

## **DEPARTMENT OF LABOR**

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB08

Requirements for Fee Disclosure to Plan Fiduciaries and Participants – Applicability Dates

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of proposed extension of applicability dates.

**SUMMARY:** This document proposes to extend specified applicability dates of the Department's interim final rule concerning fiduciary-level fee disclosure (29 CFR 2550.408b-2(c), RIN 1210-AB08) and final rule concerning participant-level fee disclosure (29 CFR 2550.404a-5, RIN 1210-AB07). These rules were published in the **Federal Register** on July 16, 2010 and October 20, 2010, respectively. Extending these dates will more closely align the application of the two rules and ensure that parties have sufficient time to comply with the requirements of the rules.

**DATES:** Comments on the proposal to extend the applicability dates for the Department's fee disclosure rules should be submitted to the Department on or before [INSERT DATE THAT IS 14 DAYS FOLLOWING PUBLICATION IN FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Michael Del Conte, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

**ADDRESSES:** To facilitate the receipt and processing of comments, EBSA encourages interested persons to submit their comments electronically to [e-ORI@dol.gov](mailto:e-ORI@dol.gov), or by using the Federal eRulemaking portal <http://www.regulations.gov> (following instructions for submission of comments). Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting comments on paper should send or deliver their comments (preferably three copies) to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Fee Disclosure Applicability. All comments will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and at the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

## **SUPPLEMENTARY INFORMATION:**

On July 16, 2010, the Department published in the **Federal Register** an interim final rule enhancing required disclosure from certain pension plan service providers to plan fiduciaries as part of a “reasonable” contract or arrangement for services under ERISA section 408(b)(2) (75 FR 41600) (the “408(b)(2) regulation”). 29 C.F.R. §2550.408b-2(c). The Department subsequently published in the **Federal Register**, on October 20, 2010, a final rule concerning the disclosure of plan fee and expense information by plan administrators to plan participants and beneficiaries (75 FR 64910) (the “participant-level disclosure regulation”). 29 C.F.R. §2550.404a-5. The participant-level disclosure regulation includes modifications to the disclosure requirements in the Department’s regulation under ERISA section 404(c), at 29 CFR § 2550.404c-1 (the “404(c) regulation”), in order to avoid duplication and integrate its requirements with those of the new participant-level disclosure regulation.<sup>1</sup>

Unless extended, the effective date for the interim final 408(b)(2) regulation will be on July 16, 2011 as to both new, and pre-existing, contracts or arrangements between covered plans and covered service providers. The Department has received many requests that this effective date be extended. A significant number of parties have argued that more time is essential to update systems and procedures for information collection and disclosure. Pointing out that the Department has not yet published a final rule, parties have explained that, if the Department modifies the current interim final rule, service providers will need additional time to make further changes. Based on these concerns, the Department believes that an extension of the rule's

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<sup>1</sup> The amendments to the Department’s 404(c) regulation apply for plan years beginning on or after November 1, 2011. The proposals contained in this document would have no effect on the applicability of these amendments.

effective date would lead to fuller and timelier compliance by plans and service providers, and thus would be in the interests of participants and beneficiaries. Moreover, as discussed below, an extension will enable the Department to align the effective date for this regulation with the applicability date of the participant-level disclosure regulation. Accordingly, in February 2011, the Department announced its intention to extend the 408(b)(2) regulation's effective date until January 1, 2012.<sup>2</sup> The Department has not received any negative comments on this announcement. The amendments proposed in this notice, if finalized, would effectuate this announcement.

