savings is estimated to total nearly 54 million hours valued at nearly $2 billion in 2010 (2010

[4] This estimate is based on 2007 Form 5500 data, which is the latest available data.
[5] This calculation uses a seven percent discount rate. The $14.9 billion of benefits and $2.7 billion of costs are valued in 2010 dollars.

dollars). The anticipated cost of the regulation is $425 million in 2012 (2010 dollars), arising from legal compliance review, time spent consolidating information for participants, creating and updating websites, preparing and distributing annual and quarterly disclosures, and material and postage costs to distribute the disclosures. A more detailed discussion of the need for this regulatory action, consideration of regulatory alternatives, and assessment of benefits and costs is included in Section E of this preamble, entitled "Regulatory Impact Analysis."

1. *General; Satisfaction of Duty to Disclose*

As proposed, the obligation to disclose the required information was imposed generally on a plan fiduciary (paragraph (a) of proposed § 2550.404a-5). Commenters, however, requested guidance as to which fiduciary is responsible for satisfying the duty to disclose. The proposal described the party responsible for providing disclosures as "a fiduciary (or a person or persons designated by the fiduciary to act on its behalf)[.]" Commenters explained that any given plan might have many fiduciaries involved in its operation and requested clarification as to which fiduciary must provide the rule's required disclosures. Accordingly, consistent with other disclosure obligations under ERISA, the Department has clarified in paragraph (a) of the final rule that the plan administrator, as defined in ERISA section 3(16), is responsible for complying with the rule's disclosure requirements.

Paragraph (b) of the final rule, consistent with the proposal, addresses the disclosure requirements plan administrators must satisfy. Paragraph (b) has been modified from the proposal to clarify, at paragraph (b)(1), that a plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative. A footnote to the proposal included the following statement: "[F]iduciaries shall not be liable for their reasonable and good faith reliance on information furnished by their service providers with respect to those disclosures required by paragraph (d)(1)."[6] Although commenters generally were supportive of this reliance relief for plan administrators required to comply with the rule's disclosure requirements, many comments asked the Department to make this relief more prominent by including it in the text of the final rule, rather than as a mere footnote to the Department's preamble. The Department was persuaded that this relief should be more prominent, and the provision therefore has been added to the text of the final rule. Further, this provision has been expanded to enable reliance on information received from or provided by both service providers to the plan and, as applicable, issuers of plan designated investment alternatives (e.g., mutual funds).

Some commenters requested that the final rule clarify whether IRA-based plans are subject to the disclosure rule. Commenters argued that IRA-based plans under the Internal Revenue Code of 1986 (Code) such as Code sections 408(k) simplified employee pensions (SEPs) and 408(p) simple retirement accounts (SIMPLEs) are already subject to

[6] 73 FR 43014 at 43018, n. 7 (July 23, 2008).

disclosure regimes under the Code and relevant securities laws. It also was argued that application of the disclosure rules would add administrative complexity to arrangements that, by their very nature, were intended to be simple and that complicating administration of such plans may serve to discourage employers from establishing or continuing such arrangement for their employees. Taking into account the foregoing arguments, as well as the fact that participants in IRA-based plans generally have considerable flexibility in the choice of their IRA provider or the ability to roll over their balances to an IRA provider of their choice, the Department has determined not to extend the application of this rule to such plans. To clarify the scope of the final rule, a new paragraph (b)(2) has been added defining the types of arrangements that constitute a "covered individual account plan" for purposes of the rule. In this regard, paragraph (b)(2) provides that a "covered individual account plan" is any participant-directed individual account plan, as defined in section 3(34) of ERISA, except that such term shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) ("simplified employee pension") or 408(p) ("simple retirement account") of the Internal Revenue Code of 1986 (Code).

A few commenters suggested the rule be expanded to cover defined contribution plans that do not allow for participant direction. The Department did not adopt this suggestion. While it may be appropriate to review the disclosure rules applicable to such plans, the Department does not believe it has sufficient information at this time to fully evaluate and address potential disclosure gaps in the context of this rulemaking.

One commenter suggested that the Department exclude small plans (for example those with fewer than 100 participants) from the scope of the final rule. The Department did not adopt this suggestion. The Department believes that participants in smaller plans face the same challenges as participants in larger plans when it comes to understanding the operations of their plans and the investment options offered thereunder. For this reason, the Department has determined that the final rule should apply to covered participant-directed individual account plans without regard to size.

Several commenters suggested that the Department clarify, and in some cases modify, the scope of the proposal as to the specific participants and beneficiaries of covered plans to which the rule applies. The proposed rule required disclosures to each participant and beneficiary of the plan that "pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to his or her individual account." The question presented by the commenters was whether disclosures must be furnished to all eligible employees or only those who actually participate in the plan. Consistent with the definition of "participant" under section 3(7) of ERISA, disclosures must be made to all employees that are eligible to participate under the terms of the plan, without regard to whether the participant has actually become enrolled in the plan. One commenter recommended that the proposal be modified to require initial disclosures to all eligible employees, but limit annual disclosures only to those that actually enroll, make contributions, and direct their investments. The Department has not adopted this recommendation. The Department believes that, with regard to employees that have not enrolled in their plan, the annual notice will serve as an important reminder of their

eligibility to participate in the plan. With regard to notification of beneficiaries, however, the obligation to disclose extends only to those beneficiaries that, in accordance with the terms of the plan, have the right to direct the investment of assets held in, or contributed to, their accounts. Such rights might arise as a result of the death of a participant or pursuant to a qualified domestic relations order.

2. *Plan-Related Information*

As noted above, paragraph (c) of the final rule addresses plan-related information that must be disclosed to participants and beneficiaries. Like the proposal, paragraph (c) sets forth three general categories of plan-related information that must be disclosed to participants and beneficiaries – general operational and identification information (paragraph (c)(1)), administrative expenses (paragraph (c)(2)), and individual expenses (paragraph (c)(3)). The required disclosures must be based on the latest information available to the plan.

a. *General operational and identification information*

Paragraph (c)(1)(i), like the proposal, requires that certain operational and identification information be disclosed to participants and beneficiaries. Specifically, this paragraph requires that participants and beneficiaries be provided: (A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions; (B) An explanation of any specified limitations on such instructions under

the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;[7] (C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights; (D) An identification of any designated investment alternatives offered under the plan; (E) An identification of any designated investment managers; and (F) A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. Subparagraph (F) was added to the final rule in response to comments requesting a clarification as to what, if anything, has to be disclosed about brokerage windows and similar arrangements that permit participants to invest their assets in other than designated investment alternatives offered by the plan. It should be noted that in addition to the general brokerage window information required by paragraph (F), other provisions of this rule require disclosure of any fees and expenses that participants will be expected to pay when utilizing the brokerage window or similar arrangement (see paragraph (c)(3)(i)(A)).

A number of commenters expressed concern about the requirement(s) that information be furnished to participants and beneficiaries "on or before the date of plan eligibility and at least annually thereafter." Specifically, the concerns focused on the

[7] Some commenters asked whether this requirement included limitations that are imposed at the investment or fund level. The Department intends that the disclosure pursuant to this paragraph would include only plan-based limitations and restrictions on a participant's ability to direct investments or transfer to or from designated investment alternatives. To the extent any limitations or restrictions are imposed at the investment, fund or portfolio level, those limitations or restrictions must be described as part of the investment-related information required by the final rule. See paragraph (d)(1)(iv) of the final regulation.

compliance challenges posed by this disclosure requirement on plans that provide for plan eligibility as of the first day of employment, noting that employers may not be able to furnish the required disclosure in advance of employment and, therefore, may be required to modify their eligibility rules to avoid noncompliance with this disclosure obligation. Commenters suggested various alternatives, such as requiring disclosure on or before enrollment in the plan or the first investment. The Department believes that the commenters make a valid point and, accordingly, has modified the rule to provide more flexibility. The final rule provides in this regard that participants and beneficiaries must be furnished the required information on or before the date on which they can first direct their investments. While not requiring disclosures as early as the date of plan eligibility, the provision does operate to ensure that participants are furnished the information either before or in connection with their first investment direction under the plan. The same timing issues exists with respect to those plan-related disclosures required by paragraphs (c)(2)(i)(A), (c)(3)(i)(A) and (d)(1) and, therefore, the Department has made identical changes to the timing requirements of those paragraphs in the final rule.

b. *Changes to general information*

The proposal required in paragraph (c)(1)(ii) that participants or beneficiaries be furnished, not later than 30 days after the date of adoption of any material change to the general plan information described in paragraph (c)(1)(i), a description of such change. The Department received several comments requesting that the timing for furnishing a description of such a material change be determined with reference to the effective date

of the change, rather than the date of its adoption. Commenters noted that the adoption date of a change sometimes precedes its effective date by as much as a year or more, and also that in some instances the date of adoption may be unclear. Several commenters also suggested that the required description of the change be furnished at least 30 days, but not more than 90 days, before the effective date of the material change, in order to apprise participants and beneficiaries of the change close to the time that it will be useful to them. In addition, questions were raised concerning what constitutes a "material" change in the required information.

With regard to the question as to what constitutes a "material" change, the Department is now of the view that, given the significance of the information that has to be disclosed under paragraph (c)(1)(i), virtually any change in the information would be a "material" change because of its importance to participants and beneficiaries. Accordingly, the Department has decided to drop the concept of "material" from the requirement to update plan participants and beneficiaries of changes in the required disclosures.

The Department also decided to amend the timing requirements in response to comments on the proposal. In this regard, the Department agrees with commenters that suggested that participants and beneficiaries should be notified of plan changes on the earliest possible date and, where practical, in advance of the effective date of the changes. In this regard, paragraph (c)(1)(ii) of the final rule provides that if there is a change to the information described in paragraph (c)(1)(i)(A) through (F), a description of such

change(s) must be furnished to participants and beneficiaries at least 30 days, but not more than 90 days, in advance of the effective date of the change(s). The final rule, however, also recognizes that there may be circumstances when changes must be made within a time frame that precludes compliance with the 30-day advance notice requirement, such as the immediate elimination of an investment option when it is determined to be no longer a prudent investment alternative. In such cases, the rule requires that information be furnished as soon as reasonably practicable.

In connection with the development of the final rule, the Department also reviewed the information required to be disclosed under paragraph (c)(2)(i)(A) (relating to administrative expenses) and paragraph (c)(3)(i)(A) (relating to individual expenses) and concluded that an updating rule should apply to those disclosures as well, given the importance of the required information to participants and beneficiaries. These new updating requirements appear at paragraphs (c)(2)(i)(B) and (c)(3)(i)(B) of the final rule.

c. *Administrative expenses*

Paragraph (c)(2)(i) of the final rule, like the proposal, requires that participants and beneficiaries be provided an explanation of any fees and expenses for general plan administrative services (e.g., legal, accounting, recordkeeping) that may be charged against their individual accounts (whether by liquidating shares or deducting dollars), and the basis on which such charges will be allocated (pro rata, per capita). The provision makes clear that such charges do not include charges that are included in the annual

operating expenses of designated investment alternatives. As noted above, this paragraph (c)(2) has been modified to establish disclosure timing and update requirements that conform with the requirements of paragraph (c)(1). See paragraph (c)(2)(i)(A) and (B).

Paragraph (c)(2)(ii), also like the proposal, requires that expenses described in paragraph (c)(2)(i) that are actually charged against a participant's or beneficiary's account be disclosed to participants and beneficiaries at least quarterly, along with a description of the service(s) to which the charge or charges relate.[8] However, in response to commenters' requests for specificity as to which services and charges are covered by this quarterly disclosure requirement, paragraph (c)(2)(ii)(A) both includes an explicit cross reference to the fees and expenses for administrative services described in paragraph (c)(2)(i) and a parenthetical noting that the disclosed charges arise from either the liquidation of shares or the deduction of dollars from individual accounts in compliance with paragraph (c)(2)(i)'s requirement that such charges are not included in the total annual operating expense of any designated investment alternative.

In a further effort to bring clarity to the disclosures provided to participants and beneficiaries, the Department has added a new subparagraph (C) to paragraph (c)(2)(ii) of the final rule. This new subparagraph is intended to provide those participants in plans with revenue sharing arrangements that serve to reduce plan administrative costs with a

[8] Some commenters requested that the Department reiterate its position, discussed in the preamble to the proposed rule, that administrative charges do not need to be broken out into service-by-service detail on the quarterly statement. The Department continues to agree with commenters on the proposal and the RFI who believe that such a breakdown is not necessary, or particularly useful, to participants and beneficiaries; the final rule therefore also allows for "aggregate" disclosure of administrative expenses, as proposed. *See* 73 FR 43014, 43016 (July 23, 2008).

better picture as to how those costs are underwritten, at least in part, by fees and expenses attendant with investment alternatives offered under their plans. Specifically, paragraph (c)(2)(ii)(C) provides that, if applicable, the statement required to be furnished pursuant to paragraph (c)(2)(ii), must include an explanation that, in addition to the expenses reported on the statement, some of the plan's administrative expenses for the preceding quarter were paid from the annual operating expenses of one or more of the plan's designated investment alternatives (e.g., through revenue sharing arrangements, Rule 12b-1 fees, sub-transfer agent fees). This required statement has been included in the final rule in response to many comments received by the Department on the provision in the proposal that administrative expenses must be disclosed pursuant to this paragraph only "to the extent not otherwise included in investment-related fees and expenses[.]" Some commenters expressed concern that participants and beneficiaries may be misled into believing that there is little or no administrative expense associated with their participation in the plan when a significant portion of the cost of administrative services is actually paid out of investment-related charges. Other commenters disagreed and believed that, because any such administrative services would be paid for from the total annual operating expenses of the designated investment alternatives in which participants invest and because such annual operating expenses are required to be separately disclosed, participants and beneficiaries will receive comprehensive information about the total charges, for administration and investment, that will be assessed against their accounts. These commenters also argue that the burden associated with attempting to attribute some portion of total annual operating expenses to plan administrative services would be significant and vastly outweigh any potential benefit to participants and

beneficiaries of such attribution. Most commenters, however, agreed that it is appropriate to inform participants, when applicable, that administrative expenses are paid from investment-related fees and are not reflected in the reported administrative expense amount. The Department was persuaded that some information, even if general, would help participants to better understand the fees and expenses attendant to operating their plan and of the fact that some fees and expenses might be underwritten by the investment alternatives offered by their plans.

Some commenters argued that administrative expenses charged to participant accounts should be reported on an annual, rather than a quarterly, basis. These commenters argued that the amounts reported as deducted during any given quarter have the potential to both mislead and confuse participants because such amounts are often subsequently reduced or restored by offsets or credits from revenue sharing and similar arrangements as part of year-end or periodic reconciliations. The commenters further argue that eliminating this information from quarterly disclosures will not affect the information available to participants because participants typically have access to Web sites where they can review the status of their account, including charges to their accounts, on a daily basis. Other commenters supported the quarterly disclosure requirement, noting that there is no other formal requirement for the disclosure of such information to participants and beneficiaries on a regular basis. After careful consideration of the various views on this requirement, the Department has decided to retain the requirement for quarterly disclosures of plan administrative expenses. While the Department recognizes that some participants may have questions concerning the

debiting of charges and crediting of offsets to their accounts during the plan year, the Department is not persuaded that the potential for confusion and questions that might result from the requirement outweighs the benefits of participants and beneficiaries being informed on a regular basis of the actual amounts taken from (or credited to) their account during the quarter and the identification of services, albeit general, to which those amounts relate.

d. *Individual expenses*

As noted above, paragraph (c)(3) requires the disclosure of those expenses charged against a participant's or beneficiary's account on an individual, rather than plan-wide basis. Examples of such charges include: fees attendant to the processing of plan loans or qualified domestic relations orders; fees for investment advice; front or back-end loads or sales charges; redemption fees; and investment management fees attendant to a participant's or beneficiary's investment that are charged directly against the individual account of the participant or beneficiary, rather than included in the annual operating expenses of the investment (as might be the case, for example, with certain unregistered designated investment alternatives, such as bank collective investment funds). In addition to clarifying changes, paragraph (c)(3), like paragraphs (c)(1) and (c)(2), incorporates new disclosure timing and update requirements, which are discussed in detail above.

A few commenters requested clarification about the quarterly disclosure requirement for individual expenses. These commenters explained that some individual expenses currently are disclosed by a confirmation statement or other similar notice that is provided at the time the charge actually is assessed to the individual participant's or beneficiary's account; these commenters argued that the Department should avoid duplication, and potential confusion to participants and beneficiaries, that would result from requiring that these expenses also be disclosed on a quarterly statement. The Department does not intend such duplicative disclosure; the rule requires that this information be provided "at least quarterly," and the Department anticipates that actual charges may be disclosed more frequently than quarterly. To the extent such a charge is otherwise disclosed during a particular quarter, for example by a confirmation statement after a charge is deducted from an account, that charge would not have to be disclosed again on the subsequent quarterly statement. No quarterly statement in compliance with this paragraph (or with paragraph (c)(2)(ii) concerning quarterly disclosure of administrative expenses) must be furnished if there were no charges to a participant's or beneficiary's account during the preceding quarter.

e. *Disclosures on or before first investment*

In an effort to clarify the scope of the updating requirements and ensure that new participants were provided at least the same information that had been provided to existing participants prior to their participation, paragraph (d)(1)(v) of the proposal provided, for purposes of the disclosure of investment-related information to new

participants, plan administrators could satisfy their obligation by furnishing the most recent annual disclosure along with any required updates furnished to participants and beneficiaries. The Department received no objections to this provision and, accordingly, is adopting it as proposed, with the exception of a paragraph re-designation and changes necessary to conform to the new timing requirements applicable to the annual disclosures. See paragraph (d)(1)(viii) of § 2550.404a-5. A question was raised, however, whether a similar clarification was needed for the plan-level disclosures required to be furnished to new participants and beneficiaries under the regulation. The Department found no basis for not providing similar guidance in the context of the required plan-level disclosures and, therefore, has added to the final rule a new paragraph (c)(4). Paragraph (c)(4) provides that for purposes of the requirements under paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) that plan administrators furnish information on or before the date on which a participant or beneficiary can first direct his or her investments, plan administrators may satisfy their obligations by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant those paragraphs and any changes to the information furnished to participants and beneficiaries pursuant to paragraphs (c)(1)(ii), (c)(2)(i)(B) and (c)(3)(i)(B) of the final rule.

3. *Investment-Related Information*

The Department received a number of comments relating to the disclosure of investment-related information pursuant to paragraph (d) of the proposal, and the related

definitional section in paragraph (h). Many of the comments raised questions concerning the proposed application of mutual fund-type disclosures to non-registered investment vehicles. The Department has made a number of changes to this section of the final rule (and the related definitional section in paragraph (h)), in an effort to address the problems raised by the commenters, while, at the same time, attempting to maintain a reasonably uniform regime for the disclosure of investment-related information, a disclosure regime that would enable participants to compare competing mutual fund, insurance and banking products on a reasonably consistent and uniform basis. In considering these issues, the Department, in addition to considering comments and input from financial industry representatives, consulted with other appropriate regulators, including the Securities and Exchange Commission (Commission), the Office of the Comptroller of the Currency, and the Financial Industry Regulatory Authority (FINRA). The Department also employed focus groups, as discussed above, to learn more about how participants make investment decisions and whether the Department's proposed Model Comparative Chart would in fact assist such decisions. The Department believes that the investment-related disclosure requirements of the final rule, discussed below, strike an appropriate balance between accommodating, on one hand, the increasing innovation and complexity of the types of investments that are available to plan participants and beneficiaries and, on the other hand, participants' and beneficiaries' need for complete, but concise and user-friendly, information about their plan investment alternatives.

a. *Information to be provided automatically*

Paragraph (d)(1) of the final rule, consistent with the proposal, describes the investment-related information that must be provided automatically, with respect to each designated investment alternative, to participants and beneficiaries on or before the date they first have the ability to direct their investments and at least annually thereafter. The specific information that must be disclosed pursuant to this paragraph is set forth below, as well as a discussion of how this required information has been modified in response to commenters' concerns. Additionally, paragraph (i) of the final rule provides special disclosure requirements for certain types of designated investment alternatives, which modify the requirements of paragraph (d)(1) of the final.

b. *Identifying information*

The proposed regulation, in paragraph (d)(1)(i), required that certain identifying information be furnished with respect to each designated investment alternative offered under the plan. The first required piece of information, in subparagraph (A), is the name of the designated investment alternative. This straight-forward requirement did not generate any public comment and has been retained in the final rule.

