

## **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:** Final rule; extension of applicability dates.

**SUMMARY:** This document extends 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 final rules were published in the **Federal Register** on July 16, 2010 and October 20, 2010, respectively. On June 1, 2011, the Department published in the **Federal Register** a proposal to extend and more closely align the initial compliance dates of the two rules in order to provide regulated parties with more time to comply with the new disclosure requirements. This document adopts final amendments to the initial compliance dates for both rules.<sup>1</sup>

**DATES:** The amendments made by this document are effective as of July 15, 2011. As explained below, the Department finds good cause that this rule shall be effective on this date. Pursuant to those amendments –

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<sup>1</sup> 76 FR 31544.

*408(b)(2) Regulation:* The effective date for the interim final fiduciary-level fee disclosure rule is extended from July 16, 2011 to April 1, 2012.

*Participant-Level Fee Disclosure Regulation:* The transitional rule in paragraph (j)(3)(i) of the final participant-level disclosure regulation is amended to require that initial disclosures be furnished no later than the later of 60 days after a first day of the first plan year beginning on or after November 1, 2011, or 60 days after the effective date of the fiduciary-level fee disclosure rule. The transitional rule also provides that certain quarterly disclosures must be furnished no later than 45 days after the end of the quarter in which the initial disclosures are required to be furnished to participants and beneficiaries pursuant to the transitional rule.

**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.

## **SUPPLEMENTARY INFORMATION:**

### **A. Background**

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” codified at 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” codified at 29 C.F.R. §2550.404a-5). The participant-level disclosure regulation also modifies 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 to integrate its requirements with those of the new participant-level disclosure regulation.

As originally published, the effective date for the interim final 408(b)(2) regulation was July 16, 2011, as to both new and existing contracts or arrangements between covered plans and covered service providers. The Department received many requests that this effective date be extended. A significant number of parties argued that more time is essential to update systems and procedures for information collection and disclosure. Pointing out that the Department had not yet published a final rule, parties explained that, if the Department modifies the current interim final rule, service providers will need additional time to make further changes to their systems and procedures for information collection and disclosure. Based on these concerns, the Department believed that an extension of the rule’s effective date would allow time for improved compliance by plans and service providers, and thus would be in the interests of participants and beneficiaries. 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 did not receive any negative comments on this announcement. In order to effectuate its intention, on June 1, 2011, the Department published a proposal to formally extend the effective date of the 408(b)(2) regulation to January 1, 2012.

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

As with the 408(b)(2) regulation, the Department received many requests that additional time be provided for parties to comply with the participant-level disclosure regulation. Parties argued 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 pointed 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 reporting and disclosure requirements,<sup>3</sup> which would include information needed to comply with the participant-level disclosure regulation. It would facilitate compliance with the participant-level disclosure regulation, they argued, if covered contracts and arrangements were first 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 agreed 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 believed that, similar to the 408(b)(2) regulation, a limited extension of time to satisfy the initial compliance requirements for the participant-level disclosure regulation is in the best interests of covered individual account plans and their participants and beneficiaries. Extending the application date would better afford plans sufficient time to ensure an efficient and effective implementation of the participant-level disclosure regulation.

To accomplish this, the Department, in its June 1, 2011 Federal Register notice, proposed to amend the transitional rule in paragraph (j)(3)(i) of the participant-level disclosure regulation.

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

The transitional rule (as originally published) required individual account plans to furnish the initial disclosures required under the regulation no later than 60 days after the applicability date. The applicability date is the first day of the first plan year beginning on or after November 1, 2011. The Department proposed to extend the transition rule to provide plans with up to 120 days (rather than 60) after the plan's applicability date to furnish the initial disclosures that otherwise are required to be furnished on or before the date on which a participant or beneficiary can first direct his or her investments. Under the proposed transition rule, the initial disclosures would have to be provided to all participants and beneficiaries who have the 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 was to ensure that individuals who become plan participants in between the applicability date and the end of the proposed 120-day period receive the important information required under the regulation.<sup>4</sup>

## **B. Comments Received and the Department's Response**

In response to its proposal, the Department received 11 comment letters.<sup>5</sup> This section summarizes these comments, the Department's response, and the final regulatory amendments published in this notice.

### *1. Applicability dates; Technical clarifications*

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<sup>4</sup> One commenter requested clarification that the proposed transition rule was not intended to apply to newly eligible employees on an ongoing basis; the Department confirms that the transition rule, as finalized in this notice, applies only to employees newly eligible on the applicability date and during the transition period, but not after a plan's transition period ends.

<sup>5</sup> These comments are available on the Department's Web site at: <http://www.dol.gov/ebsa/regs/cmt-1210-AB08a.html>.

