



DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB68

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans—Timing of Annual Disclosure

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Direct final rule.

SUMMARY: This direct final rule amends the Department of Labor’s “participant-level fee disclosure” regulation. The amendment makes a technical adjustment to a timing requirement in the current regulation. As amended, the regulation provides plan administrators with flexibility as to when they must furnish annual disclosures to participants and beneficiaries.

DATES: *Effective date:* This rule is effective [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], without further action or notice, unless significant adverse comment is received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If significant adverse comment is received, the Employee Benefits Security Administration (EBSA) will publish a timely withdrawal of the rule in the Federal Register.

*Applicability date:* The amendment is applicable to disclosures made on or after [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 1210–AB68, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: [e-ORI@dol.gov](mailto:e-ORI@dol.gov). Include RIN 1210-AB68 in the subject line of the message.
- Mail or personal delivery: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Instructions: All submissions received must include the agency name and Regulation Identifier Number (RIN) for this rulemaking. Comments received, including any personal information provided, will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and made available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210. Persons submitting comments electronically are encouraged not to submit paper copies.

FOR FURTHER INFORMATION CONTACT: Eric A. Raps, Office of Regulations and Interpretations, Employee Benefits Security Administration, Department of Labor, at (202) 693-8532. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

## **In General**

On October 20, 2010, the Department of Labor (Department) published a final regulation requiring plan administrators to disclose certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans.<sup>1</sup> The regulation requires certain information to be furnished on or before the date on which a participant can first direct his or her investments and “at least annually thereafter.” The regulation defines this term as “at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.”<sup>2</sup> The regulation was effective on December 20, 2010, but was not applicable until plan years beginning on or after November 1, 2011.<sup>3</sup>

On July 30, 2012, the Department’s Employee Benefits Security Administration (EBSA) issued Field Assistance Bulletin 2012-02R (FAB 2012-02R) providing guidance on frequently asked questions. Q&A 35 clarified that, for most plans, including calendar year plans, the first initial disclosures under the new regulation were required no later than August 30, 2012. FAB 2012-02R did not, however, specifically address the deadline for subsequent annual disclosures.<sup>4</sup>

In Field Assistance Bulletin 2013-02, issued July 22, 2013, the Department made clear that the regulation requires annual disclosures to be made no more than one year exactly (*e.g.*, 365 days) after the prior annual disclosures. Specifically, FAB 2013-02, in

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<sup>1</sup> 29 CFR 2550.404a-5; 75 FR 64910.

<sup>2</sup> 29 CFR 2550.404a-5(h)(1).

<sup>3</sup> The specified applicability date was subsequently delayed by amendment published on July 19, 2011. 76 FR 42539. Under the amendment, 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 the later of 60 days after such applicability date or 60 days after the effective date of 29 CFR 2550.408b-2(c). 29 CFR 2550.404a-5(j)(3)(i)(A).

<sup>4</sup> FAB 2012-02R supersedes FAB 2012-02 issued on May 7, 2012. Changes in the superseding bulletin did not affect Question 35.

relevant part, states “[f]or example, a plan administrator that furnished the first required chart on August 25, 2012, must furnish the next comparative chart no later than August 25, 2013.” This interpretation was intended to prevent inconsistencies, delays, and possible manipulation of the timing of annual disclosures. It also was responsive to the views expressed by some plan administrators, which contrary to EBSA's intent, interpreted “at least once in any 12-month period” to allow the furnishing of the annual disclosures, for example, on January 1 of one year and December 31 of the following year, thus allowing for approximately 24 months in between disclosures. At the same time, however, EBSA was concerned that the requirement that disclosures be made no more than one year exactly from the prior annual disclosures (as interpreted in FAB 2013-02) might impose undue administrative burdens on plans. Consequently, FAB 2013-02 solicited public comments on whether EBSA should amend the regulation to provide plan administrators with more flexibility as to when they must furnish the annual disclosures.<sup>5</sup> For example, instead of a permanently fixed annual deadline set at one year exactly from the last annual disclosure, EBSA requested comments on whether the deadline should have some degree of elasticity, such as a 30-day or 45-day window from the one-year anniversary of the last annual disclosure.

The Department received comments from several organizations representing employers, plans, recordkeepers and other service providers who furnish annual

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<sup>5</sup> FAB 2013-02 also provided a one-time “re-set” opportunity under which EBSA, as an enforcement matter, would treat a plan administrator as satisfying the “at least annually thereafter” requirement of the regulation if the administrator furnished certain annual disclosures no later than 18 months from the prior annual disclosures. This temporary relief was granted to plan administrators so that the annual deadline for furnishing comparative charts and other annual disclosures under the regulation could be aligned with the furnishing of other participant notices and disclosures. FAB 2013-02 is not affected by the direct final regulation. Thus, to the extent it is otherwise available, an administrator does not lose the re-set relief in FAB 2013-02 for the second annual disclosure (described as the “2014 comparative chart” in FAB 2013-02) as a result of the direct final regulation.

disclosures to participants and beneficiaries on behalf of plan administrators. These commenters raised multiple practical and logistical concerns about the current definition.