Subparagraph (B) of paragraph (d)(1)(i) of the proposal required the furnishing of an Internet Web site address relating to each designated investment alternative. The Web site requirements of the final rule, as well as related comments on the proposal, are discussed below in this preamble under the heading "f. Internet Web site address."

Like the proposal, the final rule, at paragraph (d)(1)(i)(B), requires identification of the type or category of the investment (e.g., money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer stock fund, employer securities). This requirement is unchanged from the proposal, although the examples of types or categories in the parenthetical, which are set forth for illustrative purposes, have been expanded in response to questions from commenters about investment alternatives that did not clearly fall within the list of examples included in the proposal. One commenter suggested that fiduciaries should be permitted to utilize various commercial services to classify the type or category of a plan's designated investment alternatives. While the Department has not modified the proposal in response to this suggestion, the Department anticipates that plan administrators typically will rely on the investment issuer's classification of the type or category of an investment alternative.

Finally, paragraph (d)(1)(i)(D) of the proposal, which required disclosure of the type of management utilized by the investment (e.g., actively managed, passively managed), has been eliminated from the final rule. Many commenters requested that this requirement be eliminated, arguing that they do not believe this information will be useful to most participants and beneficiaries; that some funds may not clearly fall within either one of these two categories, either because they have features of both or because neither category applies (for example, an employer stock fund); and, that it may even mislead participants and beneficiaries about the risks of a particular designated investment alternative. Other commenters argued that this requirement may be redundant; for example, a fund that lists its "type or category" as an index fund is by

definition passively managed. Finally, the results of the Department's focus groups support the notion that this information is not necessarily helpful, and is potentially confusing, to participants. One focus group participant, for example, stated that without knowing what is meant by active or passive management, she would choose active management because it "sounds" better. The Department was persuaded by commenters that providing this information, especially as required in a comparative format, may not be meaningful to participants and beneficiaries. Accordingly, the final rule no longer requires plan administrators to furnish, as a separate piece of identifying information, the type of management utilized with respect to a designated investment alternative. The Department notes that, for participants who wish to obtain more information about the management of a designated investment alternative, the narrative description of an investment's objectives or goals, and of the investment's principal strategies and principal risks, is likely to convey more meaningful and contextual information concerning the style of management used with respect to a designated investment alternative.

c. *Performance data*

The proposed rule, in paragraph (d)(1)(ii), required that performance data be disclosed for designated investment alternatives with respect to which the return is not fixed. Specifically, this paragraph required disclosure of the average annual total return (percentage) of the investment for the following periods, if available: 1-year, 5-years, and 10-years, measured as of the end of the applicable calendar year, as well as a statement

indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future.

This provision, paragraph (d)(1)(ii), is being adopted generally as proposed. Several commenters raised issues regarding the "if available" language, suggesting that participants and beneficiaries could be deprived of as much as nearly five years of valuable return information in situations where the designated investment alternative has been in existence for a period of time just shy of the 5- or 10-year marks. These commenters noted that Commission rules require performance for the "life of the fund" to address this issue. In order to avoid the information gap identified by the commenters, and to maintain appropriate consistency with Commission requirements, the final regulation, at (d)(1)(ii)(A), requires disclosure of the average annual total return of the investment for 1-, 5-, and 10- calendar year periods ending on the date of the most recently completed calendar year (or for the life of the designated investment alternative, if shorter).

In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, paragraph (d)(1)(ii) of the proposal required disclosure of both the fixed rate of return and the term of the investment. While no commenters opposed the proposed requirement, some commenters did request a clarification as to how the disclosure requirement applied to contracts with respect to which there is no "term of investment." The commenters explain that certain contracts, while often having a minimum guaranteed rate for the life of the contract, permit the

fixed rate to change upon notice, but never below the minimum guaranteed rate. One commenter suggested that, for such contracts, the pertinent information for participants and beneficiaries is the most recent rate of return, the minimum rate guaranteed under the contract, if any, and an explanation that the insurer may adjust the rate of return prospectively. The Department agrees. The most essential information for participants who choose to invest in fixed investment alternatives is the contractual interest rate paid to their accounts and the term of the investment during which their monies are shielded from market price fluctuations and reinvestment risks. The Department believes that, with respect to such contracts, it is particularly important that participants and beneficiaries be clearly advised of the issuer's ability to modify the rate of return and be able to readily determine the most current rate of return applicable to such investment. In this regard, the Department has modified the proposal, at paragraph (d)(1)(ii)(B) of the final, to require the disclosure of the current rate of return, the minimum rate guaranteed under the contract or agreement, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (e.g., telephone or Web site) the most recent rate of return information available.

One commenter asked whether designated investment alternatives such as stable value funds and money market mutual funds are to be treated as fixed return or variable return investments for purposes of the regulation. The fixed return provisions of the regulation are limited to designated investment alternatives that provide a fixed or stated rate of return to the participant, for a stated duration, and with respect to which investment risks are borne by an entity other than the participant (e.g., insurance

company). Examples of fixed return investments include certificates of deposit, guaranteed insurance contracts, variable annuity fixed accounts, and other similar interest-bearing contracts from banks or insurance companies. While money market mutual funds and stable value funds generally aim to preserve principal, they are not free of investment risk to the investor. Accordingly, such investments are subject to the variable return provisions of the regulation, even though they routinely hold fixed-return investments.

Several commenters requested clarification on the relationship, if any, between the disclosure requirements in the proposal and the Securities and Exchange Commission's and FINRA's advertising rules. The primary concern of commenters seemed to be in connection with the requirement to disclose annually the performance data specified in paragraph (d)(1)(ii) of the proposal and the timeliness requirements in the Commission's advertising rules. The Department has consulted with the staff of the Commission and FINRA on this issue. The Commission's staff has advised that it expects to communicate its position to the Department in a staff no-action letter, which will be issued before the applicability date of this final rule. FINRA staff has stated that it will apply the Commission's advertising rules in a manner that is consistent with the Commission's staff position published in the no-action letter. The Department and the Commission will, in turn, make the letter available to the public on their respective Web sites.

d. *Benchmarks*

Paragraph (d)(1)(iii) of the proposal required, for each designated investment alternative with respect to which the return is not fixed, the disclosure of "the name and returns of an appropriate broad-based securities market index over the 1-year, 5-year, and 10-year periods…" for which performance data must be disclosed. The proposal also provided that the benchmark could not be administered by an affiliate of the investment provider, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

Some commenters suggested that the Department eliminate this requirement, while others called for permitting or requiring multiple benchmarks for each designated investment alternative. Some commenters suggested permitting composite or customized benchmarks. Those commenters who favored an ability to include multiple benchmarks for each designated investment option noted the existence of such flexibility under SEC rules, specifically Item 22(b)(7) of Form N-1A[9]. (See, e.g., Instruction 6 to Item 22(b)(7), encouraging, in addition to a required broad-based securities market index, narrowly based indexes that reflect the market sectors in which a fund invests.) Commenters who advocated composite benchmarks stated that a fund that invests in both stocks and bonds (e.g., lifecycle fund or balanced fund) should be permitted to compare itself to a benchmark consisting of a weighted average of both an equities index and a bond index. The commenters who favored eliminating the benchmark requirement stated that certain investment strategies are not managed to a benchmark, and therefore,

[9] Now Item 27 of Form N-1A, as revised February 2010.

providing benchmark information could be misleading. Supporters of the proposal, however, maintained that participants would benefit more from having a single recognizable benchmark for each designated investment alternative under the plan, rather than multiple or blended indices for each.

The Department continues to believe that appropriate benchmarks may be helpful tools for participants to use in assessing the various investment options available under their plans and, therefore, has retained this requirement in the final rule. However, benchmarks are more likely to be helpful when they are not subject to manipulation and are recognizable and understandable to the average plan participant, as is the case with broad-based indices contemplated by Instruction 5 to Item 27(b)(7) of Form N-1A. For this reason, the final rule retains the proposed requirement that a benchmark must be a broad-based securities market index and it may not be administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used. The Department, however, notes that paragraph (d)(2)(ii) of the final regulation permits the disclosure of information that is in addition to that which is required by this final regulation, so long as the additional information is not inaccurate or misleading. Thus, in the case of designated investment alternatives that have a mix of equity and fixed income exposure (e.g., balanced funds or target date funds), a plan administrator may, pursuant to paragraph (d)(2)(ii) of the final rule, blend the returns of more than one appropriate broad-based index and present the blended returns along with the returns of the required benchmark, provided that the blended returns proportionally reflect the actual equity and fixed-income holdings of the designated investment

alternative. For example, where a balanced fund's equity-to-bond ratio is 60:40, the returns of an appropriate bond index and an appropriate equity index may be blended in the same ratio and presented along with the benchmark returns mandated by paragraph (d)(1)(iii) of the final rule. Presenting blended returns that do not proportionally reflect the holdings of the designated investment alternative would, in the view of the Department, be misleading and, therefore, not permitted pursuant to paragraph (d)(2)(ii) of the final regulation.

e. *Fee and expense information*

Paragraph (d)(1)(iv) of the proposal required disclosure of fee and expense information for designated investment alternatives. This requirement has been retained in the final rule, with a few modifications in response to public comments. Paragraph (d)(1)(iv) also has been restructured so that subparagraph (A) addresses the fee and expense disclosure requirements for designated investment alternatives with respect to which the return is not fixed, and subparagraph (B) addresses such requirements for designated investment alternatives with respect to which the return is fixed for the term of the investment.

Consistent with the proposal, paragraph (d)(1)(iv)(A)(*1*) requires disclosure of the amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees,

and purchase fees). No substantive changes were made to this provision from that which was proposed. Clarifying language, however, was added to the existing parenthetical language in order to distinguish shareholder-type fees from other investment-related fees and expenses. The new language provides that a fee or expense is a shareholder-type fee to the extent it is "not included in the total annual operating expenses of any designated investment alternative." Thus, the key distinction is how the fee is ultimately being paid by the participant or beneficiary. If the fee or expense is charged directly against participant's or beneficiary's individual investment or account, as is typically the case with sales loads, account fees, and the other items delineated in the parenthetical, then the fee or expense is to be disclosed as a shareholder-type fee. If, on the other hand, the fee or expense is paid from the operating expenses of a designated investment alternative, then the fee or expense is to be included in the total annual operating expenses of a designated investment alternative. The requirement to disclose the total annual operating expenses of each designated investment alternative is discussed below.

The Department recognizes that in some instances there will be an overlap in disclosures between shareholder type fees described in paragraph (d)(1)(iv)(A)(*1*), and individual expenses described in paragraph (c)(3) of the final rule, which are discussed in detail above under the heading "d. Individual expenses." For example, a front-end sales load imposed in connection with investing in a specific designated investment alternative that is charged (either by share or dollar deduction) directly against a participant's or beneficiary's individual account would properly be covered by and require disclosures under both paragraphs. The consequence of this overlap is that participants and

beneficiaries will not only receive general information regarding the sales load before investing, but pursuant to paragraph (c)(3)(ii) of the final rule, will also receive a statement after investing showing the dollar amount actually charged against their individual accounts.

Some commenters asked whether only fees and expenses must be disclosed, or whether plan administrators also should notify participants and beneficiaries of other limitations or restrictions concerning the designated investment alternative, such as trading restrictions or limitations on how amounts liquidated from the designated investment alternative may be reinvested. In the Department's view, it is appropriate in this context to inform participants and beneficiaries of these restrictions and limitations so that they are fully aware of the consequences of their investment decisions. Accordingly, paragraph (d)(1)(iv)(A)(*1*) of the final rule has been expanded from the proposal to require a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions).

Paragraph (d)(1)(iv)(A)(*2*) requires disclosure of the total annual operating expenses of the investment expressed as a percentage (e.g., expense ratio), calculated in accordance with paragraph (h)(5) of the final rule. This requirement is unchanged from the proposal, although, as discussed below, the definition of "total annual operating expenses" has been revised in the final rule.

Paragraph (d)(1)(iv)(A)(*3*) of the final rule includes a new requirement for an example illustrating the effect in dollars of each designated investment alternative's total annual operating expenses. Specifically, this paragraph requires disclosure of the total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the total annual operating expenses percentage disclosed for paragraph (d)(1)(iv)(A)(*2*)). A significant number of commenters felt that a dollar-based disclosure would be more useful to participants, who cannot always convert operating expense ratios into dollars, which commenters argue is a more helpful way for participants to understand the significance of fees. The results of the Department's focus group studies also support the notion that examples in dollars will help participants to better understand how fees impact retirement savings. The Department was persuaded by the large number of commenters supporting inclusion of dollar-based disclosure in the context of investment fees and, accordingly, expanded the requirements of the final rule to provide for the disclosure of a designated investment alternative's total annual operating expenses in dollars.

Paragraph (d)(1)(iv)(A)(*4*) of the final rule requires a statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. The Department did not receive any comments opposing this requirement; in fact, this required statement is consistent with the concern raised by commenters that participants and beneficiaries should not be encouraged to focus "only" on fees and expenses, since fee and expense information must

be considered in context with other information about a plan's designated investment alternatives. This required statement has been retained, unchanged from the proposal.

Paragraph (d)(1)(iv)(A)(*5*) of the final rule includes a new required statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants and beneficiaries can visit the Internet Web site of the Employee Benefits Security Administration for information and an example demonstrating the long-term effect of fees and expenses. This statement has been added in response to the suggestion of commenters that participants and beneficiaries would benefit from an understanding that, over time, fees and expenses may substantially reduce the growth of their retirement accounts.

Finally, paragraph (d)(1)(iv)(B) of the final rule provides the fee and expense information that must be disclosed for designated investment alternatives with respect to which the return is fixed for the term of the investment. Consistent with the proposal, plan administrators must disclose the amount and a description of any shareholder-type fees, and a description of any restrictions or limitations that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part. For examples of fixed-return investments, see the discussion above in this preamble under the heading "c. Performance data."

f. *Internet Web site address*

The proposed rule contained a requirement that plan fiduciaries provide an "Internet Web site address that is sufficiently specific to lead participants and beneficiaries to supplemental information regarding the designated investment alternative, including the name of the investment's issuer or provider, the investment's principal strategies and attendant risks, the assets comprising the investment's portfolio, the investment's portfolio turnover, the investment's performance and related fees and expenses[.]"

The Department received a number of comments concerning this Web site requirement. Some commenters supported the requirement, but requested clarifications such as who would be responsible for maintaining the Web site address and whether participants and beneficiaries could be referred to the Web site of a service provider or investment issuer. Other commenters argued that the requirement should be eliminated because Web site information is not currently provided for all designated investment alternatives in the participant-directed plan marketplace; for example, Web site information often is not provided for bank collective investment funds, certain insurance products, and employer stock.

After careful consideration of these comments, the Department has decided to retain the Web site approach to disclosing investment-related information. See paragraph (d)(1)(v) of the final rule. The Department believes, in this regard, that the availability of information via a Web site reduces the amount of information required to be directly provided to participants and beneficiaries, without compromising a participant's or

beneficiary's access to the additional information. While a critical objective of this rulemaking is to ensure that all participants and beneficiaries in participant-directed individual account plans are furnished the information they need to make informed investment decisions, the Department remains sensitive to the possibility that too much information may only serve to overwhelm, rather than inform, participants and beneficiaries. The Department believes that the Web site approach to disclosure strikes an appropriate balance in this context, accommodating different levels of participant interest in more detailed investment-related disclosures. While the Department recognizes, based on the comments, that the required Web sites may not currently be available for all investment vehicles offered by individual account plans in today's marketplace, the Department is not persuaded that the costs and burdens attendant to establishing and maintaining a Web site that will satisfy the disclosure requirements of this final rule will outweigh the benefits of improved disclosure and ready access to more detailed and current information by participants and beneficiaries.

Under the final rule, the responsibility for ensuring the availability of a Web site address falls upon the plan administrator. However, whether, and to what extent, the plan administrator is responsible for establishing and maintaining the Web site itself will depend on the responsibilities assumed by either the issuer of the designated investment alternative(s) or a service provider to the plan. That is, as provided in paragraph (b)(1) of the final rule, a plan administrator will not be liable for the completeness and accuracy of information used to satisfy the disclosure requirements of this regulation when the plan

administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

In addition to the general comments discussed above, some commenters expressed concern about the specific items of information required to be made available on the Web site. Several commenters, for example, asked whether the list of items in the proposed rule was intended to be exclusive, or whether plans may be required, or be permitted, to provide additional information.[10] The final rule, at paragraph (d)(1)(v), has been revised to make clear that the supplemental information identified in the regulation is the only information that is required to be contained on the Web site; this clarification was accomplished by deleting the word "including" which had been used in the proposed regulation before the list of content items. Nonetheless, there is nothing in this final rule that precludes a plan administrator, service provider or the issuer of a designated investment alternative from including on the Web site additional information that may assist participants and beneficiaries in assessing the appropriateness of the designated investment alternative for their plan accounts.

Paragraph (d)(1)(v)(A) of the final retains the requirement from the proposal that the Web site include the name of the investment's issuer. The Department did not receive any comments on this provision.

[10] Paragraph (d)(1)(i)(B) of the proposal required disclosure of "supplemental information regarding the designated investment alternative, ***including*** …" (emphasis added). Some commenters argued that use of the word "including" could be read as "including, but not limited to." In that case, plans would be uncertain as to whether additional information must be provided and, if so, what information must be provided.

Paragraph (d)(1)(v)(B) contains a new content requirement for supplemental information that is required to be contained on the Web site. Several commenters requested that the Department add, as another item of supplemental information available at a designated investment alternative's Web site, a description of the designated investment alternative's objectives or goals. These commenters felt that merely disclosing the "type or category" of investment, as required by subparagraph (d)(1)(i)(C) of the proposal, was not sufficient and that participants or beneficiaries would benefit from a narrative statement of the alternative's basic objectives or goals. The Department agrees with these commenters that participants and beneficiaries should be apprised of a designated investment alternative's objectives or goals and that this information will be helpful in understanding how the alternative's principal strategies are intended to achieve those objectives or goals. Commenters did not demonstrate that requiring this information would be problematic or burdensome; rather, it seems clear that investment issuers generally already disclose this information. The final rule has been modified from the proposal to explicitly require, in paragraph (d)(1)(v)(B), disclosure of the investment's objectives or goals in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate.