Commenters generally supported the Department's proposed alignment of the two rules' applicability dates and believe that the 408(b)(2) regulation should, as proposed, be effective before plans are required to comply with the participant-level disclosure regulation. Commenters disagreed, however, about the specific timeframes proposed by the Department (*i.e.*, that the 408(b)(2) regulation would be effective on January 1, 2012 and that the transition rule for the participant-level disclosure regulation would be extended from 60 to 120 days following a covered individual account plan's applicability date). Some commenters endorsed the proposed timeframes. They explained that the Department has been working on fee disclosure and related issues for several years, and that service and investment providers, as well as plan fiduciaries, have had ample time to monitor these developments in fee disclosure and prepare for compliance. Further, one commenter stressed that application of the rules should not be further delayed because of the direct impact of plan fees on participants' and beneficiaries' retirement security.

Other commenters, however, argued that the Department must further delay application of the rules to enable timely compliance by service providers, plan fiduciaries, and plan administrators. Commenters explained that continuing uncertainty exists as to whether the Department will make significant changes from the interim final rule when it publishes the final 408(b)(2) regulation. Given this uncertainty, service providers argued that they will not be able to effectively finalize their system modifications or to firmly establish the content and format of their disclosures to reflect any such changes by January 1, 2012. One commenter also asserted that plan fiduciaries, who will be required to review and analyze the 408(b)(2) regulation's new

disclosures, will not have enough time to satisfy these obligations and, if necessary, take action in response to the disclosures received from their plan service providers. Commenters provided several alternatives for further delaying the effective date of the 408(b)(2) regulation, for example, delaying the compliance date for six or twelve months following publication of a final rule or until January 1, 2013. To address commenters' concerns as to any new requirements in the final regulation, commenters suggested that the Department also could provide a delayed effective date for such new requirements, or announce a transition period during which parties may rely on the interim final rule.

Commenters also presented a variety of concerns as to why application of the participant-level disclosure regulation should be further delayed. For example, service providers and plan administrators continue to request interpretive guidance from the Department as to plan administrators' obligations under the participant-level disclosure regulation; commenters believe that such obligations are not clear and that additional guidance from the Department is necessary before parties are required to comply. Commenters also offered a variety of technical issues faced by plans and service providers as they prepare for compliance, for example potential difficulties in obtaining required investment information concerning non-registered plan designated investment alternatives and challenges faced by multi-vendor 403(b) plans that must obtain and compile data from vendors with different recordkeeping systems. Commenters suggested that the transition rule should be revised to be 120 or 180 days following the effective date of the 408(b)(2) regulation (rather than 120 days following the plan's applicability date). Commenters explained that tying the transition rule to the effective date of the 408(b)(2) regulation would avoid inconsistent treatment for non-calendar year plans under the proposed

transition rule, which would, for example, result in a November 1 plan being unable to take full advantage of the proposed 120-day transition rule.

Based on its careful review of the comments and consideration of the arguments presented, the Department is amending the effective date of the 408(b)(2) regulation to be April 1, 2012. This is 3 months longer than the length of the extension in the proposal. As of publication of this notice in the **Federal Register**, the Department has not yet published a final 408(b)(2) regulation. To the extent the final regulation includes changes from the interim final rule, the Department agrees that covered service providers and plan fiduciaries would benefit from additional time to review such changes and make final modifications to their systems and disclosures. The Department wants to ensure that thorough and accurate disclosures, in compliance with the final 408(b)(2) regulation, are furnished to plan fiduciaries to help them carefully analyze plan service contracts and arrangements in compliance with their fiduciary duties under ERISA. Commenters generally requested an extension longer than 3 months. The Department, however, is not persuaded that such an extension is necessary under the circumstances. The Department intends to publish a final 408(b)(2) regulation in the **Federal Register** before the end of the year, and does not expect that the changes to the interim final rule are likely to require more additional time for compliance than is provided in this document. The Department also believes that a further delay in implementing the regulation is not in the best interest of responsible plan fiduciaries, plan administrators, and plan participants and beneficiaries. In the Department's view, extending the effective date until April 1, 2012 strikes a balance between these competing considerations.



As proposed, and consistent with commenters' views, these final amendments will continue to align application of the rules so that the 408(b)(2) regulation will be effective prior to plans being required to furnish disclosures pursuant to the participant-level disclosure regulation. However, in response to commenters' concerns, the Department has modified the proposed transition rule for the participant-level disclosure regulation. First, the Department agrees with commenters that the transition rule should be tied to the effective date for the final 408(b)(2) regulation. This linkage will ensure that the 408(b)(2) regulation becomes effective first, and that all plans (regardless of whether they are calendar year plans) will be able to take advantage of the transition period following the 408(b)(2) regulation's effective date. Second, because the Department extended the effective date of the 408(b)(2) regulation for an additional 3 months , and because the beginning of the transition period under the participant-level disclosure regulation's transitional rule will be correspondingly extended, the Department is adopting a 60-day transition period for the participant level fee disclosure rule. Given the additional time (3 months) being provided to plan administrators because of the 408(b)(2) regulation's delayed effective date, the Department believes that a 60-day transition period following such delayed date for the participant level fee disclosure rule is sufficient given commenters' concerns. Accordingly, paragraph (j)(3)(i)(A) of the participant-level disclosure regulation now provides that 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 the plan's applicability date or 60 days after the effective date of the 408(b)(2) regulation.