For instance, the commenters maintain that the current definition may prevent them from consolidating the annual disclosures under the regulation with other annual plan disclosures. One commenter stated “many plan sponsors and service providers try, where possible, to consolidate participant communications in a way that ensures effective disclosures and avoids overloading participants with information too frequently.” On this point, a different commenter observed “it is helpful for employers to have a flexible deadline in case they need to change the dates of their annual enrollment periods or other annual plan-related mailings. A 45-day window would provide them with the flexibility to timely provide the annual disclosures to participants without concern that they may miss the deadline.”

Another concern raised by the commenters is that the current definition requires them to track the specific date of annual disclosures on a plan-by-plan or participant-by-participant basis, even though large recordkeepers may have responsibility for tens of thousands of plan clients and millions of plan participants. The commenters also maintain that the current definition is a disincentive or punishment to plans that provide early disclosures in a given year. The commenters also maintain that certain investment information needed on a comparative chart, such as a designated investment alternative’s 1-year, 5-year, and 10-year performance, often comes from different investment vendors and may not always be predictably delivered and consolidated by the 12-month anniversary deadline.

Each of these concerns stems from the fact that the furnishing of a required annual disclosure before the expiration of the 12-month deadline (365<sup>th</sup> day) in any year necessarily changes and accelerates the deadline for subsequent plan years (*i.e.*, the deadline “creeps” forward for all future years when there is early compliance during the current year). One commenter, for example, stated “the requested flexibility mitigates the incentive that plan sponsors and service providers may have to delay furnishing the materials when they may otherwise be able to send them sooner, in order to avoid accelerating subsequent compliance deadlines.” The commenters overwhelmingly support a regulatory amendment that provides some flexibility as to the timing of annual disclosures. A reasonable interpretation of their comments is that they support a buffer zone of no less than 45 days, and that such flexibility would abate the concerns mentioned above. Commenters also identified special or irregular events that warrant flexibility, including corporate mergers and changes in recordkeepers, investment lineups, plan years (e.g., from fiscal to calendar year), or law.

No commenter objected to giving plan administrators some flexibility, or suggested that flexibility would harm participants and beneficiaries or hinder their ability to direct their investments. Two commenters, in fact, suggested just the opposite. One of them observed that “[r]esolving this concern will also benefit plan participants because it will facilitate expedited furnishing of the materials when it is feasible for providers and plan sponsors to do so.” The other observed “it is common for plans to periodically change the menu of investment options available to participants and, in such circumstances, a plan may find it helpful to slightly delay distribution of an otherwise due comparative chart until the new investment options are set.”

The overall objective of the “participant-level fee disclosure” regulation is to make sure participants and beneficiaries in participant-directed individual account plans are furnished the information they need, on a regular and periodic basis, to make informed decisions about the management of their individual accounts and the investment of their retirement savings. While deadlines are needed to avoid irregular and non-periodic disclosures, flexible deadlines alone do not undermine the overall objective of the regulation.

Based on the foregoing, the Department has decided to replace the definition contained in paragraph (h)(1) of the current regulation with a new definition that provides a buffer requested by the commenters. The current regulatory language states that the term *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.” Today’s direct final rule replaces “12-month period” with “14-month period.” Thus, the definition, as amended by this rulemaking, states that the term *at least annually thereafter* “means at least once in any 14-month period, without regard to whether the plan operates on a calendar year or fiscal year basis.” It is the Department’s view that this definition achieves the correct balance by ensuring that participants and beneficiaries will receive annual disclosures on a consistent and regular basis, and without unwarranted delays in-between disclosures, while at the same time offering plan administrators some flexibility.

The Department also requests comments on whether a similar adjustment is needed for the “at least quarterly” definition in paragraph (h)(2) of the regulation.<sup>6</sup> Today’s direct final rule has no effect on the definition contained in paragraph (h)(2). No

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<sup>6</sup> The “at least quarterly” timing requirement in paragraph (h)(2) applies to disclosures detailing administrative and individual expenses “actually charged” to individual accounts.

commenter identified problems with this definition or requested an adjustment similar to the adjustment being made to the “at least annually” definition. Consequently, the Department today has no basis to make any change to this definition. The lack of comment on this definition may be due, in whole or in part, to EBSA Field Assistance Bulletin 2006-03 (providing a 45-day window for furnishing quarterly pension benefit statements required under section 105 of ERISA) and paragraph (e)(2) of 29 CFR 2550.404a-5 (which allows quarterly fee disclosures to be furnished with quarterly pension benefit statements). Commenters are encouraged to consider FAB 2006-03 if making a comment.

#### **Temporary Enforcement Policy**

The Department is adopting an enforcement policy, effective immediately, under which plan administrators may rely on the new definition in paragraph (h)(1) prior to the effective date of the amendment. Some plans may be preparing their next set of annual disclosures, which may be due before the effective date of the amendment. Accordingly, EBSA, as an enforcement matter, will treat a plan administrator as satisfying the timing requirement in paragraph (h)(1) of the regulation if the plan administrator complies with the new definition establishing a 2-month grace period for annual disclosures, provided that the plan administrator reasonably determines that doing so will benefit participants and beneficiaries. This enforcement policy expires on the effective date of the direct final rule without notice or any other action by the Department. If the direct final rule is withdrawn because of significant adverse comment, EBSA will provide further guidance on this enforcement policy in the Federal Register notice announcing the withdrawal of the rule. The relief under this policy is in addition to the relief previously granted under



FAB 2013-02 and is available regardless of whether a plan has used the relief in such FAB 2013-02 to reset the first or second applicable annual disclosure.