Although commenters generally were not opposed to the requirement in the proposal that the Web site for a designated investment alternative include information about the investment's "principal strategies and attendant risks," some commenters requested clarification as to the nature of the information that must be disclosed in order to satisfy this requirement. For example, some commenters asked if the Department

intended to model this requirement after the requirement in securities laws that investment companies disclose their "principal investment strategies" and "principal risks."[11] The Department believes that the "strategies" and "risks" associated with an investment alternative should be well-understood concepts in the plan investment marketplace, and the Department does not anticipate that plan administrators or the parties providing the Web sites will have difficulty in satisfying this requirement. In response to the commenters, the Department has clarified that paragraph (d)(1)(v)(C) of final rule requires disclosure of the investment's "principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate" of the designated investment alternative. The Department believes that the standards for narrative disclosure contained in the Commission's requirements are general enough that this information can be furnished with respect to all designated investment alternatives.[12]

Several commenters requested clarification of the requirement in paragraph (d)(1)(i)(B) of the proposal to disclose the "assets comprising the investment's portfolio." Specifically, commenters asked whether this requirement mandates disclosure of every individual asset or security held by the investment alternative, which commenters argue will not be helpful to most participants, or, more simply, disclosure of the type or types of

[11] See Item 4(a) and (b) of Securities and Exchange Commission Form N-1A or Item 5(c) and (e) of Securities and Exchange Commission Form N-3.

[12] See, e.g., Securities and Exchange Commission Form N-1A Item 4(a) (requiring a summary of how the mutual fund intends to achieve its investment objectives by identifying the fund's principal investment strategies, including the type or types of securities in which the fund will principally invest and any policy to concentrate in securities issuers in a particular industry or group of industries) and Item 4(b)(1) (requiring a summary of the principal risks of investing in the fund, including risks to which the fund's portfolio as a whole is subject and the circumstances reasonably likely to affect adversely the fund's net asset value, yield, or total return; Item 4(b)(1) also requires special disclosure for money market-type funds, investments sold through insured depository institutions, and non-diversified investments).

assets or securities held by the investment alternative. Some commenters also recommended eliminating this requirement, since investment alternatives that are not subject to Commission registration do not currently compile and disclose this information, and because the burden of compiling this information, especially for complex investments, would not justify its benefit. The Department did not intend that the Web site include a detailed list of all assets and securities that comprise the investment alternative's portfolio. The reference to "assets comprising the investment's portfolio" has not been included in the final rule. In addition, paragraph (d)(1)(v)(C) of the final rule, inside the parenthetical, now clarifies that a discussion of the investment's principal strategies includes "a general description of the types of assets held" by the investment.[13] This narrative description is supplemented by more specific information that is available on request to participants under paragraph (d)(4) of the final rule.

Some commenters raised concerns with the proposal's requirement that the Web site include information concerning a designated investment alternative's portfolio turnover. These commenters questioned what exactly must be disclosed about an investment's portfolio turnover, for example, whether a ratio or turnover rate would suffice. Other commenters recommended elimination of the requirement, because investment alternatives that are not subject to Commission registration are not currently required to disclose portfolio turnover information. The Department was not persuaded that this requirement should be eliminated for all designated investment alternatives. An investment alternative's portfolio turnover indicates the frequency with which the

[13] This clarification is consistent with a requirement in the Department's 404(c) regulation, prior to its amendment herein, to disclose "information relating to the type and diversification of assets comprising the portfolio"). See 29 CFR § 2550.404c-1(b)(2)(i)(B)(1)(ii).

investment alternative is buying and selling securities. An investment that is frequently buying and selling securities may be generating higher trading costs. Trading costs are not included in an alternative's expense ratio, yet the cost of trading on a portfolio level does have an effect, in some cases a large effect, on the alternative's rate of return. The Department, therefore, believes that such information may be helpful to participants and beneficiaries in assessing the appropriateness of their investment options.

While the Department recognizes that not all designated investment alternatives available to plan participants and beneficiaries calculate portfolio turnover rates, the Department understands that such investment alternatives should be able to do so without significant difficulty or costs. The final rule, at paragraph (d)(1)(v)(D), therefore, has been revised to require that, unless expressly exempted elsewhere in the rule, the information on the Web site must include the investment's portfolio turnover rate in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate.[14] The Department has exempted certain designated investment alternatives, such as fixed-return and employer stock alternatives, from the portfolio turnover requirement where the Department has concluded that turnover rates are irrelevant to the participants and beneficiaries. See paragraph (i) of the final rule for special rules for certain designated investment alternatives and annuity options.

A few commenters requested clarification about what information must be disclosed on the Web site concerning "the investment's performance and related fees and

[14] Consistent with Instruction 4(c) to Item 13(a) of Form N-1A and Instruction 11(e) to Item 4 of Form N-3, money market funds (and other investment products with similar investment objectives) may omit a portfolio turnover rate.

expenses" as required by paragraph (d)(1)(i)(B) of the proposal. Specifically, these commenters ask to what extent this requirement is redundant given the performance and fee and expense information that is otherwise required to be disclosed on the annual disclosure document; if it is not redundant, commenters question what additional performance and fee and expense information must be provided on the Web site. The intent of this provision was to make available more recent information than what was provided to participants on an annual basis. In responses to these comments, the Department has modified the proposal to split this requirement into two separate provisions and has clarified the updating obligation for all supplemental information. Paragraph (d)(1)(v)(E) of the final rule addresses the performance data that must be displayed by reference to the return information specified in paragraph (d)(1)(ii) and requires that such information be updated on at least a quarterly basis (as defined in paragraph (h)(2) of the final rule), or more frequently if required by other applicable law. Other than providing the revised performance information on the Web site in compliance with this updating requirement, plan administrators are not obligated to provide any additional or different information concerning an investment's performance. Paragraph (d)(1)(v)(F) of the final rule addresses the fee and expense information that must be displayed by reference to the fee and expense information specified in paragraph (d)(1)(iv). This information must be updated in accordance with the general updating requirement for supplemental information discussed below. Corresponding to the content parameters for updating performance information, plan administrators are not obligated to provide any additional or different information concerning an investment's fees and expenses than that required by paragraph (d)(1)(iv) of the final rule.

Commenters also requested guidance as to how often the Web site supplemental information must be updated; the proposal did not provide an updating requirement. In view of the fact that participants will have continuing access to Web sites, it is the expectation that the information made available via the Web site will be accurate and updated by the plan administrator, service provider or the issuer of a designated investment alternative as soon as reasonably possible following a change, or notification thereof.

Recognizing that some participants may not have ready access to the information required to be made available on an Internet Web site, the final rule, at paragraph (d)(2)(i)(C), requires that participants and beneficiaries be furnished, as part of the required comparative format disclosure document, information about how to request, and obtain free of charge, a paper copy of the information required to be maintained on a Web site pursuant to paragraph (d)(1)(v) or paragraph (i), as applicable.

g. Glossary

Although not part of the proposed rule, a number of commenters suggested that participants and beneficiaries would benefit from a glossary of investment and financial terms relevant to the designated investment alternatives under the plan. Indeed, the lack of a glossary of investment terminology in the proposed regulation was perceived as a key weakness of the proposal by some of these commenters. One of these commenters,

for example, commissioned a nationally representative online survey of 2,106 participants in 401(k) plans to gather feedback on the proposal's model comparative chart. A conclusion of that survey is that providing clear definitions of financial terminology and using vocabulary that is not perceived as complicated may help to improve participants' understanding of the disclosure. ICF's report to the Department following their focus group studies further supported the commenters and the conclusion of the online survey. The Department was persuaded that the furnishing of a glossary or access to a glossary of terms relevant to plan investments would be helpful to participants and, accordingly, has included such a requirement in the final rule. See paragraph (d)(1)(vi). Specifically, paragraph (d)(1)(vi) provides for the furnishing of a general glossary of terms to assist participants and beneficiaries in understanding the designated investment alternatives, or an Internet Web site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address. The Department anticipates a number of ways to satisfy this furnishing requirement. For example, a plan administrator could satisfy this furnishing requirement either by including an appropriate glossary in the comparative disclosure document or, in lieu thereof, by including an Internet Web site address at which such a glossary may be accessed. Alternatively, the Web site address for each designated investment alternative, required pursuant paragraphs (d)(1)(v) and (i) of the final rule, may contain its own glossary of terms relevant to that specific alternative, or link to such a glossary.

Some commenters suggested that the Department prepare or make available such a glossary. At this juncture, the Department believes that plan administrators, in

conjunction with their service providers and issuers of investment alternatives, are in the best position to determine the glossary (or glossaries) appropriate for their participants, taking into consideration the investment options made available under the plan. Nonetheless, the Department is interested in further exploring whether the Department should develop or identify general investment glossaries that could be utilized by plan administrators in satisfying their obligations under the final rule. Specifically, the Department invites interested persons to share their views as to what terminology should be addressed in a general investment glossary and whether, or to what extent, such glossaries currently exist that could serve as a resource for relatively unsophisticated participant-investors. Suggestions and views on the development and availability of one or more such glossaries should be addressed to e-ORI@dol.gov, subject: Participant Investment Glossary.

h. *Annuity options*

The Department received a number of comments relating to the disclosure of information with respect to investment products that consist, in whole or in part, of annuities or annuitization guarantees. These commenters maintain that core concepts in the proposal, such as "average annual total return," "benchmarks," and "total annual operating expenses," while entirely appropriate for designated investment alternatives with respect to which returns can and do vary, such as mutual funds, collective investment funds, and portfolio operating companies within variable annuity contracts, are irrelevant to annuities or annuitization guarantees. The commenters, therefore,

requested that the Department revise the proposal to require disclosure of information more appropriate to annuity contracts, funds or products. Some of the commenters emphasized that plan administrators need the flexibility to explain the benefits of these products which may provide annuities or annuitization guarantees along with exposure to the equities market and requested that the final rule allow for such explanations in the disclosure.

In response to these comments, the Department has added two new provisions to the final rule. The first new provision, at paragraph (d)(1)(vii) of the final rule, is intended to address commenters' concerns with annuity features that are contained within variable annuity contracts, under which participants and beneficiaries have a right to purchase an annuity with their accumulated plan savings at a rate specified in the contract ("variable annuity"). The information that must be disclosed pursuant to this paragraph (d)(1)(vii) for the variable annuity complements the investment–related information disclosed pursuant to paragraph (d)(1) for the related portfolio operating companies. Paragraph (d)(1)(vii) is applicable to any designated investment alternative consisting in part of a contract, fund or product that affords participants or beneficiaries the option to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company. When applicable, paragraph (d)(1)(vii) of the final rule incorporates by cross reference the requirements of the second new provision, a special rule, at paragraph (i)(2)(i) through (vii) of the final regulation. This provision requires the disclosure of information relating to the variable annuity itself to the extent that the information is not otherwise disclosed pursuant to paragraph (d)(1)(iv).

Through the combination of these two provisions, the Department intends for participants and beneficiaries to receive comprehensive disclosure of investment and annuity information pertaining to both portfolio operating companies within a variable annuity contract and the variable annuity itself. The special rule at paragraph (i)(2)(i) through (vii) of the final regulation is discussed more fully below.

i. *Disclosures on or before first investment*

As discussed above, paragraph (d)(1)(v) of the proposal provided, for purposes of the disclosure of investment-related information to new participants, that plan administrators could satisfy this obligation by furnishing the most recent annual disclosure along with any required updates furnished to participants and beneficiaries. The Department received no objections to this provision and, accordingly, is adopting it as proposed, except that it has been re-designated as paragraph (d)(viii) in the final rule and modified to conform with the new timing requirements (i.e., to reflect the change from "on or before the date of plan eligibility" to "on or before the date on which the participant or beneficiary can first direct his or her investment").

j. *Comparative format requirement*

Paragraph (d)(2) of the proposed regulation provided that the investment-related information required pursuant to paragraph (d)(1) must be furnished in a chart or similar format that is designed to facilitate comparison of such information for each designated investment

alternative offered under the plan. The Department also included as an Appendix to the proposal a Model Comparative Chart that could be used to satisfy this requirement. Several commenters on the proposal specifically noted their support for the requirement that investment-related information be disclosed in a comparative format. Further, participants in the Department's focus group studies believe that the Model Comparative Chart would make it easier to choose among a plan's designated investment alternatives; these individuals felt that the Chart is an improvement over the manner in which plan investment information currently is made available to them and that the Chart would encourage them, in some cases, to obtain additional information about plan designated investment alternatives.

The Department has retained this requirement in paragraph (d)(2) of the final rule, subject to a few minor modifications, and has also published with the final rule a revised Model Comparative Chart which reflects conforming changes to the final rule's disclosure requirements. Paragraph (d)(2)(i) of the final rule requires that the information described in paragraph (d)(1) and, if applicable, paragraph (i), must be furnished in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan. This paragraph of the final rule also requires that the date of the chart be prominently displayed. As proposed, the final rule requires in paragraphs (d)(2)(i)(A) and (B) a statement indicating the name, address, and telephone number of the plan administrator (or the plan administrator's designee) to contact for the provision of the information that must be made available upon request pursuant to paragraph (d)(4) of the final rule and a statement that additional

investment-related information (including more current performance information) is available at the listed Internet Web site addresses.

As noted above, a new subparagraph (C) has been added to paragraph (d)(2)(i) of the final rule. This new subparagraph requires that the comparative disclosure include information about how participants and beneficiaries can request, and obtain, free of charge, paper copies of the information required to be maintained on a Web site pursuant to paragraph (d)(1)(v) of the final rule. This new disclosure requirement will help to ensure that participants and beneficiaries who do not have access to the internet, nonetheless, can, if they so choose, obtain supplemental information contained on the Web sites, in order to facilitate a comprehensive consideration of the available investment choices under the plan. Because the final rule includes special Web site disclosure rules for certain designated investment alternatives and annuity options (paragraph (i)(2) for annuity options and paragraph (i)(3) for fixed-return alternatives), the new the subparagraph (C) includes explicit references to these special rules in order to eliminate any ambiguity as to whether the rights provided by new subparagraph (C) extend to such investment choices. In this regard, the Department notes that although paragraph (i)(1) contains a special rule for qualifying employer securities, certain requirements of paragraph (d)(1)(v) are not modified by the special rule and remain applicable to qualifying employer securities; consequently, the rights provided by new subparagraph (C) extend to qualifying employer securities via the reference to paragraph (d)(1)(v) in subparagraph (C).

Paragraph (d)(2)(ii), like the proposal, provides that nothing in the final rule precludes a plan administrator from including additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading. The Department believes that the technical concerns raised by commenters on the Model Comparative Chart have been addressed in revisions to the operative provisions of the final rule.

One procedural question raised by commenters, for example on behalf of Code section 403(b) plans, was whether each issuer of designated investment alternatives could prepare its own comparative chart for distribution and send it directly to participants and beneficiaries, such that, for example, a participant in a plan with three investment issuers would receive three charts, stating that this would greatly simplify the plan administrator's task in meeting the comparative format requirement. It is the view of the Department that nothing in the final regulation precludes plan administrators from combining multiple documents for purposes of satisfying their obligation to provide the information required by this rule in a comparative form. For example, a chart could be divided such that one part presented stock funds while another part presented bond funds, as in the Department's model format. Similarly, a chart could group investment alternatives by issuer. On the other hand, the Department also is of the view that permitting individual investment issuers, or others, to separately distribute comparative charts reflecting their particular investment alternatives would not be furnishing information in a form that would facilitate a comparison of the required investment information and, therefore, would not comply with the requirements of paragraph (d)(2).

k. *Information to be provided subsequent to investment*

Paragraph (d)(3) of the final rule requires that, when a plan provides for the pass-through of voting, tender, and similar rights, the plan administrator must furnish participants and beneficiaries who have invested in a designated investment alternative with these features any materials about such rights that have been provided to the plan. This provision, which is unchanged from the proposal, is similar to the requirement currently applicable to ERISA section 404(c) plans.[15]

l. *Information to be provided upon request*

Paragraph (d)(4) of the final rule requires a plan administrator to furnish certain identified information either automatically or upon request by participants and beneficiaries, based on the latest information available to the plan. This provision, which also is unchanged from the proposal, is modeled on the requirements currently applicable to ERISA section 404(c) plans with respect to information to be furnished upon request.[16]

4. *Form of Disclosure*

Paragraph (e) of the final rule, like the proposal, specifically addresses the form in which the required disclosures may be made. Commenters on the proposal generally

[15] See 29 CFR § 2550.404c-1(b)(2)(i)(B)(1)(ix).
[16] See 29 CFR § 2550.404c-1(b)(2)(i)(B)(2).

supported the ability of plan administrators to coordinate the requirements of this rule with other disclosure materials. The Department notes that, like the proposal, paragraph (e) merely recognizes various acceptable means of disclosure; it does not preclude other means for satisfying disclosure obligations under the final rule.

Specifically, paragraph (e)(1) makes clear that plan-related information required to be disclosed pursuant to paragraphs (c)(1)(i), (c)(2)(i)(A) and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with the time frames prescribed by paragraph (c) of this section. Paragraph (e)(2) of the final rule, like the proposal, makes clear that the information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

Paragraph (e)(3) provides that a plan administrator that uses and accurately completes the model in the Appendix, taking into account each plan’s specific provisions and each designated investment alternative offered under the plan, will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

Paragraph (e)(4) further clarifies that, except as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula,

percentage of assets, or per capita charge. Finally, paragraph (e)(5) generally requires that the information required to be prepared by the plan administrator for disclosure under the regulation must be written in a manner calculated to be understood by the average plan participant.

5. *Selection and Monitoring*

Paragraph (f) of the final rule continues to make clear that nothing in the regulation would relieve a fiduciary of its responsibilities to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.[17] This paragraph is unchanged from the proposal.

6. *Manner of Furnishing*

Paragraph (g) of the proposal addressed the "manner of furnishing" the disclosures required by the regulation. Specifically, paragraph (g) of the proposal provided that the required disclosure shall be furnished in any manner consistent with the requirements of 29 CFR 2520.104b-1, including paragraph (c) of that section relating to the use of electronic media.

[17] Also, with regard to ERISA's general fiduciary standards, as noted in the preamble to the proposal, 73 FR 43014 at 43018, n. 8, it should be noted that there may be extraordinary situations when fiduciaries will have a disclosure obligation beyond those addressed by the final rule. For example, if a fiduciary knew that, due to a fraud, information contained in a public financial report would mislead investors concerning the value of a designated investment alternative, the fiduciary would have an obligation to take appropriate steps to protect the plan's participants, such as disclosing the information or preventing additional investments in that alternative by plan participants until the relevant information is made public. *See also Varity Corp. v. Howe*, 516 U.S. 489 (1996) (plan fiduciary has a duty not to misrepresent to participants and beneficiaries material information relating to a plan).

This proposal produced significant comments. A number of commenters recommended that the Department expand the permissibility of electronic disclosure beyond that currently addressed in the Department's safe harbor regulation, at § 2520.104b-1(c). They argued that such forms of disclosure would be more efficient, less burdensome, and less costly for plans and, therefore, participants. Other commenters cautioned against broadening the electronic disclosure standards, arguing that many workers do not have Internet access or prefer paper over electronically disclosed materials. Important questions involve the extent of the cost savings from expanded use of electronic disclosure and the number of workers who would be disadvantaged from such an expansion (which could itself take various forms, perhaps including "opt out" electronic disclosure).

In light of these differing views and the significance of the issues surrounding the use of electronic disclosure, the Department has decided to reserve paragraph (g) of the regulation while further exploring whether, and possibly how, to expand or modify the standards applicable to the electronic distribution of required plan disclosures. To ensure a full review of the issue, the Department will, in the near future, be publishing a Federal Register notice requesting public comments, views, and data relating to the electronic distribution of plan information to plan participants and beneficiaries. Pending the completion of this review and the issuance of further guidance, the Department notes that the general disclosure regulation at 29 CFR § 2520.104b-1 applies to material furnished under this regulation, including the safe harbor for electronic disclosures at paragraph (c) of that regulation. It is anticipated, however, that resolution of this issue will occur in

advance of the compliance date for this regulation, so as to ensure for appropriate notice for plans.