Although the final participant-level disclosure regulation was effective on December 20, 2010, its requirements only begin to apply for plan years beginning on or after November 1, 2011. The regulation also includes a transitional rule, in paragraph (j)(3)(i), for furnishing disclosures required on or before the date on which a participant or beneficiary can first direct his or her investment. For participants or beneficiaries who, as of their plan's applicability date, had the right to direct the investment of their individual accounts, the plan must furnish these initial disclosures no later than 60 days after the applicability date. As with the 408(b)(2) regulation, the Department has continued to receive requests that additional time be provided in order for parties to comply. Further, because the Department announced its intention to extend the 408(b)(2) regulation's effective date to January 1, 2012, parties argue that it would be preferable to extend application of the participant-level disclosure regulation until after the effective date of the 408(b)(2) regulation. Specifically, these parties point to the provision in the 408(b)(2) interim final regulation which requires covered service providers to furnish information requested by a responsible plan fiduciary or plan administrator in order to comply with ERISA's

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<sup>2</sup> See <http://www.dol.gov/ebsa/newsroom/2011/ebsa021111.html>.

reporting and disclosure requirements,<sup>3</sup> which would include relevant information required to comply with the participant-level disclosure regulation. It would facilitate compliance with the participant-level disclosure regulation, they argue, if contracts and arrangements were brought into compliance with the 408(b)(2) regulation, so that this reporting and disclosure provision is in effect, prior to the applicability of the participant-level disclosure regulation.

The Department agrees that aligning the application of these two regulations would assist plan fiduciaries and plan administrators in obtaining information required to comply with the participant-level disclosure regulation. Further, the Department believes that, similar to the 408(b)(2) regulation, a limited extension is in the best interests of covered individual account plans and their participants and beneficiaries. Delayed application will better afford plans sufficient time to ensure an efficient and effective implementation of the participant-level disclosure regulation. To accomplish this end, the Department does not believe it is necessary to extend the regulation's effective date or its general application to plan years beginning on or after November 1, 2011. However the Department proposes to extend the transition rule in paragraph (j)(3)(i), which specifies the date by which initial disclosures must actually be provided. Under this proposal, a plan would have 120 days (rather than 60) after its applicability date to furnish the initial disclosures that are otherwise required to be furnished before the date on which a participant or beneficiary can first direct his or her investments. Thus, a calendar year plan would have to furnish the initial disclosures no later than April 30, 2012, and the disclosures required by paragraphs (c)(2)(ii) and (c)(3)(ii) (*e.g.*, quarterly statement of fees/expenses actually deducted) would have to be furnished no later than May 15, 2012. Under the proposed transition rule, the initial disclosures must be provided to all participants and beneficiaries who have the

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<sup>3</sup> 29 CFR § 2550.408b-2(c)(1)(vi).

right to direct their investments when such disclosures are furnished, not just to those individuals who had the right to direct their investments on the applicability date. This is to ensure that individuals who become plan participants in between the applicability date and the end of the 120-day period receive the important information required under the regulation. To the extent the plan also has contracts or arrangements with covered service providers, as defined by the 408(b)(2) regulation, those contracts or arrangements must be in compliance with the 408(b)(2) regulation as of January 1, 2012, in advance of the required initial disclosures under the participant-level disclosure regulation.

The Department has not been persuaded to extend the application of the participant-level disclosure regulation, or the 408(b)(2) regulation, beyond these dates. Although the Department believes it is appropriate to provide some relief to help ensure a timely, efficient, and coordinated implementation of the two rules, the Department also believes that it is critical for responsible plan fiduciaries, plan administrators, and plan participants and beneficiaries to benefit from the increased transparency provided by the rules as soon as possible.

At this time, the Department solicits comments on this proposal to formally extend the effective date of the 408(b)(2) regulation and the transitional rule for application of the participant-level disclosure regulation.

## **List of Subjects in 29 CFR Part 2550**

Employee benefit plans, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and Trustees.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 29 CFR part 2550 as follows:

### **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. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 and Secretary of Labor's Order No. 6–2009, 74 FR 21524 (May 7, 2009). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–2 also issued under sec. 657, Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

2. Section 2550.404a–5 is amended by revising paragraph (j)(3)(i) to read as follows:

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

\* \* \* \* \*

(j) \* \* \*

(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 investments must be furnished no later than 120 days after such applicability date.

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3. Section 2550.408b-2 is amended, in paragraph (c)(1)(xii), by removing the date “July 16, 2011” and adding in its place “January 1, 2012.”

Signed at Washington, DC, this 26th day of May, 2011.

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Phyllis C. Borzi

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

**BILLING CODE 4510-29-P**



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