**Good Cause Finding That Proposed Rulemaking Unnecessary**

Rulemaking under section 553 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) ordinarily involves publication of a notice of proposed rulemaking in the Federal Register and provides the public with the opportunity to comment on the proposed rule. However, an agency may issue a rule without prior notice and comment if it determines for good cause that prior notice and comment is impracticable, unnecessary, or contrary to the public interest.

The Department finds it unnecessary to publish a notice of proposed rulemaking. The Department, in FAB 2013-02, already solicited public comment on the issue of flexible timing for annual disclosures. Additional notice and comment is not likely to change the Department's conclusion that there is a need for greater flexibility, but it will delay the relief sought by the affected parties. Such delay also makes ordinary notice and comment procedures impracticable for those plan administrators who would benefit from the new definition in paragraph (h)(1) in connection with disclosures that must be furnished in the early part of 2015.

The Department is concurrently publishing a notice of proposed rulemaking in the "Proposed Rules" section of today's Federal Register that will serve as a notice of proposal to amend part 2550 as described in this direct final rule. If the Department receives significant adverse comment during the comment period, it will withdraw this direct final rule. The Department will then address public comments in a subsequent

final rule. The Department does not intend to institute a second comment period on this rule. Any parties interested in commenting must do so during this comment period.

### **Regulatory Impact Analysis**

#### *Executive Orders 12866*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule (1) Having an annual effect on the economy of \$100 million or more, 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. Pursuant to the terms of the Executive Order, OMB has determined that this regulatory action is significant within the meaning of section 3(f)(4) of the Executive Order, and therefore it will be reviewed by OMB. As discussed in the Paperwork Reduction Act section below, the Department expects this

amendment to benefit plan administrators by providing flexibility when the annual disclosures are furnished with no additional cost impact.

*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 APA (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Under Section 553(b) of the APA, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. This direct final regulation is exempt from the APA's notice and comment requirements because the Department made a good cause finding earlier in this preamble that a general notice of proposed rulemaking is not necessary. Therefore, the RFA does not apply and the Department is not required to either certify that this regulation would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

*Paperwork Reduction Act*

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is

minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

In accordance with the requirements of the PRA (44 U.S.C. 3506(c)(2)), the Department submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d) for the current rule that was published on October 20, 2010. The information collection request was approved by OMB on October 5, 2010, under OMB Control Number 1210-0090, which currently is scheduled to expire on April 30, 2017.

Currently, the Department has submitted an information collection for the ICR as revised by the direct final rule under the emergency procedures for review and clearance contained in 5 CFR 1320.13. A copy of the ICR may be obtained by contacting the PRA addressee shown below. The Department is hereby soliciting comments concerning the revision to the ICR currently approved under OMB Control Number 1210-0090. The Department and OMB are interested particularly in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the PRA Addressee within the same 30-day comment period that applies for comments on the direct final rule. Any comments received will be considered when the Department submits an extension request for the emergency ICR to OMB.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210. Telephone (202) 693-8410; Fax: (202) 219-5333. These are not toll-free numbers. ICRs submitted to OMB also are available at <http://www.RegInfo.gov>.

The Department expects this amendment to have no impact on the cost or hour burden associated with the ICR, because it solely determines when the disclosures are distributed but does not affect the content of the disclosures. The timing flexibility provided by the amendment will benefit plan administrators by allowing them to combine and distribute annual disclosures with other employment and annual employee benefits communication materials, which may result a small decrease in burden; however, the Department does not have sufficient data to estimate this decrease. The Department welcomes comments regarding this assessment.

*Congressional Review Act*

This direct 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.

*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 direct 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.

*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 direct 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, Pensions, Disclosure

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:

**PART 2550 --RULES AND REGULATIONS FOR FIDUCIARY  
RESPONSIBILITY**

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

**Authority:** 29 U.S.C. 1135 and Secretary of Labor’s Order No. 1-2011, 77 FR 1088 (January 9, 2012). Sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012). Sec. 2550.401c-1 also issued under 29 U.S.C. 1101. Sec. 2550.404a-1 also issued under sec. 657, Pub. L. 107-16, 115 Stat 38. Sec. 2550.404a-2 also issued under sec. 657 of Pub. L. No. 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. In § 2550.404a-5, revise paragraph (h)(1) to read as follows:

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

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(h) \* \* \*

(1) *At least annually thereafter* means at least once in any 14-month period, without regard to whether the plan operates on a calendar year or fiscal year basis.

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Signed at Washington, DC, this 12th day of March 2015.

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Phyllis C. Borzi

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

**Billing Code: 4510-29-P**

**[FR Doc. 2015-06211 Filed: 3/18/2015 08:45 am; Publication Date: 3/19/2015]**