7. *Definitions*

The proposed rule contained, in section (h), a series of definitions for some of the terms used in the rule. These definitions of technical terms were intended to assist plan administrators, their service providers, and issuers of designated investment alternatives in complying with the requirements of the rule. In response to comments and clarifications requested by commenters, the Department made some additions and modifications to the definitions contained in section (h), which are discussed below in this section. One commenter suggested that the Department should address potential changes to the cross-references contained in the rule's definitions, which refer to rules under the Securities and Exchange Commission's jurisdiction, for example by referencing the Commission's Form N-1A. Absent further guidance, it is the Department's intention that these cross-references will refer, as appropriate, to successor rules and instructions.

The Department also received comments requesting that the rule define some of the terms used in the Model Comparative Chart, but these commenters appeared to focus on defining terms for the benefit of participants and beneficiaries, for example suggesting that a glossary or other index of terms, with "plain English" definitions, be provided. In response to these commenters, and in response to participants in the Department's focus

group studies, who similarly supported the inclusion of definitions for investment and financial terms, the Department, at paragraph (d)(1)(vi) of the final rule, now requires the furnishing of or access to a general glossary of terms appropriate to assist participants and beneficiaries in understanding their designated investment alternatives. This glossary requirement is discussed above with the other investment-related information requirements.

The Department did not receive any comments or questions concerning the definitions of "at least annually thereafter" or "at least quarterly;" accordingly, those phrases continue to be defined, as proposed, in the final rule.

a. *Average annual total return*

The proposal, in paragraph (h)(2), defined "average annual total return" to mean the average annual profit or loss realized by a designated investment alternative at the end of a specified period, calculated in the same manner as average annual total return is calculated under Item 21 of Securities and Exchange Commission Form N-1A[18] with respect to an open-end management investment company registered under the Investment Company Act of 1940 (1940 Act). In general, the commenters strongly supported the concept of providing participants with this type of performance data. However, in response to several technical comments as to how this definition would be applied to products other than those that register using the Form N-1A, the final rule, in paragraph (h)(3), contains a revised definition. As revised, the term "average annual total return"

[18] Now item 26 of Form N-1A, as revised, February 2010.

means the "average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N-1A, N-3, or N-4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan." The new references to Form N-3 and N-4 are to provide additional guidance with respect to designated investment alternatives that consist of separate accounts offering variable annuity contracts which are registered under the 1940 Act. The sales loads exception responds to commenters' concerns that the proposed definition, specifically the reference to Item 21 of the Form N-1A (now Item 26 in Form N-1A, as revised), might result in participants and beneficiaries receiving inaccurate information about actual returns in cases where the designated investment alternative waives sales loads; under this exception, plan administrators may disregard any requirement under Commission Forms to assume sales loads if they are not actually charged to plan participants and beneficiaries. The use of this definition is intended to assure that all participants and beneficiaries will, taking into account the variety of investments available through ERISA plans, receive the most uniform and comparable performance information available for their investment options, without regard to whether the designated investment alternative is a product registered under the 1940 Act.

b. *Designated investment alternatives*

Several commenters expressed concern with the Department's definition of "designated investment alternatives" in paragraph (h)(1) of the proposal. Specifically, commenters questioned the definition's exclusion of "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. Commenters argued that the proposal was not clear as to what information would in fact have to be disclosed concerning participants' and beneficiaries' investments through such an arrangement. The final rule retains the proposed definition of "designated investment alternatives," although re-designated as paragraph (h)(4) in the final, and therefore continues to exclude brokerage windows and similar arrangements from the definition. However, as discussed earlier, it is important that participants and beneficiaries understand how brokerage windows operate and the expenses attendant thereto when they are offered as part of the investment platform of a plan. For this reason, the final rule includes more specific requirements than the proposal concerning the information that must be disclosed about brokerage windows or similar arrangements. See paragraph (c)(1)(i)(F) of the final rule.

c. *Total annual operating expenses*

The proposed regulation defined the term "total annual operating expenses" as "annual operating expenses of the designated investment alternative (e.g., investment management fees, distribution, service, and administrative expenses) that reduce the rate of return to participants and beneficiaries, expressed as a percentage, calculated in the

same manner as total annual operating expenses is calculated under Instruction 3 to Item 3 of the Commission's Form N-1A with respect to an open-end management investment company registered under the Investment Company Act of 1940." The Department invited comments on what, if any, problems the proposed definition presented for investment funds and products that are not subject to the 1940 Act and, any suggestions for alternative definitions or approaches.

Some commenters questioned whether it is appropriate for the Department to model its disclosure requirement for calculating expenses for all designated investment alternatives in ERISA plans on a mutual fund methodology. These commenters suggested the Department might instead consider developing multiple methodologies that take into account the unique characteristics of the many different types of investment options in participant-directed individual account plans, particularly those that are not registered under the 1940 Act. The Department considered this suggestion and has accordingly modified the expense calculation as discussed more fully below. A core objective of the regulation is to ensure that participants receive uniform and reliable information about their plan's investment options whether or not such options are registered or unregistered under Commission requirements. The Department believes that the final rule's revised definition will achieve this result and produce a comparable expense calculation across the different types of investment options offered under ERISA plans.

Specifically, one commenter, representing the insurance industry, noted that certain insurance products are required to be registered under the Securities Act of 1933, 1940 Act, or both and that such registrants must file their registration statements on the Commission's Forms N-3 or N-4. The commenter pointed out that both of these forms set forth a methodology for reporting the total annual expenses of the insurance product. This commenter suggested that the Department should consider utilizing these established methodologies with respect to designated investment alternatives offered through variable annuity contracts, rather than the methodology in the Commission's Form N-1A, where appropriate, in order to reduce direct and indirect compliance costs. The Department reviewed the methodologies in the Forms N-3 and N-4 and concluded that while they require substantially the same methodology as the Form N-1A, the suggested methodologies and language offer more precision with respect to certain annual expenses unique to variable annuity contracts ("mortality and expense risk fees"), which are not addressed in the Form N-1A. Therefore, paragraph (h)(5)(i)of the final rule has been revised to accommodate this commenter's request.

Other commenters, representing the banking industry, were concerned that the proposed definition with its reliance on Commission standards may not work well when applied to a designated investment alternative that consists of a bank collective investment fund because these alternatives typically are not registered under the 1940 Act. These commenters stated that, unlike a mutual fund, a bank collective investment fund is not required to deduct all of its operating expenses from the fund's assets, and may instead charge some or all of its operating expenses directly to the plans investing in

the fund. These commenters asserted that the proposed definition would not capture such expenses and emphasized their unfamiliarity with the required expense calculation as well as its impact on bank collective investment funds. The Department found these comments persuasive and, in the final rule, added paragraph (h)(5)(ii), a separate definition of total annual operating expenses for these unregistered alternatives. The Department believes that this new definition will produce an expense calculation that is substantially the same as the expense calculation for registered alternatives while capturing the different ways that unregistered alternatives charge plans.

Paragraph (h)(5)(ii) of the final rule defines the term "total annual operating expenses" as "the sum of the fees and expenses described in paragraphs (h)(5)(ii)(A) through (C) of this section before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year."[19] Paragraph (h)(5)(ii)(A) requires the inclusion of all "management fees as described in the Securities and Exchange Commission Form N-1A that reduce the alternative's rate of return." Paragraph (h)(5)(ii)(B) requires the inclusion of any "distribution and/or servicing fees as described in the Securities and Exchange Commission Form N-1A that reduce the alternative's rate of return." Paragraph (h)(5)(ii)(C) requires the inclusion of any "other fees or expenses not included in subparagraph (A) or (B) that reduce the alternative's rate of return" such as externally negotiated investment management fees charged by bank collective investment funds, but

[19] The Department intends to achieve as much symmetry between registered and unregistered designated investment alternatives as is possible. For that reason, consistent with Instructions 3(d)(i) and 6(a) to Item 3 Form N-1A, paragraph (h)(5)(ii) of the final regulation directs the calculation of total annual operating expenses before any waivers or reimbursements.

excludes "brokerage costs as described in Item 21 of Securities and Exchange Commission Form N-1A."[20]

The following example illustrates the requirements of paragraphs (h)(5)(ii) of the final rule. Plan A offers Designated Investment Alternative One (DIA 1) which invests $125 million in bank collective investment fund XYZ, an unregistered investment alternative, with assets of $1.2 billion. XYZ investment management fees of .22% are deducted directly from the fund's assets. Additional investment management fees of XYZ of .16% are invoiced directly to Plan A, which pays the expense and then proportionately reduces the value of the shares of Plan A participants and beneficiaries who are invested in DIA 1. Recordkeeping expenses of XYZ of $15,000 are invoiced directly to Plan A which allocates this charge proportionally to the accounts of Plan A participants and beneficiaries that are invested in DIA 1. XYZ also charges a servicing fee of .10% for marketing materials it makes available to Plan A participants and beneficiaries. These fees are deducted directly from the fund's assets.

The provisions of paragraph (h)(5)(ii) of the final rule require these four expenses to be included in the total annual operating expenses of DIA 1 because they reduce the alternative's rate of return to participants and beneficiaries. In other words, the sum of these expenses is subtracted from the alternative's gross returns, which indirectly reduces the value of a participant's investment in DIA 1. In this example, the total annual

[20]Brokerage costs are not included in a mutual fund's expense ratio because, under generally accepted accounting principles, they are either included as part of the cost basis of securities purchased or subtracted from the net proceeds of securities sold and ultimately are reflected as changes in the realized and unrealized gain or loss on portfolio securities in the fund's financial statements. See 68 FR 74820.

operating expenses of DIA 1 are the sum of these four expenses or .492% (represented as .49% after rounding to the nearest hundredth of a percent). The investment management fee of .22% and the servicing fee of .10% are included by virtue of paragraph (h)(5)(ii)(A) and paragraph (h)(5)(ii)(B), respectively. The additional investment management fee of .16% is included by virtue of paragraph (h)(5)(ii)(C), and so is the recordkeeping fee of .012% (calculated as: $15,000 / $125,000,000). Thus, the annual cost to the participants and beneficiaries who invest in DIA 1 is $4.92 for every $1,000 invested.

Under paragraph (h)(5)(ii) of the final rule, if a fee or expense does not reduce a designated investment alternative's rate of return, the fee or expense is not to be included in the total annual operating expense of that alternative. Thus, if the recordkeeping expenses of $15,000 in the above example were paid from plan assets by liquidating shares of DIA 1 from participants' accounts, rather than reducing the value of their shares, the total annual operating expenses of DIA 1 would be .48% rather than .492%. In such circumstances, the recordkeeping fee would instead be covered by paragraph (c)(3) of the final regulation, not paragraph (h)(5)(ii), and would have to be disclosed on the statement required by paragraph (c)(3)(ii) of the final regulation.

8. *Special rules for certain designated investment alternatives*

Many commenters expressed concern that the framework of the proposed regulation as it related to investment-related information could not be meaningfully

applied to certain types of investment options. Specifically, these commenters argued that many of the pieces of information that the proposal mandates must be disclosed do not apply to certain designated investment alternatives, such as employer securities or investments that include annuity or annuitization guarantee features, and that it would be difficult to disclose the unique characteristics of these investment alternatives within the framework of the proposal. Accordingly, the Department expanded the final rule to include special rules, described below, to address these concerns and require that plan administrators and their service providers disclose relevant information concerning these investment options.

a. *Special rules for designated investment alternatives that consist of employer securities*

Several commenters stated that investments in employer securities should warrant separate treatment from other designated investment alternatives under the final rule because many of the required investment-related disclosures fail to correspond with investment characteristics of company stock. Some commenters even argued that investments in employer securities should be completely excluded from the definition of designated investment alternatives. Another commenter claimed that the proposal would create a cause of action under ERISA section 502 for disclosure regulated by the securities laws, permitting litigants to evade the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). However, in the Department's view, this rule does

nothing to impair the disclosure requirements of the securities laws, which remain in full force and effect. Causes of action under ERISA section 502 are limited to remedying violations of ERISA and plan provisions. This section does not allow plaintiffs to bring suits for violations of securities law or with respect to securities not belonging to an ERISA plan. Plaintiffs bringing suit for violations of the securities laws continue to be subject to the PSLRA and SLUSA.

The Department has been persuaded to modify several aspects of the proposal for investments in employer securities rather than creating a complete exclusion from the investment-related disclosures. The Department has rejected a complete exclusion under the final rule because, as stated by one commenter to the proposal, 20 million Americans invest in stock in their companies through 401(k) plans, based on the 2006 General Social Survey.[21] The Department's 5500 data for 2007 indicates that there are approximately 72.2 million participants in individual account plans, of whom 17 million were participants in plans that offered employer securities. In terms of magnitude, this means approximately one fourth of all participants in individual account plans could have invested in company stock. The Department believes that these participants and beneficiaries are entitled to the investment-related information for employer securities required by paragraph (d) as modified under paragraph (i) of the final rule.

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[21] Davis, James Allan; Smith, Tom W.; and Marsden, Peter V. *General social surveys, 1972-2006: cumulative codebook /* Principal Investigator, James A. Davis; Director and Co-Principal Investigator, Tom W. Smith; Co-Principal Investigator, Peter V. Marsden. -- Chicago: National Opinion Research Center, 2007. 2,552 pp., 28cm. -- (National Data Program for the Social Sciences Series, no. 18).

Consequently, the Department has developed a special provision for investments in, or primarily in, employer securities as defined in section 407 of ERISA, and has also exempted these investments from certain aspects of the final rule. In making these modifications to the proposal, the Department recognized that while certain designated investment alternatives consist primarily of investments in employer securities that are held as shares, other alternatives that invest primarily in employer securities may also hold cash management investments for liquidity purposes, so that participants and beneficiaries acquire units of participation in a fund (i.e., a unitized fund) rather than actual shares when they allocate their contributions to this investment alternative.

With regard to the supplemental information that must be provided to participants and beneficiaries through an Internet Web site address, the Department has modified the proposed rule to exempt these qualifying employer securities from the requirements of paragraph (d)(1)(v)(C) concerning the disclosure of an investment's principal strategies and risks, and instead is requiring an explanation under paragraph (i)(1)(i) of the final rule as to the importance of a well-balanced and diversified investment portfolio. The Department expects that plan administrators will use the language provided in the Department's Field Assistance Bulletin 2006-03 (FAB 2006-03) to satisfy this requirement. The FAB language provides: "To help achieve long-term retirement security, you should give careful consideration to the benefits of a well-balanced and diversified investment portfolio. Spreading your assets among different types of investments can help you achieve a favorable rate of return, while minimizing your overall risk of losing money. This is because market or other economic conditions that

cause one category of assets, or one particular security, to perform very well often cause another asset category, or another particular security to perform poorly. If you invest more than 20% of your retirement savings in any one company or industry, your savings may not be properly diversified. Although diversification is not a guarantee against loss, it is an effective strategy to help you manage investment risk."

As stated in paragraph (i)(1)(ii) of the final rule, the Department is also exempting these qualifying employer securities from the Internet Web site requirements relating to portfolio turnover required under paragraph (d)(1)(v)(D).

Many commenters also pointed to the proposal's fee and expense information requirement, which is preserved in paragraph (d)(1)(iv)(A)(*2*) of the final rule, to disclose an investment's total annual operating expenses, expressed as a percentage, as problematic; essentially, these commenters maintained that an expense ratio is irrelevant or non-calculable for investments consisting primarily of employer securities. The Department has considered these comments and has exempted, in paragraph (i)(1)(iv) of the final rule, qualifying employer securities from the requirement to disclose an expense ratio, provided such designated investment alternative is not a unitized fund. As a corollary to this exemption, these investments are also relieved, under paragraphs (i)(1)(iii) and (v), respectively, of the final rule, from the requirements of paragraph (d)(1)(iv)(A)(*2*) relating to fee and expense information and the requirements of paragraph (d)(1)(iv)(A)(*3*) relating to the expense ratio expressed as a dollar amount per $1000 invested.

Some commenters expressed concern with the requirement that such investments disclose performance data expressed as average annual total return for specified periods. The Department has determined to modify the definition of average annual total return, which is otherwise applicable under paragraph (h)(3) of the final rule, for qualifying employer securities that are publicly traded on a national exchange or generally recognized market, provided such designated investment alternative is not a unitized fund, in paragraph (i)(1)(vi) of the final rule. For this purpose, average annual total return is defined in paragraph (i)(1)(vi)(B) to mean the change in value of an investment in one share of stock on an annualized basis over a 1, 5, or 10 year period, assuming dividend reinvestment; such a return measurement is commonly referred to as total shareholder return. This return is calculated by taking the sum of the dividends paid during the measurement period, plus the difference between a stock price (consistent with section 3(18) of ERISA) at the end and the beginning of the measurement period divided by the stock price at the beginning of the measurement period. For example, and ignoring the reinvestment of dividends for simplicity, if a share is $100 at the beginning of the measurement period and $115 at the close, and dividends paid totaled $5 over the period, the disclosed return would be 20% (5+115-100/100).

Similarly, in paragraph (i)(1)(vi)(C) of the final rule, the Department is modifying the definition of average annual total return for qualifying employer securities that are not publicly traded on a national exchange or generally recognized market, provided such designated investment alternative is not a unitized fund, to require disclosure of return

information calculated using principles similar to those for the return calculation of publicly traded securities under paragraph (i)(1)(vi)(B). The Department anticipates that in many cases dividends will not have been paid on such securities and that the plan administrators will use Form 5500 plan valuation data in calculating this return. The new reference to ERISA section 3(18) expresses the Department's intent that the "stock price" used in these calculations be consistent with the fair market value methodologies that the plan administrator is already using under current law with respect to the value of employer stock held by the plan.

b. *Special rules for annuities*

As discussed above, the Department, in response to comments, has made two changes to the final rule to better ensure the disclosure of both investment and annuity related information to plan participants and beneficiaries. These changes appear in the final rule at paragraphs (d)(1)(vii) and (i)(2). Paragraph (i)(2) of the final rule sets forth the information that must be disclosed about annuity options. Paragraph (i)(2) applies to any designated investment alternative consisting of a contract, fund or product that affords participants or beneficiaries the option to allocate contributions toward the current purchase of a stream of retirement income payments guaranteed by an insurance company. Paragraph (i)(2) addresses commenters' concerns with stand-alone annuity options under which current participant contributions purchase a fixed-dollar stream of income commencing at a future point in time, typically at retirement age ("fixed-deferred annuity"). Paragraph (d)(1)(vii), as discussed more fully above, addresses commenters'

concerns with annuity options that are contained within variable annuity contracts, under which participants and beneficiaries have a right to purchase an annuity with their accumulated plan savings at a rate specified in the contract ("variable annuity"). Moreover as noted above, the requirements in paragraph (i)(2) of the final rule explicitly apply to variable annuities as required by the cross reference in paragraph (d)(1)(vii) of the final rule.

When applicable, the paragraph (i)(2) special rule provides that the plan administrator must, in lieu of the investment-related information described in paragraph (d)(1)(i) through (vi) of the final rule, provide each participant or beneficiary basic information about the benefits and costs of the annuity, as well as an Internet Web site address to lead participants and beneficiaries to additional information. Since both variable and fixed-deferred annuities are subject to the comparative format requirement in paragraph (d)(2) of the final rule, the plan administrator must furnish the content information described in paragraph (i)(2)(i) through (vi) of this special rule in a comparative chart or similar format. The Department believes that maintaining the comparative chart requirement will enable participants to undertake a comparison of annuity options when a plan includes two or more annuity options as designated investment alternatives.

c. *Special Web site rules for fixed-return investments*

As discussed above, the proposal, in paragraph (d)(1)(i)(B), required disclosure of an Internet Web site for each designated investment alternative offered under the plan. In response to concerns about this Web site requirement, which were discussed earlier in this preamble, the final rule, at paragraphs (d)(1)(v)(A) through (F), has been revised to clarify the specific items of information that must be made available at the required Web site address. In developing these revisions, however, the Department concluded that many of the revised content requirements in paragraphs (d)(1)(v)(A) through (F) simply do not apply to designated investment alternatives with respect to which the return is fixed for the term of the investment, e.g., portfolio turnover rate. The final rule, therefore, includes special rules that clarify and limit the information that that must be made available at the required Web site address for each designated investment alternative with respect to which the return is fixed for the term of the investment. These special rules, at paragraph (i)(3) of the final regulation, require disclosure of, among other things, name of the investment's issuer; objectives or goals (e.g., to provide stability of principal and guarantee a minimum rate of interest); performance data updated on at least a quarterly basis (or more frequently if required by other applicable law); and fee and expense information.

d. *Special rules for target date or similar funds*

The Department intends to publish a separate notice of proposed rulemaking that would supplement the otherwise applicable disclosures in this rule for designated

investment alternatives that are target date-type funds. Accordingly, the Department has reserved paragraph (i)(4) for inclusion of such guidance.

C. Final Amendment to § 2550.404c-1

This notice also includes a final amendment to the regulation under section 404(c) of ERISA, 29 CFR § 2550.404c-1. This amendment generally is unchanged from the proposal, except for the minor modification discussed below. This amendment to section 2550.404c-1(b), (c), and (f) integrates the disclosure requirements in the amended section 404(c) regulation with the disclosure requirements in the final regulation section 2550.404a-5 to avoid having different disclosure rules for plans intended to comply with the ERISA section 404(c) requirements. Similar to the proposal, this amendment eliminates references to disclosures that are now encompassed in section 2550.404a-5 and incorporates in paragraph (b)(2)(i)(B)(*2*) of the 404(c) regulation a cross-reference to the final rule, thereby establishing a uniform disclosure framework for all participant-directed individual account plans.

The final 404(c) regulation has been modified in one respect from the proposal. Specifically, the Department eliminated the reference to "[i]dentification of any designated investment managers" previously required in paragraph (b)(2)(i)(B)(*2*) of the proposed amendment. Commenters noted that identification of designated investment managers also was required pursuant to paragraph (c)(1)(i)(E) of proposed section 2550.404a-5. The Department did not intend to create a duplicative requirement and has

therefore eliminated the requirement from the 404(c) regulation; identification of any designated investment managers will be continue to be required for 404(c) plans because (pursuant to paragraph (b)(2)(i)(B)(*2*) of the final 404(c) regulation, published herein) such plans must satisfy all of the disclosure requirements of the new regulation under section 404(a), which includes identification of any designated investment managers.

Finally, as discussed further in the preamble to the proposal, at 73 FR 43018, the Department reiterates its view that a fiduciary breach or an investment loss in connection with the plan's selection or monitoring of a designated investment alternative is not afforded relief under section 404(c) because it is not the result of a participant's or beneficiary's exercise of control.[22] The Department has added, in paragraph (d)(2)(iv) of the final 404(c) amendment, a statement that "paragraph (d)(2)(i) of this section does not serve to relieve a fiduciary from its duty to prudently select and monitor any designated investment manager or designated investment alternative offered under the plan."

D. Effective and Applicability Dates; Transition Issues

A significant number of commenters expressed concern about the establishment of an effective date that would not allow plans sufficient time to review and implement the new disclosure requirements. Commenters suggested that the Department should allow affected persons twelve to eighteen months to revise their recordkeeping and other systems to ensure that the required information is being captured and to prepare all of the necessary disclosure materials, including any coordination of these new requirements

[22] *See also* 57 FR 46906, n. 27 (preamble to § 2550.404c-1) (Oct. 13, 1992).

with existing disclosures. In an effort to balance the importance of the required information to plan participants with the practical burdens and costs attendant to compliance with a new disclosure regime, the Department is adopting these final rules with a 60-day effective date, but deferring the application of the new rules for at least 12 months. In this regard, the final rule will be applicable as of the beginning of the first plan year which starts on or after the first day of the thirteenth month following the date of publication. The Department believes that the delayed applicability date will afford plans sufficient time to ensure an efficient and effective implementation of the new rules. See paragraph (j)(1) and (2).

The Department also provided transition relief, in paragraph (j)(3) of the final rule, to assist parties in complying with the final rule. Specifically, paragraph (j)(3)(i) provides that notwithstanding the effective and applicability dates for the final rule, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after the rule's applicability date to participants and beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual accounts, on the applicability date.

Representatives of the banking industry indicated that transitional relief from the requirement to disclose 5- and 10-year performance may be needed for some plans that contain unregistered bank products as designated investment alternatives, if the final regulation were to adopt the "total annual operating expenses" and "average annual total

return" definitions set forth in paragraph (h) of the proposed regulation. This is because the methodologies behind these definitions depend on certain data that neither plans nor bank funds were compelled to maintain before this final rule.

Since the final rule contains definitions similar to those in the proposal, the Department was persuaded that transitional relief is necessary. The final regulation, at paragraph (j)(3)(ii), therefore, provides that for plan years beginning before October 2021, if a plan administrator reasonably determines that it does not have the information on expenses attributable to the plan that is necessary to calculate, in accordance with paragraph (h)(3), the 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses. For this purpose, the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for the actual annual expenses during the 5-year and 10-year periods if the plan administrator reasonably determines that doing so will result in a reasonably accurate estimate of the average annual total returns. Nothing in this paragraph (j)(3)(ii) requires disclosure of returns for periods before the commencement of the alternative.

E. Regulatory Impact Analysis

As discussed earlier in this preamble, this final rule establishes a uniform basic disclosure regime for participant-directed individual account plans. Many of the

disclosures required by the final rule are similar to those required for participant-directed individual account plans that currently comply with ERISA section 404(c) and the Department's regulations issued thereunder. The Department is uncertain regarding the information that is provided to participants in plans that are not ERISA section 404(c) compliant. Therefore, for purposes of this regulatory impact analysis (RIA), the Department assumes that the final rule's requirements are new for plans that are not ERISA section 404(c) compliant.

Based on the foregoing assumptions, the Department estimates that the average incremental costs and benefits for participants in ERISA section 404(c) compliant plans will be smaller than for those plans that are not. Also, participants in ERISA section 404(c) compliant plans or plans providing similar information only will receive an incremental benefit from the rule's new disclosure requirements, because they already receive some of the information required to be disclosed under the final rule.

1. *Executive Order 12866 Statement*

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Department has determined that this action is "economically significant" under section 3(f)(1) because it is likely to have an effect on the economy of more than $100 million in any one year.

Accordingly, the Department has undertaken, as described below, an analysis of the costs and benefits of the final regulation. The Department continues to believe that the final regulation's benefits justify its costs. The present value of the benefits over the ten-year period 2012-2021 is expected to be about $14.9 billion, with a low estimate of $7.2 billion and a high estimate of $29.9 billion. The present value of the costs over the same time period is expected to be $2.7 billion, with a low estimate of $2.0 billion and a high estimate of $3.3 billion. Overall, the Department estimates that the final regulation will generate a net present value (or net present benefit) of almost $12.3 billion. Table 1 shows the annualized monetized benefits and cost of the regulations and also provides a summary of the benefits and costs. The Department also expects the regulation to produce substantial additional benefits, in the form of improved investment decisions, but the Department was not able to quantify this effect.

Table 1.--*Accounting Table*

	Primary Estimate	Low Estimate	High Estimate	Year Dollar	Discount Rate	Period Covered

Benefits						
Annualized Monetized ($millions/year)	1,986.1	952.3	3,973.9	2010	7%	2012-2021
	1,986.1	952.3	3,973.9	2010	3%	2012-2021
Explanation of Monetized Benefits	The regulation's disclosure requirements are expected to reduce participants' time otherwise used for searching for fee and other investment information.					
Qualitative	The Department expects the regulation to produce substantial additional benefits, in the form of improved investment decisions, but the Department was not able to quantify this effect					
Costs						
Annualized Monetized ($millions/year)	353.8	265.5	442.2	2010	7%	2012-2021
	352.3	264.9	439.7	2010	3%	2012-2021
Explanation of Monetized Costs	Plans are likely to incur administrative burdens and costs in order to comply with the requirements of the regulation. The quantified cost estimate includes costs due to legal review of the regulation, consolidation of fee information, creation and maintenance of a website, record keeping, production and distribution of disclosures, and material and postage costs.					

2. *Need for Regulatory Action*

Understanding and comparing investment options available in a 401(k) plan can be complicated and confusing for many participants. The magnitude of complexity and confusion may be defined by reference to the number of available investment options and the materials utilized for communicating investment-related information. Moreover, the process of gathering and comparing information may itself be time consuming. For example, the U.S. Government Accountability Office noted in a recent report that "it is hard for participants to make comparisons across investment options because they have to piece together the fees that they pay, and assessing fees across investment options can be

difficult because data are not typically presented in a single document that facilitates comparison."[23]

The final rule's new disclosure requirements will help a large number of plan participants by placing investment-related information in a format that facilitates comparison of investment alternatives. This simplified format will make it easier and less time consuming for participants to find and compare investment-related information. As a result, plan participants should make better investment decisions which will enhance their retirement income security.

Table 2 below shows the number of entities affected by the rule. According to the 2007 Form 5500 data, the latest complete data available, approximately 318,000 participant-directed individual account plans covering over 58.2 million participants reported compliance with ERISA 404(c). Approximately 165,000 participant-directed individual account plans covering about 13.9 million participants reported that they are not ERISA section 404(c) compliant. In total, the rule will impact 483,000 participant-directed individual account plans covering 72 million participants.

Table 2.--*Number of Affected Entities*

Plans	
Number of 404(c) Compliant Plans	318,000
Number of Non-404(c) Compliant Plans	165,000
Number of Participant-directed Plans	483,000

[23] U.S. General Accounting Office, *Private Pensions: Information That Sponsors and Participants Need to Understand 401(k) Plan Fees*, p. 15, fn 20. This report may be accessed at http://www.gao.gov/new.items/d08222t.pdf.

Participants	
404(c) Plans	58,195,000
Non-404(c) Plans	13,916,000
Number of Participants in Participant-directed Plans	72,111,000

Note: The displayed numbers are rounded and therefore may not add up to the totals

3. *Benefits*

The Department believes the final rule will provide two primary benefits: (1) reduced time for plan participants to collect investment-related information and organize it into a format that allows the information to be compared; and (2) improved investment results for plan participants due to the enhanced disclosures available to them. Each benefit is discussed in further detail below; however, the Department only was able to quantify the search time reduction benefit.

a. *Reduction in Participant Search Time*

As discussed above, the Department assumes that the final rule's new disclosure requirements will benefit plan participants by reducing the time they spend searching for and compiling fee and expense information into a comparative format. In the RIA of the proposal, the Department estimated that 29 percent of all participants would experience time savings due to the easier access to information and the unified format. However, a commenter pointed out that the Department significantly underestimated the number of participants that will experience time savings. The commenter suggested that all participants who believe that fee, expense and performance information is important for

making investment decisions and read materials provided to them most likely will experience time savings. The commenter suggested using a result from the EBRI's 2007 Retirement Confidence Survey[24] which indicates that 73 percent (plus or minus 3 percent) of workers saving for retirement used written materials received at work as a source of information when making retirement savings and investment decisions.[25] The Department agrees with the commenter and has revised its estimates to reflect that out of the 72 million participants affected by the rule, 70 to 76 percent, or nearly 50 to 55 million participants, will benefit from reduced search costs.

Although the Department sought to anchor its analysis on empirical evidence, there are a number of variables that are subject to uncertainty. In particular, although the Department is confident that the new disclosure format will reduce search costs, the Department does not have empirical evidence on the magnitude of these savings. Search time savings will vary widely depending on the type of investment options available through the plan, the completeness of baseline routine voluntary disclosures, the participant's sophistication, among other factors. To illustrate the potential benefits, the Department assumes that participants who are not receiving ERISA section 404(c) compliant disclosures, on average, will save one-and-a-half hours, while participants receiving such disclosures will save one hour on average. The Department also provides

[24] Employee Benefit Research Institute Issue Brief #304, April 2007. The survey found that 73 percent of workers saving for retirement used written material received at work as a source of information when making retirement savings and investment decisions.

[25] The survey notes: "In theory, each sample of 1,252 yields a statistical precision of plus or minus 3 percentage points (with 95 percent certainty) of what the results would be if all Americans age 25 and older were surveyed with complete accuracy. There are other possible sources of error in all surveys, however, that may be more serious than theoretical calculations of sampling error. These include refusals to be interviewed and other forms of nonresponse, the effects of question wording and question order, and screening. While attempts are made to minimize these factors, it is impossible to quantify the errors that may result from them."

a range assuming half the time savings on the low and double the time savings on the high end.

The benefits estimate uses an average wage of $37 for private sector workers participating in a pension plan to estimate how much the average participants would value the time saved. It is based on hourly wages from Panel 4 of the 2004 wave from the Survey of Income Program Participation (SIPP) and on wage growth data for private-sector workers that participate in a pension plan with individual accounts from the Bureau of Labor Statistics (BLS). In the proposal the Department had additionally adjusted the wage rate to account for the difference that plan participants attribute to leisure versus work time. The Department received a comment that the estimate used may not have been representative of participants' value of leisure time and suggested that the Department simply use the average wage rate. The Department agrees and for the purpose of estimating a dollar value of the time uses an average wage rate of about $37.

These assumptions result in annual time savings of approximately 26 to 112 million hours valued at $1.0 to $4.0 billion in 2012. The total present value of this benefit is $7.2 to $29.9 billion using a seven percent discount rate.

b. *Reduction in Fees and Expenses*

By reducing participants' time required to collect information and organize fee and performance information, the final rule should increase the amount of investment-related information participants consider and the attention devoted to and efficiency of such consideration. This will help participants pick appropriate investment options that

will provide the best value to them. Moreover, the increased transparency could strengthen competition between investment products and drive down fees.

In its RIA of the proposal, the Department estimated that fees and expenses are higher than necessary by 11.3 basis points on average. Some commenters on the proposal, as well as some commenters on the Department's proposed exemptions relating to the provision of investment advice by a fiduciary advisor to participants and beneficiaries in participant-directed individual account plans and beneficiaries of individual retirement accounts,[26] dispute this estimate. The commenters point to evidence that the pricing of investment products and related services is competitive and efficient, and contend that there is no credible evidence to the contrary.

The commenters raised several specific challenges to the Department's analysis. First, they contend that the Department's estimate relies inappropriately on dispersion in mutual fund expenses as evidence that such expenses are sometimes higher than necessary and as a basis for estimating the degree to which this is so. Dispersion in expenses reflects differences among the investment products or the services bundled with them, the commenters say, and therefore such dispersion is consistent with competitive, efficient pricing. Second, the commenters argue that the analysis draws incorrect inferences about fees and expenses in DC plans. The analysis overlooks the role of DC plan fiduciaries in choosing reasonably priced investments and relies too much on research that examined retail rather than DC plan experience, they say. Third, the commenters highlight what they maintain are technical flaws in some of the research that

[26] See 73 FR 49895 (August 22, 2008) and 73 FR 49924 (August 22, 2008).

the Department cited as supporting the conclusion that fees and expenses are sometimes higher than necessary, and they take issue with the Department's interpretation of this research.

In response to these commenters, the Department undertook to refine and strengthen its analysis. First, the Department agrees that the RIA of the proposal relied too heavily on mere dispersion of fees and expenses as a basis for estimating whether and to what degree they might be higher than necessary. The estimate that they are on average 11.3 basis points higher than necessary lacks adequate basis and should be disregarded. Second, the Department agrees that fees and expenses paid by DC plan participants can differ from those paid by retail investors. Any evidence of higher than necessary expenses in the retail sector might suggest similar circumstances in DC plans, but would not demonstrate it. Third, the Department reviewed available research literature in light of the commenters, and refined its analysis and conclusions accordingly, as summarized immediately below.

Expense Sensitivity – Surveys and studies strongly suggest gaps in awareness of and sensitivity to expenses.[27] Other studies consider whether investors with different levels of sophistication make different decisions about fees. If more sophisticated investors are more sensitive to fees, less sophisticated ones might be paying more than

[27] *See e.g.*, James J. Choi et al., *Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds*, National Bureau of Economic Research Working Paper W12261 (May 2006); Jeff Dominitz et al., *How Do Mutual Funds Fees Affect Investor Choices? Evidence from Survey Experiments* (May 2008) (unpublished, on file with the Department of Labor); and John Turner & Sophie Korczyk, *Pension Participant Knowledge About Plan Fees*, AARP Pub ID: DD-105 (Nov. 2004). Commenters point out that net flows are concentrated in mutual funds with low expenses. However it is unclear whether this reflects investor fee sensitivity or brand name recognition and successful marketing by large, established funds whose low fees are attributable to economies of scale.

would be optimal. Alternatively, they might be paying more in order to obtain sophisticated help. Much literature suggests a negative relationship between sophistication and expenses paid,[28] but some does not.[29] Overall this literature leaves open the question of whether investment prices are sometimes inefficiently high, but suggests that even if prices are efficient investors may make poor purchasing decisions. The Department believes that many individual investors, including DC plan participants, historically have not factored expenses optimally into their investment choices.

Sector Differences – Some studies lend insight to the question of whether investment prices are efficient by comparing prices paid or performance in different market segments.[30] The Department believes that taken together, this literature suggests

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[28] Sebastian Müller & Martin Weber, *Financial Literacy and Mutual Fund Investments: Who Buys Actively Managed Funds?*, Social Science Research Network Abstract 1093305 (Feb. 14, 2008) find that more financially literate investors pay lower front-end loads but similar management fees, and suggest that investors who know about management fees appear not to care about them. Jeff Dominitz et al., *How Do Mutual Funds Fees Affect Investor Choices? Evidence from Survey Experiments* (May 2008) (unpublished, on file with the Department of Labor) find that financially literate individuals are better able to estimate fees, and better estimates are associated with more optimal investment choices. Brad M. Barber et al., *Out of Sight, Out of Mind, The Effects of Expenses on Mutual Fund Flows*, Journal of Business, Volume 79, Number 6, 2095-2119 (2005) find that repeat investors are more sensitive to load fees than expense ratios, but commenters point out that this finding may be an artifact of industry load setting practices.

[29] Mark Grinblatt et al., *Are Mutual Fund Fees Competitive? What IQ-Related Behavior Tells Us*, Social Science Research Network Abstract 1087120 (Nov. 2007) find that investors with different IQs pay similar fees, which "suggests that fees are set competitively."

[30] John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest*, The Journal of Corporate Law, Volume 26, 609-673 (Spring 2001) found that the price paid by mutual funds for equity fund management is higher than that paid by pension funds. Based on this and other evidence they argue that mutual fund fees are often excessive. John C. Coates & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, Social Science Research Network Abstract 1005426 (Aug. 2007) challenge Freeman and Brown's methods and conclusions, arguing that these differences in prices are attributable to differences in services for which Freeman and Brown did not account. They offer evidence that fees are competitive. Alicia H. Munnell et al., *Investment Returns: Defined Benefits vs. 401(k) Plans*, Center for Retirement Research Issue Brief Number 52 (Sept. 2006) find higher returns in DB plans than in DC plans and offer that "part of the explanation may rest with higher fees" that are paid by DC plan participants. Rob Bauer & Rik G.P. Frehen, *The Performance of US Pension Funds*, Social Science Research Network Abstract 965388 (Jan. 2008) find that DC and DB plans both perform close to benchmarks while mutual funds underperform, and point to hidden costs in mutual funds as the most likely reason. Diane Del Guercio & Paula A. Tkac, *The Determinants of the Flow of Funds of Managed Portfolios: Mutual Funds vs. Pension Funds*, The Journal of Financial and Quantitative

that there are unexplained differences in prices and performance across sectors but fails to demonstrate conclusively whether such differences are systematically attributable to inefficiently high investment prices.

Market Power – At least one study suggests that mutual funds may wield market power to mark up prices to inefficient levels.[31]

What Expenses Buy – A number of studies consider the degree to which expense dispersion is a function of product features and bundled services, and if it is, whether that dispersion is justified by differences in observable attendant financial benefits such as performance. Some of this literature also considers the degree to which investors choose investments where expenses are so justified. In the Department's view this literature taken together suggests that a substantial portion of expense dispersion is attributable to distribution expenses, including compensation of intermediaries and advertising.[32] It casts doubt on whether such expenses are duly offset by observable financial benefits. Most studies are consistent with the possibility that such expenses are at least partly

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Analysis, Volume 37, Number 4, 523-557 (Dec. 2002) find that "in contrast to mutual fund investors, pension clients punish poorly performing managers by withdrawing assets under management and do not flock disproportionately to recent winners."

[31] Guo Ying Luo, *Mutual Fund Fee-Setting, Market Structure and Mark-Ups,* Economica, Volume 69, Number 274, 245-271 (May 2002) exploits differences in market concentration across different narrow mutual funds categories, and finds that mark-ups average 30 percent of fees across all categories of no load funds and more than 70 percent across load funds (assuming a 5-year holding period).

[32] The literature also attributes much expense dispersion to differences in the cost of managing different types of funds. For example, active equity management is more expensive than passive and management of foreign or small cap equity funds is more expensive than management of large cap domestic equity funds. Investors therefore might optimally diversify across funds with different levels of investment management expense. Some studies question whether active management delivers observable financial benefits commensurate to the associate expense. For example, Kenneth R. French, *The Cost of Active Investing,* Social Science Research Network Abstract 1105775 (Apr. 2008) finds that investors spend 0.67 percent of aggregate U.S. stock market value each year searching for superior return, and characterizes this as society's cost of price discovery.

offset by unobserved benefits such as reduced search costs and other support for novice and unsophisticated investors, but most are also consistent with the possibility that some expenses are not so offset and that investors, especially unsophisticated ones, sometimes pay inefficiently high prices.[33] The authors of some studies expressly interpret their failure to identify offsetting financial benefits as evidence that prices are inefficiently high. Some suggest that conflicted intermediaries may serve their own and fund managers' interests, thereby generating inefficiently high profits for either or both. Others disagree, believing that investors efficiently derive a combination of financial and intangible benefits for their expense dollars.[34]

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[33] Both of these hypotheses are also consistent with literature finding a negative link between sophistication and expenses.

[34] The following is a sampling of findings and interpretations reported in various studies that the Department reviewed. The Department observes that some of these studies have been published in peer-reviewed journals, while others have not. Some are working papers subject to later revision. Some research is visibly supported by industry or other interests, and some may be independent. Very little of this research separately examines DC plan investing. Nearly all of it examines mutual fund markets to the exclusion of certain competing insurance company or bank products. Some of it examines foreign experience. The Department believes it must be cautious in drawing inferences from this research as to whether investment prices paid by participants are efficient.

Daniel B. Bergstresser et al., *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry*, Social Science Research Network Abstract 616981 (Sept. 2007) find that investors who pay to purchase funds via intermediaries realize inferior returns, and say this result is consistent with either intangible benefits for investors or inefficiently high prices due to conflicts.

Ralph Bluethgen et al., *Financial Advice and Individual Investors' Portfolios*, Social Science Research Network Abstract 968197 (Mar. 2008) find that advisers (who are mostly compensated by commission) improve diversification and allocation across classes while increasing fees and turnover. They say these findings are consistent with "honest advice."

Susan Christoffersen et al., *The Economics of Mutual-Fund Brokerage: Evidence from the Cross Section of Investment Channels*, Science Research Network Abstract 687522 (Dec. 2005) identify some financial benefits reaped by investors who pay to invest through intermediaries.

Sean Collins, *Fees and Expenses of Mutual Funds, 2006*, Investment Company Institute Research Fundamentals, Volume 16, Number 2 (June 2007) reports that mutual fund fees and expenses are declining.

Sean Collins, *Are S&P 500 Index Mutual Funds Commodities?*, Investment Company Institute Perspective, Volume 11, Number 3 (Aug. 2005) argues that S&P 500 index funds are not uniform commodities. For example, they are distributed in different ways. He finds that 91 percent of the variation in these funds' expense ratios can be explained by a combination of fund asset size, investor account size, fee waivers and separate fees, and investor advice that is bundled into expense ratios. He argues that these funds competitively pass economies of scale along to investors, and reports that assets and flows are concentrated in low-cost funds.

Henrik Cronqvist, *Advertising and Portfolio Choice*, Social Science Research Network Abstract 920693 (July 26, 2006) finds that fund advertising steers investors toward "portfolios with higher fees, more risk, more active management, more 'hot' sectors, and more home bias." He suggests that "with the use of

advertising, funds can differentiate themselves and therefore charge investors higher fees than the lowest-cost supplier in the industry."

Daniel N. Deli, *Mutual Fund Advisory Contracts: An Empirical Investigation*, The Journal of Finance, Volume 57, Number 1, 109-133 (Feb. 2002) finds that differences in investment advisers' marginal compensation reflect differences in their marginal product, difficulty in measuring adviser performance, control environments, and scale economies. Based on this finding, he suggests that investment prices are efficient and recommends caution in any regulatory effort to influence such prices.

Edwin J. Elton et al., *Are Investors Rational? Choices Among Index Funds*, The Journal of Finance, Volume 59, Number 1, 261-288 (Feb. 2004) find that flows into high expense (and therefore predictably low performance) S&P 500 index mutual funds are higher than would be expected in an efficient market. They conclude that because investors are not perfectly informed and rational, inferior products can prosper. Commenters, however, contend that because the authors scaled flows by fund size and smaller funds have higher expenses, these findings exaggerate the degree to which flows are directed to high expense funds.

Javier Gil-Bazo & Pablo Ruiz-Verdú, *Yet Another Puzzle? Relation Between Price and Performance in the Mutual Fund Industry*, Social Science Research Network Abstract 947448 (March 2007) find that "funds with worse before-fee performance charge higher fees." They hypothesize that lower performing funds lose sophisticated investors to higher performing funds, then are left with relatively unsophisticated investors who are not as responsive to price.

John A. Haslem et al., *Performance and Characteristics of Actively Managed Retail Equity Mutual Funds with Diverse Expense Ratios*, Financial Services Review, Volume 17, Number 1, 49-68 (2008) find that funds with lower expenses have superior returns. John A. Haslem et al., *Identification and Performance of Equity Mutual Funds with High Management Fees and Expense Ratios*, Journal of Investing, Volume 16, Number 2 (2007) find that certain performance measures vary negatively with fees and, on that basis, suggest that mutual funds do not compete strongly on price and that expenses are too high.

Sarah Holden & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees and Expenses 2006*, Investment Company Institute Research Fundamentals, Volume 16, Number 4 (Sept. 2007) report that 401(k) mutual fund investors tend to pay lower than average expenses and that 401(k) assets are concentrated in low cost funds.

Ali Hortacsu & Chad Syverson, *Product Differentiation, Search Costs, and Competition in the Mutual Fund Industry: A Case Study of S&P 500 Index Funds*, Quarterly Journal of Economics, 403 (May 2004) document dispersion in S&P 500 Index Fund expense ratios, and report that low-cost funds have a dominant, but falling, market share. They conclude that an influx of novice investors who must defray search costs explains dispersion in expenses and flows to high expense funds.

Todd Houge & Jay W. Wellman, *The Use and Abuse of Mutual Fund Expenses*, Social Science Research Network Abstract 880463 (Jan. 2006) find that load funds charge higher 12b-1 and management fees. They attribute this to abusive market segmentation that extracts excessive fees from unsophisticated investors.

Giuliano Iannotta & Marco Navone, *Search Costs and Mutual Fund Fee Dispersion*, Social Science Research Network Abstract 1231843 (Aug. 2008) analyze the effect of search costs on mutual fund fees with data on broad U.S. domestic equity funds. They estimate the portion of the expense ratio that is not justified by the quality of service provided, by the cost structure of the investment company, or by the specificities of the clientele served by the fund and find that its dispersion is lower for highly visible funds and for funds that invest heavily in marketing. In the case of the U.S. mutual fund market, they argue, the dispersion of this residual demonstrates the extent to which some firms can charge a "non-marginal" (that is higher than competitive) price.

Marc M. Kramer, *The Influence of Financial Advice on Individual Investor Portfolio Performance*, Social Science Research Network Abstract 1144702 (Mar. 2008) finds that advised investors take less risk and thereby reap lower returns. Risk-adjusted performance is similar. Adjusting further for investor characteristics, advised investors perform slightly worse.

Erik R. Sirri & Peter Tufano, *Costly Search and Mutual Fund Flows*, The Journal of Finance, Volume 53, Number 5, 1589-1622 (Oct. 1998) find that investors are "fee sensitive in that lower-fee funds and funds that reduce fees grow faster." Investors' fee sensitivity is not symmetric, however.

Edward Tower & Wei Zheng, *Ranking Mutual Fund Families: Minimum Expenses and Maximum Loads as Markers for Moral Turpitude*, Social Science Research Network Abstract 1265103 (Sept. 2008) find a negative relationship between expense ratios and gross performance.

In light of this literature and public commenters, the Department believes that the available research provides an insufficient basis to confidently determine whether or to what degree participants pay inefficiently high investment prices. Market conditions that may lead to inefficiently high prices – namely imperfect information, search costs and investor behavioral biases – certainly exist in the retail IRA market and likely exist to some degree in particular segments of the DC plan market. The Department believes there is a strong possibility that at least some participants pay inefficiently high investment prices. If so, the Department would expect these actions to reduce that inefficiency. This would increase participants' welfare by transferring surplus from producers of investment products and services to them and by reducing dead weight loss. The Department additionally believes that even where investment prices are efficient, participants often make bad investment decisions with respect to expenses – that is, they buy investment products and services whose marginal cost exceed the associated marginal benefit to them.[35] The Department expects these actions to reduce such investment errors, improving participant and societal welfare. However, the Department has no basis on which to quantify such errors or improvements.

The *Division of Investment Management: Report on Mutual Fund Fees and Expenses*, U.S. Securities and Exchange Commission (Dec. 2000), *at http://www.sec.gov/news/studies/feestudy.htm* describes mutual fund fees and expenses and identifies major factors that influence fee levels but does not assess whether prices are efficient.

Xinge Zhao, *The Role of Brokers and Financial Advisors Behind Investment Into Load Funds*, China Europe International Business School Working Paper (Dec. 2005), *at http://www.ceibs.edu/faculty/zxinge/brokerrole-zhao.pdf* finds that funds with higher loads receive higher flows, and suggests that conflicted intermediaries enrich themselves at investors' expense.

[35] It is possible that the converse could sometimes occur: participants might fail to buy efficiently priced products and services whose marginal cost lags the associated marginal benefit to them. In that case advice, by correcting this error, might lead to higher expenses, but would still improve welfare. Because research suggests that participants are insensitive to fees rather than excessively sensitive to them the Department believes that this converse situation is likely to be rare.

In addition to the benefits that participants will derive from the disclosure of investment-related information in a comparative format, they also will benefit from a retrospective disclosure of plan administrative fees actually charged to their accounts in the prior quarter. Previous RFI comments from participant advocates, plan sponsors and service providers support such a disclosure requirement.[36] However, one comment to the contrary on behalf of service providers was received by the Department in response to the proposal. The commenter expressed concern that "the value of quarterly statements to the participant does not justify the cost of providing the data."[37] The Department continues to believe, as it did in connection with the proposal, that participants who are trying to plan for retirement are entitled to a comprehensive disclosure that includes not only information about fee and expenses that may occur depending on investment options selected, but also information on other fees that were actually assessed against their accounts in the previous quarter. Information about actual charges to participants' accounts may, among other things, help participants understand their current reported account balance, detect errors in prior charges by the plan, handle general household budgeting and retirement planning, and insure that the charges are reasonable. In addition, this information already should be available in some form as part of ordinary plan recordkeeping that tracks participant account balances.

4. *Costs*

[36] These comments on the RFI can be found under http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html.
[37] Comments on the proposal can be found under http://www.dol.gov/ebsa/regs/cmt-fiduciaryrequirements.html.

The Department estimates that the regulation may result in the following additional administrative burdens and costs[38] for plans (or plan sponsors).[39]

a. *Costs Due to Upfront Review and Updating of Plan Documents*

In the RIA of the proposal, the Department estimated costs of about $30.3 million for participant-directed individual accounts plans to review the regulation upfront and to prepare the disclosures. Using updated in-house labor rates for professional and clerical employees, the Department has increased the estimated costs to about $35.0 million in 2012. Costs to update plan documents to take into account plan changes, such as new investment alternatives, changes in general plan administrative expenses, and changes in individual expenses are estimated to be approximately $20.3 million in subsequent years.

b. *Costs Due to Production of Quarterly Dollar Amount Disclosures*

The final regulation will require plan administrators to send out disclosures about administrative charges to participants' accounts and engage in recordkeeping on both a plan-wide as well as a participant-specific basis. The Department estimates that the cost

[38] The Department's estimate of these costs are highly uncertain, discussed in more detail in the Uncertainty section, reflecting especially uncertainty about the average time plans will spend on performing their task.

[39] For purposes of this analysis the Department assumes that these costs are borne by plans, even though they might be initially incurred by service providers.

to produce the actual dollar disclosure is approximately $30.5 million for 2012[40] and $10.7 million in subsequent years.

c. *Costs Due to Assembling Required Information for Chart and Web site*

Additional administrative burdens and costs are likely to arise because of the need for plans to consolidate information from more than one source to prepare the required comparative chart. In the proposal, the Department estimated that it takes a person with a financial background about one hour per plan to consolidate the information from multiple sources for the comparative chart. The Department acknowledges that some plans with non-mutual fund designated investment alternatives may require more time to prepare the required information for the chart and the Web site. Therefore, the Department has quintupled the time estimate to five hours per plan, on average, for the first year and quadrupled the time estimate to four hours per plan, on average, for subsequent years. This results in estimated costs for the consolidation of fee information from multiple sources of approximately $151.5 million in 2012 and $121.2 million in subsequent years.[41]

d. *Costs Due to the Web site Requirement*

[40] The Department did not account for additional paper costs, given that no additional pages need be added as long as this information is included as part of the quarterly benefit statement.
[41] This number also includes a small update of the in-house wage rate for a financial professional.

The regulation does not require plans to create and maintain a Web site. Rather, paragraph (d)(1)(v) of the rule requires plan administrators to disclose on the required comparative chart an Internet Web site address that is sufficiently specific to lead participants to supplemental information about each investment option offered under the plan. The Department received comments that many non-mutual fund products may not presently maintain a Web site, therefore additional costs will be incurred. In response to these comments, the Department has quantified the cost of creating and maintaining a Web site, below as an upper bound.

For purposes of quantifying the cost of creating and maintaining a Web site, the Department assumes that about 50 percent of plans, or employers sponsoring such plans, already maintain a Web site where plan information may be found.[42] For these plans, some information will likely be required to be added to existing Web sites, which will have to be updated periodically. The Department assumes that 241,000 plans, or employers sponsoring such plans, already maintain Web sites with plan-related information and that for each such plan on average, an IT professional will spend one hour updating the Web site for the required information. In addition, the Department assumes that the plan will update the information about three additional times during the year, which will require one-half hour of an IT professional's time for each update. The estimated 241,000 plans that do not currently maintain a Web site with plan information

[42] The Department lacks representative survey information on the number of plans that have a Web site, but believes that an average rate of 50 percent is reasonable. In estimating this rate, the Department has taken into account that plans that offer only non-mutual fund options might not have Web sites currently and that plans that offer a combination of mutual funds and non-mutual fund investment options are less likely to have Web sites than plans offering only mutual funds. In addition, commenters estimated that about half of plans use a third party administrator or independent record keeper. Due to this uncertainty, the Department's estimate of the resulting costs is also highly uncertain.

will require, on average, two hours of an IT professional's time to create a basic Web site and one-half hour to update the information on the Web site three times in the first year.[43] In addition, the 241,000 plans presently without Web sites will have to rent server space. This is estimated to cost plans, on average, $240 a year, resulting in an aggregate cost of $159.4 million in the first year to create and update Web sites.

In subsequent years, only new plans will incur the cost of developing a Web site. Existing plans are assumed to update the information on the Web site four times per year requiring one-half hour of an IT professional's time for each update. Plans also will incur server space rental cost estimated at $240 per plan, resulting in a total cost in each subsequent year of $142.6 million.

e. Costs of Distribution and Materials for Disclosures

The final rule's required disclosures, as well as any materials the plan receives regarding voting, tender or similar rights ("pass-through materials"), are usually sent to plan participants on an annual or quarterly basis.[44] Using updated in-house wage rates, this leads to an estimate of about $39.2 million in labor costs.[45] Plans will also bear materials and postage costs of about $9.0 million in 2012. The Department believes that

[43] The hourly labor cost of an IT professional is assumed to be $70.

[44] As in the RIA of the proposal, this section does not include distribution or material costs for the disclosures of administrative fees charged to participants' accounts as the Department assumes that this information can be included as part of the quarterly benefit statement.

[45] Some of this information is already required for 404(c) compliant plans and by the Department's Qualified Default Investment Alternative regulation. In addition, a large majority of plans voluntarily provide this information to its participants. As a result, the Department estimates that only 577,000 participants will receive this information for the first time because of the final regulation, and 38% percent of participants will receive the information electronically.

plans have pass-through materials readily available for participants who must receive such disclosures; therefore, it has attributed no cost to gather this information.

In total, the Department estimates that in 2012, participant-directed individual account plans will incur increased administrative costs of approximately $424.6 million.

f. Discouragement of Some Employers from Sponsoring a Retirement Plan

Increased administrative burdens may discourage some employers, particularly small employers, from sponsoring a retirement plan. For small plan sponsors, the administrative burden is felt disproportionately because of their limited resources. Small business owners who do not have the resources to analyze plan fees or to hire an analyst may be discouraged from offering a plan at all.

Regulatory burden is one among many reasons small businesses do not to sponsor a retirement plan. According to the 2000, 2001, and 2002 Employee Benefit Research Institute (EBRI)'s Small Employer Retirement Surveys, about 2.7 percent of small employers cited "too many government regulations" as the most important reason they do not offer a retirement plan.[46] A commenter on the proposed rule supported this assertion, but did not provide a specific estimate of its impact. Due to very limited data on this issue, the Department is not able to quantify its impact.[47]

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[46] The survey defines small employers as those having up to 100 full-time workers. Other reasons small employers do not offer a retirement plan are that workers prefer wages or other benefits, that a large portion of employees are seasonal, part-time, or high turnover, and that revenue is too low or uncertain. See http://www.ebri.org/surveys/sers for more detail.

[47] It also is possible that rather than discouraging employers from sponsoring or continuing to sponsor a retirement plan, increased administrative burden could instead influence some employers to offer less investment options in their participant-directed individual account plans.

g. *Summary of Costs*

The quantified total costs are shown in Table 3 below. Column (A) reports the estimated costs of up-front review of the regulation, Column (B) reports the costs to update plan documents, and Column (C) reports the cost to produce quarterly dollar amounts for administrative fees charged to participant accounts. The cost to assemble the required information, create and update Web sites, and associated distribution and material costs are reported in columns (D), (E), (F) and (G). The total present value of these costs is estimated at $2.7 billion over the ten year period 2012 to 2021. As discussed in more detail in the uncertainty section below, a range of possible cost estimates was constructed by decreasing and increasing key cost assumptions by 50 percent. This led to a range for the cost estimates of $2.0 to $3.3 million.

TABLE 3 .--*Total Discounted Costs of Proposal reported in $Millions/Year*

Year	Up-front Review Cost	Update Plan Documents	Production of Quarterly Dollar Amount Disclosures	Assembling the Required Chart and Website Information	Creation/ Updating of Website	Distribution Materials Costs	Staff Cost to Distribute Disclosures	Total Costs A+B+C+D +E+F+G
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	
2012	35.0	0.0	30.5	151.5	159.4	9.0	39.2	424.6
2013	5.1	13.8	10.0	113.3	133.3	8.4	36.6	320.5
2014	4.8	12.9	9.3	105.9	124.6	7.9	34.2	299.6
2015	4.5	12.1	8.7	99.0	116.4	7.4	32.0	280.0
2016	4.2	11.3	8.1	92.5	108.8	6.9	29.9	261.7
2017	3.9	10.5	7.6	86.4	101.7	6.4	27.9	244.5
2018	3.7	9.8	7.1	80.8	95.0	6.0	26.1	228.5
2019	3.4	9.2	6.6	75.5	88.8	5.6	24.4	213.6
2020	3.2	8.6	6.2	70.6	83.0	5.2	22.8	199.6
2021	3.0	8.0	5.8	65.9	77.6	4.9	21.3	186.6

Total with 7% Discounting	2,659.2
Total with 3% Discounting	3,095.1

Note: The displayed numbers are rounded and therefore may not add up to the totals.

h. *Uncertainty in the Cost Estimates*

Although the Department made adjustments to the analysis in response to comments, the Department remains uncertain regarding the exact magnitude of the costs of these changes. The variables with the most uncertainty in the cost estimates are:

- The time required for legal professionals, clerical professionals[48] and accountants to perform their tasks;
- The cost to obtain the actual dollar amounts of participant's administrative and individual expenses; and
- The labor cost to create and maintain Web sites.

To estimate the influence of these variables on the analysis, the Department re-estimated the costs of the final regulation under different assumptions for these uncertain variables. Increasing the variables of concern by 25 percent resulted in a present value of $3.0 billion. Increasing the variables by 50 percent resulted in a present value of $3.3 billion. Increasing the key variables by 75 percent results in a $3.6 billion present value for the final regulation.

[48] The clerical time to distribute disclosures remains unchanged in this sensitivity analysis.

5. *Net Benefits*

As the analysis above shows, our low end benefit estimate of $7.2 billion exceeds our high end cost estimate of $3.3 billion. Thus, the Department remains highly confident in its conclusion expressed in the RIA for the proposal that increased fee disclosure can induce changes in participant behavior and reductions in plan fees. Several public comments on the proposal reinforce these conclusions.

6. *Comments and Revisions*

The Department received several comments questioning various assumptions on which its estimates of the benefits were based and suggesting that it had underestimated the costs of the proposal. In response to these comments, as discussed above, the Department reevaluated the quantified benefits resulting from a reduction of fees and increased its estimate of the costs to account for the creation and updating of Web sites and the complexity of retrieving the information needed to produce the comparative chart and obtain required supplemental information. In addition, the Department updated its estimates of labor costs.

7. *Alternatives*

In formulating this final rule, the Department considered several alternative approaches, which are discussed in detail in the RIA of the proposal. The Department did not adopt any of the alternatives discussed in the RIA of the proposal, because it did not

receive any sufficiently persuasive comments suggesting that it should. Some commenters suggested alternatives the Department had not considered. For example, a commenter suggested that plans should be allowed to provide supplemental information required to be disclosed by the rule in a written document rather than on a Web site, because many companies do not have access to a Web site. Another, commenter asked the Department to clarify whether the proposal applies to IRAs that provide for employer contributions— that is, "Simplified Employee Pension Retirement Account" (SEP) and "Savings Incentive Match Plan for Employees" (SIMPLE) plans. The Department did not adopt the first commenter's suggestion, but it did clarify in the final rule that SEP and SIMPLE IRAs are excluded from the rule. The Department's decisions regarding these regulatory alternatives are discussed earlier in this preamble.

8. *Final Regulatory Flexibility Analysis*

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551, et seq.) and which are likely to have a significant economic impact on a substantial number of small entities. At the proposed rule stage, the Department prepared an initial RFA analysis, because it did not have enough information to certify that the rule would not have a significant effect on a substantial number of small entities, although the Department stated that it considered it unlikely that the proposed rule would significantly affect such entities.

In connection with the final rule, the Department has prepared a final RFA in compliance with section 604 of the RFA. For purposes of this analysis, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. The Department used this standard in the proposed rule and consulted with the Small Business Administration Office of Advocacy concerning its use of this standard for RFA purposes and requested public comments on this issue. The Department did not receive any comments that addressed its use of the participant count standard.

The following subsections address specific requirements of the RFA.

a. *Need for and Objectives of the Rule*

With the proliferation of participant-directed individual account plans, such as 401(k) plans, which afford participants and beneficiaries the opportunity to direct the investment of all or a portion of the assets held in their individual plan accounts, participants and beneficiaries are increasingly responsible for making their own retirement savings decisions. This increased responsibility has led to a growing concern that participants and beneficiaries may not have access to, or if accessible, may not be considering information critical to making informed decisions about the management of

their accounts, particularly information on investment choices, including attendant fees and expenses. This rule requires participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among investment options. The Department believes that the rule will provide beneficial information to participants and beneficiaries that will allow them to make informed decisions with regard to investing assets in their individual accounts.

The reasons for and objectives of this final regulation are discussed in detail in Section A of this preamble, "Background," and in section "Need for Regulatory Action" of the Regulatory Impact Analysis (RIA) above. The legal basis for the rule is set forth in the "Authority" section of this preamble, below.

b. *Public Comments*

A public comment on the proposed rule suggested that the Department underestimated the cost to small service providers to comply with the proposed rule. Specifically, the commenter stated that the Department underestimated the time required for an attorney or other legal professional to review the rule and the disclosures, and the hourly rate for an attorney to perform this service. In response to the first comment, the Department would like to clarify that the time estimate for legal review is an average estimate spread across all plans that must comply with the rule and is not the time estimate that is applicable only to small plans. With regard to the second issue, the Department would like to clarify that the estimated hourly wage rate is not a billable rate;

it is an in-house wage rate that includes profit or overhead and is based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index (June, 2009, Bureau of Labor Statistics), which is the most reliable data the Department has to support its cost estimates. The commenter also stated that the Department underestimated the time small plan sponsors will have to spend gathering information to comply with the disclosure requirements of the final rule. As further discussed under the Cost section of the RIA, the Department has increased its estimate of the hours it will to take to gather and consolidate information required for the disclosure from one hour to four hours.

Finally, the commenter implored the Department to apply a delayed effective date for small plans of at least one year following the effective date for large plans in order to allow such plans to develop the systems necessary to comply with the disclosure requirements of the final rule. While the Department did not adopt the commenter's suggestion, as stated above in the preamble, the Department has set January 1, 2012, as the applicability date for calendar year plans to comply with the rule, which should provide plans with sufficient time to develop the necessary systems for compliance.

c. *Affected Small Entities*

The Department estimates that the final rule will apply to approximately 419,000 small plans covering approximately 9.5 million participants.

d. *Estimating Compliance Requirements for Small Entities/Plans*

The Department continues to believe that the effects of this final rule will be to increase retirement savings by providing participants and beneficiaries with enhanced information about their plans, which is expected to allow them to make more informed investment decisions. The Department also believes that small plans will benefit from the rule, because it will clarify the information that must be disclosed to plan participants in order for plan fiduciaries to meet their fiduciary duty under ERISA.

While small and large plans will incur administrative costs due to the final rule, these costs are reasonable compared to the benefits and will probably be borne by the participants who will also receive the benefits under the rule. From industry comments, the Department inferred that participants in larger plans, more often than participants in smaller plans, have access to needed investment information. The Department continues to believe that participants in small plans need as much information about their plan investments as participants in larger plans.

Assuming that the plan incurs the average costs for all disclosure activities that are considered in the RIA section above, the following calculation illustrates how large the costs of the disclosures would be for a very small plan (one-participant plan). As can be seen in Table 4, the total cost of compliance for a one-participant plan amounts to less than $873 in the first year and less than that amount in the subsequent years. The costs in 2012 include a review cost of about $73 per plan (one-half hour of a legal professional's

time plus one-half hour of a clerical professional's time), labor costs of $314 for consolidating the information for the comparative chart (five hours), costs of, on average, $485 for the creation and maintenance of a Web site, $0.40 per participant for recordkeeping and disclosure of information, additional annual labor cost for distribution of $0.90 in section 404(c) compliant plans or plans that already provide similar information ($1.50 in plans that do not already provide section 404(c) compliant or similar information), and material and postage costs of $0.15 in 404(c) compliant plans or plans that already provide similar information ($2.40 in plans that do not already provide section 404(c) compliant or similar information).

These cost estimates should be considered an estimate of the upper bound on plan expenses. To the extent that small plans rely on third party administrators or independent record keepers that have economies of scale, plan costs could be lower. To the extent that plans use record keepers that already provide plan Web sites changes by the record keeper to comply with the final rule will likely impose few, if any, additional costs for plans. In addition, if plans use investment alternatives like mutual funds that already provide much of the required information, Web site costs would be less, as would the cost to gather information for the Web site and the comparative chart.

Small plans may be able to find lower cost options to comply with the rule. If, for example, server space for the Web site is provided by the service provider at almost no cost and the plan is not required to spend as much time gathering the required information because it chose plan options for which the information is more readily

available, a one-participant plan could experience first year costs of $310 and $240 in subsequent years.

TABLE 4.--Costs For One-Participant Plan (Undiscounted)

	404(c) Plans and Plans with Similar Information		Non-404(c) Plans without Similar Information	
Type of Cost	Initial Year	Subsequent Year	Initial Year	Subsequent Year
Plan Review	73	36	73	36
Consolidation of Information	314	251	314	251
Cost of Website	485	380	486	381
Actual Dollar Disclosure	0.40	0.15	0.40	0.15
Labor Cost for Distribution	0.90	0.90	1.50	1.50
Material Cost	0.15	0.15	2.40	2.40
Total	**$873**	**$669**	**$876**	**$672**

Note: The displayed numbers are rounded and therefore may not add up to the totals.

e. Duplicative, Overlapping, and Conflicting Rules

ERISA section 404(c) and the regulations thereunder contain disclosure requirements for plan fiduciaries of certain participant-directed account plans that are to some extent similar to the ones that are contained in the proposed regulation. As explained in more detail in the Background section of this preamble, the Department amended the regulations under section 404(c) in order to establish a uniform set of basic

disclosure requirements and to ensure that all participants and beneficiaries in participant-directed individual account plans have access to the same investment-related information.

In addition, the Department has consulted with the Securities and Exchange Commission to avoid duplicative, overlapping, or conflicting requirements. The Department is unaware of any additional relevant federal rules for small plans that duplicate, overlap, or conflict with this final rule.

9. *Paperwork Reduction Act*

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the proposed rule solicited comments on the information collections included therein. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the proposal for OMB's review. No public comments were received that specifically address the paperwork burden analysis of the information collections.

The Department submitted an ICR to OMB for its request of a new information collection. OMB approved the ICR on October 5, 2010, under OMB Control Number 1210-0090, which will expire on October 31, 2013.

The final rule requires plan- and investment-related fee and expense information to be disclosed to participants and beneficiaries in participant-directed individual account

plans. This ICR pertains to two categories of information that is required to be disclosed: ‘‘plan-related’’ and ‘‘investment-related’’ information. The information collection provisions of the rule are intended to ensure that fiduciaries provide participants and beneficiaries with sufficient information regarding plan fees and expenses and designated investment alternatives to make informed decisions regarding the management of their individual accounts. The calculation of the estimated hour and cost burden of the ICR were discussed in detail in the proposed rule and are summarized below.

The Department estimates that disclosing and distributing plan- and investment-related information to participants and beneficiaries as required by the rule will require approximately 6.6 million burden hours with an equivalent cost of approximately $347 million and a cost burden of approximately $221 million in the first year. In each subsequent year, the total labor burden hours are estimated to be approximately 5.5 million hours with an equivalent cost of approximately $275 million and the cost burden is estimated at approximately $201 million per year.

The Department’s estimate of the total burden in the final rule has increased from the proposal due to four factors: (1) counts of plans and participants were updated to account for more recent data; (2) wage rates were updated to account for more recent data; (3) the hour and cost burden associated with creating and maintaining a Web site to comply with the regulatory requirements was added; and (4) the estimate of the average hour burden to gather information for the comparative chart and Web site was increased.

The first two changes resulted only in a slightly higher burden, while the other two changes increased the burden significantly as discussed in more detail below.

Increased burden due to Web site requirement: The estimated burden includes 1.4 million burden hours ($101 million in equivalent costs) in the first year, and 1.1 million burden hours ($76 million equivalent costs) in subsequent years for plans to engage an information technology professional to comply with the rule's requirement for plans to provide a Web site to disclose supplemental information to participants and beneficiaries. The estimated annual cost of the Web site is approximately $116 million. This hour and cost burden associated with providing a plan Web site was not estimated at the proposed rule stage.

Increased burden due to increase in average hour burden estimate of gathering information for the comparative chart and Web site: The estimated burden reported above also includes 1.9 million in added burden hours in the first year ($121 million in added equivalent costs) to consolidate information from multiple sources for the comparative chart and Web site. In the proposal, the Department estimated that this requirement could take, on average, one hour per plan; in response to comments, the final RIA uses an estimate of five hours, on average, per plan in the first year, and four hours, on average in subsequent years.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

Affected Public: Business or other for-profit, not-for-profit institutions.

Estimated Number of Respondents: 483,000.

Estimated Number of Annual Responses: 738,207,000.

Frequency of Response: Initially, Annually, Upon Request, Updating.

Estimated Total Annual Burden Hours: 6,583,000 hours in the first year; 5,520,000 in each subsequent year.

Estimated Total Annual Burden Cost: $221,040,000 for the first year; $201,225,000 for each subsequent year.

10. *Congressional Review Act*

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and will be transmitted to Congress and the Comptroller General for review. The final rule is a "major rule" as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of $100 million or more.

11. *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, the final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments in the aggregate of more than $100 million, adjusted for inflation, or increase expenditures by the private sector of more than $100 million, adjusted for inflation.

12. *Federalism Statement*

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. The final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Fiduciaries, Investments, Pensions, Disclosure, Reporting and recordkeeping requirements, and Securities.

For the reasons set forth in the preamble, the Department is amending Subchapter F, Part 2550 of Title 29 of the Code of Federal Regulations as follows:

SUBCHAPTER F—FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2550 –RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135; sec. 657, Pub. L. 107-16, 115 Stat.38; and Secretary of Labor's Order No. 1-2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401b-1 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), 3 CFR, 1978 Comp. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), 3 CFR, 1978 Comp. 332. Sec. 2550.401c-1 also issued under 29 U.S.C. 1101. Sections 2550.404c-1 and 2550.404c-5 also issued under 29 U.S.C. 1104. Sec. 2550.407c-3 also issued under 29 U.S.C. 1107. Sec. 2550.408b-1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp. p. 332, effective Dec. 31, 1978,

44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp. 332. Sec. 2550.412-1 also issued under 29 U.S.C. 1112.

2. Add § 2550.404a-5 to read as follows:

§ **2550.404a-5--Fiduciary requirements for disclosure in participant-directed individual account plans.**

(a) General. The investment of plan assets is a fiduciary act governed by the fiduciary standards of section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1001 et seq. (all section references herein are references to ERISA unless otherwise indicated). Pursuant to section 404(a)(1)(A) and (B), fiduciaries must discharge their duties with respect to the plan prudently and solely in the interest of participants and beneficiaries. When the documents and instruments governing an individual account plan, described in paragraph (b)(2) of this section, provide for the allocation of investment responsibilities to participants or beneficiaries, the plan administrator, as defined in section 3(16), must take steps to ensure, consistent with section 404(a)(1)(A) and (B), that such participants and beneficiaries, on a regular and periodic basis, are made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including fees and expenses, and regarding designated investment alternatives, including fees and expenses

attendant thereto, to make informed decisions with regard to the management of their individual accounts.

(b) Satisfaction of duty to disclose. (1) In general. The plan administrator of a covered individual account plan must comply with the disclosure requirements set forth in paragraphs (c) and (d) of this section with respect to each participant or beneficiary that, pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to, his or her individual account. Compliance with paragraphs (c) and (d) of this section will satisfy the duty to make the regular and periodic disclosures described in paragraph (a) of this section, provided that the information contained in such disclosures is complete and accurate. A plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

(2) Covered individual account plan. For purposes of paragraph (b)(1) of this section, a "covered individual account plan" is any participant-directed individual account plan as defined in section 3(34) of ERISA, except that such term shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) ("simplified employee pension") or 408(p) ("simple retirement account") of the Internal Revenue Code of 1986.

(c) Disclosure of plan-related information. A plan administrator (or person designated by the plan administrator to act on its behalf) shall provide to each participant

or beneficiary the plan-related information described in paragraphs (c)(1) through (4) of this section, based on the latest information available to the plan.

(1) General. (i) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter:

(A) An explanation of the circumstances under which participants and beneficiaries may give investment instructions;

(B) An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;

(C) A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights;

(D) An identification of any designated investment alternatives offered under the plan;

(E) An identification of any designated investment managers; and

(F) A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(ii) If there is a change to the information described in paragraph (c)(1)(i)(A) through (F) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan

administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(2) Administrative expenses. (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses for general plan administrative services (e.g., legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative, as well as the basis on which such charges will be allocated (e.g., pro rata, per capita) to, or affect the balance of, each individual account.

(B) If there is a change to the information described in paragraph (c)(2)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(2)(i)(A) of this section that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for such services;

(B) A description of the services to which the charges relate (e.g., plan administration, including recordkeeping, legal, accounting services); and

(C) If applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (e.g., through revenue sharing arrangements, Rule 12b-1 fees, sub-transfer agent fees).

(3) Individual expenses. (i)(A) On or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter, an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on an individual, rather than on a plan-wide, basis (e.g., fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, commissions, front or back-end loads or sales charges, redemption fees, transfer fees and similar expenses, and optional rider charges in annuity contracts) and which are not reflected in the total annual operating expenses of any designated investment alternative.

(B) If there is a change to the information described in paragraph (c)(3)(i)(A) of this section, each participant and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be furnished as soon as reasonably practicable.

(ii) At least quarterly, a statement that includes:

(A) The dollar amount of the fees and expenses described in paragraph (c)(3)(i)(A) of this section that are actually charged (whether by liquidating shares or

deducting dollars) during the preceding quarter to the participant's or beneficiary's account for individual services; and

(B) A description of the services to which the charges relate (e.g., loan processing fee).

(4) Disclosures on or before first investment. The requirements of paragraphs (c)(1)(i), (c)(2)(i)(A), (c)(3)(i)(A) of this section to furnish information on or before the date on which a participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant those paragraphs and any updates to the information furnished to participants and beneficiaries pursuant to paragraphs (c)(1)(ii), (c)(2)(i)(B) and (c)(3)(i)(B) of this section.

(d) Disclosure of investment-related information. The plan administrator (or person designated by the plan administrator to act on its behalf), based on the latest information available to the plan, shall:

(1) Information to be provided automatically. Except as provided in paragraph (i) of this section, furnish to each participant or beneficiary on or before the date on which he or she can first direct his or her investments and at least annually thereafter, the following information with respect to each designated investment alternative offered under the plan—

(i) Identifying information. Such information shall include:

(A) The name of each designated investment alternative; and

(B) The type or category of the investment (e.g., money market fund, balanced fund (stocks and bonds), large-cap stock fund, employer stock fund, employer securities).

(ii) Performance data. (A) For designated investment alternatives with respect to which the return is not fixed, the average annual total return of the investment for 1-, 5-, and 10- calendar year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future; and

(B) For designated investment alternatives with respect to which the return is fixed or stated for the term of the investment, both the fixed or stated annual rate of return and the term of the investment. If, with respect to such a designated investment alternative, the issuer reserves the right to adjust the fixed or stated rate of return prospectively during the term of the contract or agreement, the current rate of return, the minimum rate guaranteed under the contract, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (e.g., telephone or Web site) the most recent rate of return required under this section.

(iii) Benchmarks. For designated investment alternatives with respect to which the return is not fixed, the name and returns of an appropriate broad-based securities market index over the 1-, 5-, and 10- calendar year periods (or for the life of the alternative, if shorter) comparable to the performance data periods provided under paragraph (d)(1)(ii)(A) of this section, and which is not administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

(iv) Fee and expense information. (A) For designated investment alternatives with respect to which the return is not fixed:

(1) The amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, which are not included in the total annual operating expenses of any designated investment alternative) and a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions);

(2) The total annual operating expenses of the investment expressed as a percentage (i.e., expense ratio), calculated in accordance with paragraph (h)(5) of this section;

(3) The total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the percentage described in paragraph (d)(1)(iv)(A)(2) of this section);

(4) A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions; and

(5) A statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant’s or beneficiary’s retirement account and that participants and beneficiaries can visit the Employee Benefit Security Administration’s Web site for an example demonstrating the long-term effect of fees and expenses.

(B) For designated investment alternatives with respect to which the return is fixed for the term of the investment, the amount and a description of any shareholder-type fees and a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part.

(v) Internet Web site address. An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information regarding the designated investment alternative:

(A) The name of the alternative's issuer;

(B) The alternative's objectives or goals in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate;

(C) The alternative's principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate;

(D) The alternative's portfolio turnover rate in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate;

(E) The alternative's performance data described in paragraph (d)(1)(ii) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law; and

(F) The alternative's fee and expense information described in paragraph (d)(1)(iv) of this section.

(vi) Glossary. A general glossary of terms to assist participants and beneficiaries in understanding the designated investment alternatives, or an Internet Web

site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address.

(vii) Annuity options. If a designated investment alternative is part of a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company, the information set forth in paragraph (i)(2)(i) through (i)(2)(vii) of this section with respect to the annuity option, to the extent such information is not otherwise included in investment-related fees and expenses described in paragraph (d)(1)(iv).

(viii) Disclosures on or before first investment. The requirement in paragraph (d)(1) of this section to provide information to a participant or beneficiary on or before the date on which the participant or beneficiary can first direct his or her investments may be satisfied by furnishing to the participant or beneficiary the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1) of this section.

(2) Comparative format. (i) Furnish the information described in paragraph (d)(1) and, if applicable, paragraph (i) of this section in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan and prominently displays the date, and that includes:

(A) A statement indicating the name, address, and telephone number of the plan administrator (or a person or persons designated by the plan administrator to act on its behalf) to contact for the provision of the information required by paragraph (d)(4) of this section;

(B) A statement that additional investment-related information (including more current performance information) is available at the listed Internet Web site addresses (see paragraph (d)(1)(v) of this section); and

(C) A statement explaining how to request and obtain, free of charge, paper copies of the information required to be made available on a Web site pursuant to paragraph (d)(1)(v), paragraph (i)(2)(vi), relating to annuity options, or paragraph (i)(3), relating to fixed-return investments, of this section.

(ii) Nothing in this section shall preclude a plan administrator from including additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading.

(3) Information to be provided subsequent to investment. Furnish to each investing participant or beneficiary, subsequent to an investment in a designated investment alternative, any materials provided to the plan relating to the exercise of voting, tender and similar rights appurtenant to the investment, to the extent that such rights are passed through to such participant or beneficiary under the terms of the plan.

(4) Information to be provided upon request. Furnish to each participant or beneficiary, either at the times specified in paragraph (d)(1), or upon request, the following information relating to designated investment alternatives—

(i) Copies of prospectuses (or, alternatively, any short-form or summary prospectus, the form of which has been approved by the Securities and Exchange Commission) for the disclosure of information to investors by entities registered under either the Securities Act of 1933 or the Investment Company Act of 1940, or similar

documents relating to designated investment alternatives that are provided by entities that are not registered under either of these Acts;

(ii) Copies of any financial statements or reports, such as statements of additional information and shareholder reports, and of any other similar materials relating to the plan's designated investment alternatives, to the extent such materials are provided to the plan;

(iii) A statement of the value of a share or unit of each designated investment alternative as well as the date of the valuation; and

(iv) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3-101 and the value of each such asset (or the proportion of the investment which it comprises).

(e) Form of disclosure. (1) The information required to be disclosed pursuant to paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with paragraph (c)(1)(i) of this section.

(2) The information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) of this section may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).

(3) A plan administrator that uses and accurately completes the model in the Appendix, taking into account each designated investment alternative offered under the

plan, will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

(4) Except as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge.

(5) The information required to be prepared by the plan administrator for disclosure under this section shall be written in a manner calculated to be understood by the average plan participant.

(f) Selection and monitoring. Nothing herein is intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.

(g) Manner of furnishing. *Reserved.*

(h) Definitions. For purposes of this section, the term—

(1) At least annually thereafter means at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(2) At least quarterly means at least once in any 3-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

(3) Average annual total return means the average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N-1A, N-3, or N-4, as appropriate, except that such method of computation may exclude any front-end,

deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan.

(4) Designated investment alternative means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term "designated investment alternative" shall not include ``brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(5) Total annual operating expenses means:

(i) In the case of a designated investment alternative that is registered under the Investment Company Act of 1940, the annual operating expenses and other asset-based charges before waivers and reimbursements (e.g., investment management fees, distribution fees, service fees, administrative expenses, separate account expenses, mortality and expense risk fees) that reduce the alternative's rate of return, expressed as a percentage, calculated in accordance with the required Securities and Exchange Commission form, e.g., Form N-1A (open-end management investment companies) or Form N-3 or N-4 (separate accounts offering variable annuity contracts); or

(ii) In the case of a designated investment alternative that is not registered under the Investment Company Act of 1940, the sum of the fees and expenses described in paragraphs (h)(5)(ii)(A) through (C) of this section before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year–

(A) Management fees as described in the Securities and Exchange Commission Form N-1A that reduce the alternative's rate of return,

(B) Distribution and/or servicing fees as described in the Securities and Exchange Commission Form N-1A that reduce the alternative's rate of return, and

(C) Any other fees or expenses not included in paragraphs (h)(5)(ii)(A) or (B) of this section that reduce the alternative's rate of return (e.g., externally negotiated fees, custodial expenses, legal expenses, accounting expenses, transfer agent expenses, recordkeeping fees, administrative fees, separate account expenses, mortality and expense risk fees), excluding brokerage costs described in Item 21 of Securities and Exchange Commission Form N-1A.

(i) Special rules. The rules set forth in this paragraph apply solely for purposes of paragraph (d)(1) of this section.

(1) Qualifying employer securities. In the case of designated investment alternatives designed to invest in, or primarily in, qualifying employer securities, within the meaning of section 407 of ERISA, the following rules shall apply –

(i) In lieu of the requirements of paragraph (d)(1)(v)(C) of this section (relating to principal strategies and principal risks), provide an explanation of the importance of a well-balanced and diversified investment portfolio.

(ii) The requirements of paragraph (d)(1)(v)(D) of this section (relating to portfolio turnover rate) do not apply to such designated investment alternatives.

(iii) The requirements of paragraph (d)(1)(v)(F) of this section (relating to fee and expense information) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or

beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(iv) The requirements of paragraph (d)(1)(iv)(A)*(2)* of this section (relating to total annual operating expenses expressed as a percentage) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(v) The requirements of paragraph (d)(1)(iv)(A)*(3)* of this section (relating to total annual operating expenses expressed as a dollar amount per $1,000 invested) do not apply to such designated investment alternatives, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(vi)(A) With respect to the requirement in paragraph (d)(1)(ii)(A) of this section (relating to performance data for 1-, 5-, and 10-year periods), the definition of "average annual total return" as defined in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives in lieu of the definition in paragraph (h)(3) of this section if the qualifying employer securities are publicly traded on a national exchange or generally recognized market and the designated investment alternative is not a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment.

(B) The term "average annual total return" means the change in value of an investment in one share of stock on an annualized basis over a specified period, calculated by taking the sum of the dividends paid during the measurement period,

assuming reinvestment, plus the difference between the stock price (consistent with ERISA section 3(18)) at the end and at the beginning of the measurement period, and dividing by the stock price at the beginning of the measurement period; reinvestment of dividends is assumed to be in stock at market prices at approximately the same time actual dividends are paid.

(C) The definition of "average annual total return" in paragraph (i)(1)(vi)(B) of this section shall apply to such designated investment alternatives consisting of employer securities that are not publicly traded on a national exchange or generally recognized market, unless the designated investment alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment. Changes in value shall be calculated using principles similar to those set forth in paragraph (i)(1)(vi)(B) of this section.

(2) Annuity options. In the case of a designated investment alternative that is a contract, fund or product that permits participants or beneficiaries to allocate contributions toward the current purchase of a stream of retirement income payments guaranteed by an insurance company, the plan administrator shall, in lieu of the information required by paragraphs (d)(1)(i) through (d)(1)(v), provide each participant or beneficiary the following information with respect to each such option:

(i) The name of the contract, fund or product;

(ii) The option's objectives or goals (e.g., to provide a stream of fixed retirement income payments for life);

(iii) The benefits and factors that determine the price (e.g., age, interest rates, form of distribution) of the guaranteed income payments;

(iv) Any limitations on the ability of a participant or beneficiary to withdraw or transfer amounts allocated to the option (e.g., lock-ups) and any fees or charges applicable to such withdrawals or transfers;

(v) Any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option, such as surrender charges, market value adjustments, and administrative fees;

(vi) A statement that guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability; and

(vii) An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information –

(A) The name of the option's issuer and of the contract, fund or product;

(B) Description of the option's objectives or goals;

(C) Description of the option's distribution alternatives/guaranteed income payments (e.g., payments for life, payments for a specified term, joint and survivor payments, optional rider payments), including any limitations on the right of a participant or beneficiary to receive such payments;

(D) Description of costs and/or factors taken into account in determining the price of benefits under an option's distribution alternatives/guaranteed income payments (e.g., age, interest rates, other annuitization assumptions);

(E) Description of any limitations on the right of a participant or beneficiary to withdraw or transfer amounts allocated to the option and any fees or charges applicable to a withdrawal or transfer; and

(F) Description of any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option (e.g., surrender charges, market value adjustments, administrative fees).

(3) Fixed-return investments. In the case of a designated investment alternative with respect to which the return is fixed for the term of the investment, the plan administrator shall, in lieu of complying with the requirements of paragraph (d)(1)(v) of this section, provide an Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information –

(i) The name of the alternative's issuer;

(ii) The alternatives objectives or goals (e.g., to provide stability of principal and guarantee a minimum rate of return);

(iii) The alternative's performance data described in paragraph (d)(1)(ii)(B) of this section updated on at least a quarterly basis, or more frequently if required by other applicable law;

(iv) The alternative's fee and expense information described in paragraph (d)(1)(iv)(B) of this section.

(4) Target date or similar funds. *Reserved.*

(j) Dates. (1) Effective Date. This section shall be effective on [INSERT 60 DAYS AFTER DATE OF PUBLICATION].

(2) Applicability Date. This section shall apply to covered individual account plans for plan years beginning on or after November 1, 2011.

(3) Transitional rules. (i) Notwithstanding paragraphs (b), (c) and (d) of this section, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after such applicability date to participants or beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual account on the applicability date.

(ii) For plan years beginning before October 1, 2021, if a plan administrator reasonably and in good faith determines that it does not have the information on expenses attributable to the plan that is necessary to calculate, in accordance with paragraph (h)(3) of this section, the 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses or the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for such expenses. When a plan administrator uses a reasonable estimate or the most recently reported total annual operating expenses as a substitute for actual expenses pursuant to this paragraph, the administrator shall inform participants of the basis on which the returns were determined. Nothing in this section requires disclosure of returns for periods before the inception of a designated investment alternative.

3. In § 2550.404c-1 revise (b)(2)(i)(B), (c)(1)(ii), and (f)(1), and add (d)(2)(iv) to read as follows:

§ 2550.404c-1— ERISA section 404(c) plans.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed investment decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this paragraph, a participant or beneficiary will be considered to have sufficient information if the participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

(1) An explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Income Security Act, and 29 CFR 2550.404c-1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary;

(2) The information required pursuant to 29 CFR 2550.404a-5; and

(3) In the case of plans which offer an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative), a description of the procedures established to

provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights, by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures (see paragraphs (d)(2)(ii)(E)(4)(vii), (viii) and (ix) of this section).

* * * * *

(c) * * *

(1) * * *

(ii) For purposes of sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section, a participant or beneficiary will be deemed to have exercised control with respect to voting, tender or similar rights appurtenant to the participant's or beneficiary's ownership interest in an investment alternative, provided that the participant's or beneficiary's investment in the investment alternative was itself the result of an exercise of control; the participant or beneficiary was provided a reasonable opportunity to give instruction with respect to such incidents of ownership, including the provision of the information described in 29 CFR 2550.404a-5(d)(3); and the participant or beneficiary has not failed to exercise control by reason of the circumstances described in paragraph (c)(2) with respect to such incidents of ownership.

* * * * *

(d) * * *

(2) * * *

(iv) Paragraph (d)(2)(i) does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan.

* * * * *

(f) * * *

(1) Plan A is an individual account plan described in section 3(34) of the Act. The plan states that a plan participant or beneficiary may direct the plan administrator to invest any portion of his individual account in a particular diversified equity fund managed by an entity which is not affiliated with the plan sponsor, or any other asset administratively feasible for the plan to hold. However, the plan provides that the plan administrator will not implement certain listed instructions for which plan fiduciaries would not be relieved of liability under section 404(c) (see paragraph (d)(2)(ii) of this section). Plan participants and beneficiaries are permitted to give investment instructions during the first week of each month with respect to the equity fund and at any time with respect to other investments. The plan administrator of Plan A provides each participant and beneficiary with the information described in paragraph (b)(2)(i)(B) of this section, including the information that must be provided on or before the date on which a participant or beneficiary can first direct his or her investments and at least annually thereafter pursuant to 29 CFR 2550.404a-5, and provides updated information in the

event of any change in the information provided. Subsequent to any investment by a participant or beneficiary, the plan administrator forwards to the investing participant or beneficiary any materials provided to the plan relating to the exercise of voting, tender or similar rights attendant to ownership of an interest in such investment (see paragraph (b)(2)(i)(B)(3) of this section and 29 CFR 2550.404a-5(d)(3)). Upon request, the plan administrator provides each participant or beneficiary with copies of any prospectuses (or similar documents relating to designated investment alternatives that are provided by entities that are not registered under the Securities Act of 1933 or the Investment Company Act of 1940), financial statements and reports, and any other materials relating to the designated investment alternatives available under the plan in accordance with 29 CFR 2550.404a-5(d)(4)(i) through (iv). Also upon request, the plan administrator provides each participant and beneficiary with other information required by 29 CFR 2550.404a-5(d)(4) with respect to the equity fund, which is a designated investment alternative, including a statement of the value of a share or unit of the participant's or beneficiary's interest in the equity fund and the date of the valuation. Plan A meets the requirements of paragraph (b)(2)(i)(B) of this section regarding the provision of investment information.

* * * * *

Signed at Washington, DC, this 7th day of October, 2010.

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Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

BILLING CODE 4510-29-P

APPENDIX to §2550.404a-5 – Model Comparative Chart

ABC Corporation 401k Retirement Plan

Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact [insert name of plan administrator or designee] at [insert telephone number and address]. A free paper copy of the information available on the Web site[s] can be obtained by contacting [insert name of plan administrator or designee] at [insert telephone number].

Document Summary

This document has 3 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

Part I. Performance Information

Table 1 focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site[s].

Table 1—Variable Return Investments								
Name/ Type of Option	Average Annual Total Return as of 12/31/XX				Benchmark			
	1yr.	5yr.	10yr.	Since Inception	1yr.	5yr.	10yr.	Since Inception
Equity Funds								
A Index Fund/ S&P 500 www. website address	26.5%	.34%	-1.03%	9.25%	26.46%	.42%	-.95%	9.30%
					S&P 500			
B Fund/ Large Cap www. website address	27.6%	.99%	N/A	2.26%	27.80%	1.02%	N/A	2.77%
					US Prime Market 750 Index			
C Fund/ Int'l Stock www. website address	36.73%	5.26%	2.29%	9.37%	40.40%	5.40%	2.40%	12.09%
					MSCI EAFE			
D Fund/ Mid Cap www. website address	40.22%	2.28%	6.13%	3.29%	46.29%	2.40%	-.52%	4.16%
					Russell Midcap			
Bond Funds								
E Fund/ Bond Index www. website address	6.45%	4.43%	6.08%	7.08%	5.93%	4.97%	6.33%	7.01%
					Barclays Cap. Aggr. Bd.			
Other								
F Fund/ GICs	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75%

www. website address					3-month US T-Bill Index			
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8%	3.1%	3.3%	4.99%
					3-month US T-Bill Index			
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46%	N/A	N/A	3.09%
					S&P 500			
					23.95%	N/A	N/A	3.74%
					Generations 2020 Composite Index*			

*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

Table 2 focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

Table 2—Fixed Return Investments			
Name/ Type of Option	Return	Term	Other
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed-Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.

Part II. Fee and Expense Information

Table 3 shows fee and expense information for the investment options listed in Table1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

Table 3—Fees and Expenses			
Name / Type of Option	Total Annual Operating Expenses As a %	Per $1000	Shareholder-Type Fees
Equity Funds			
A Index Fund/ S&P 500	0.18%	$1.80	$20 annual service charge subtracted from investments held in this option if valued at less than $10,000.
B Fund/ Large Cap	2.45%	$24.50	2.25% deferred sales charge subtracted from amounts withdrawn within 12 months of purchase.
C Fund/ International	0.79%	$7.90	5.75% sales charge subtracted from amounts invested.

Stock		
D Fund/ Mid Cap ETF	0.20% $2.00	4.25% sales charge subtracted from amounts withdrawn.
Bond Funds		
E Fund/ Bond Index	0.50% $5.00	N/A
Other		
F Fund/ GICs	0.46% $4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65% $6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50% $15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
Fixed Return Investments		
H 200X / GIC	N/A	12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed-Type Invest Account	N/A	5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at http://www.dol.gov/ebsa/publications/401k employee.html. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Part III. Annuity Information

Table 4 focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

Table 4—Annuity Options

Name	Objectives / Goals	Pricing Factors	Restrictions / Fees
Lifetime Income Option www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of $10 for each share you own, for your life. For example, if	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share.	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit. You will pay a 25%

	you own 30 shares at age 65, you will receive $300 per month over your life.	The cost includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	surrender charge for any amount you withdraw before annuity payments begin. If your income payments are less than $50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
Generations 2020 Variable Annuity Option www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund. This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above. The cost also includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	Maximum surrender charge of 8% of account balance. Maximum transfer fee of $30 for each transfer over 12 in a year. Annual service charge of $50 for account balances below $100,000.

Please visit www.ABCPlanglossary.com for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.