Finally, the Department also revised the transitional rule by adding a new subsection (j)(3)(i)(B) to provide guidance on when the quarterly disclosures required under paragraphs

(c)(2)(ii) and (c)(3)(ii) of the participant-level disclosure regulation must first be furnished.

These disclosures must be furnished no later than 45 days after the end of the quarter in which the initial disclosures (referred to in subsection (j)(3)(i)(A) of the transitional rule) are required to be furnished to participants and beneficiaries. The new subsection preserves ordinary sequencing of disclosures under the regulation by preventing the first quarterly disclosure from being due before the first initial disclosure.

The following example illustrates the new bifurcated transitional rule in paragraph (j)(3)(i)(A) and (B). As to calendar year plans, the participant-level disclosure regulation becomes applicable on January 1, 2012. Pursuant to subsection (A) of the final transitional rule, such plans must furnish their first set of initial disclosures (all disclosures other than disclosures required at least quarterly) no later than May 31, 2012, which is 60 days after the April 1, 2012 effective date of the 408(b)(2) regulation. Further, pursuant to subparagraph (B) of the transitional rule, the disclosures required by paragraphs (c)(2)(ii) and (c)(3)(ii) of the regulation (*e.g.*, the quarterly statement of fees/expenses actually deducted) would have to be furnished no later than August 14, 2012, which is the 45<sup>th</sup> day after the end of the second quarter (April – June) in which the initial disclosure was required.

A few commenters requested that the Department clarify when plans must comply with the revised 404(c) regulation's disclosures. The final amendments to the 404(c) regulation require, in part, that participants and beneficiaries be furnished: “[t]he information required pursuant to 29 CFR 2550.404a-5” (*i.e.*, the participant-level disclosure regulation).<sup>6</sup> In a footnote to the proposal's preamble, the Department stated that the amendments to the 404(c)

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<sup>6</sup> 29 CFR 2550.404c-1(b)(2)(i)(B)(2).

regulation apply for plan years beginning on or after November 1, 2011 and that proposal would have no effect on the applicability of these amendments. Although the transition rule, finalized in this notice, does not itself apply to the amended 404(c) regulation, the Department confirms that plan administrators do not have to furnish the newly required information under the 404(c) regulation before such information must be delivered (subject to the final transition rule) under the participant-level disclosure regulation. Such information is “required pursuant to” the participant-level disclosure regulation only at such time(s) as it must first be furnished under such regulation.

It has been determined that this is not a significant rulemaking for purposes of E.O. 12866. In addition, the Department finds that the amendments in this document will not significantly affect the regulatory flexibility analyses issued in connection with the rules so amended. 75 Fed. Reg. 41629 (July 16, 2010); 75 Fed. Reg. 64934 (Oct. 20, 2010).

Pursuant to 5 U.S.C. Section 553(d)(3), the Department finds for good cause that in order to accomplish the purposes of these amendments, they must be effective before the current July 16, 2011, effective date of the interim final 408(b)(2) regulation (29 CFR 2550.408b-2(c), RIN 1210-AB08).

## *2. Electronic delivery*

Several commenters requested further guidance from the Department as to the standards for electronic delivery that will apply to disclosures furnished to participants and beneficiaries

under the participant-level disclosure regulation. Commenters argued that whether, and the extent to which, these disclosures may be furnished electronically will significantly impact service providers' systems design and compliance efforts. Although the Department separately is pursuing a regulatory initiative to explore electronic delivery in the context of participant and beneficiary disclosures,<sup>7</sup> commenters do not believe that the Department will complete its broad review of this issue and publish final guidance as to the standards that will apply before plans will have to comply with the participant-level disclosure regulation. In the meantime, these commenters suggested that the Department extend to the participant-level disclosure regulation the guidance on the manner of delivery that was provided for pension benefit statements in Field Assistance Bulletin (FAB) 2006-03.<sup>8</sup>

The Department is carefully analyzing these comments as part of its broader review of public comments in response to its recent request for information concerning ERISA electronic delivery standards generally.<sup>9</sup> These issues, however, are beyond the scope of this rulemaking which is limited to extending the compliance dates for the 408(b)(2) and participant-level disclosure regulations. Consistent with its statement in the preamble to the final participant-level disclosure regulation, the Department intends to provide guidance on this issue for purposes of the participant-level disclosure regulation in advance of the regulation's compliance date, so as to ensure appropriate notice for plans.

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

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<sup>7</sup> See 76 FR 19285 (April 7, 2011).

<sup>8</sup> See Field Assistance Bulletin No. 2006-03 (Dec. 20, 2006).

<sup>9</sup> 76 FR 19285.

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 amends 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) (A) 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 the later of 60 days after such applicability date or 60 days after the effective date of 29 CFR 2550.408b-2(c).

(B) Notwithstanding paragraphs (b) and (c) of this section, the initial disclosures required under paragraphs (c)(2)(ii) and (c)(3)(ii) of this section must be furnished no later than 45 days after the end of the quarter in which the disclosure referred to in paragraph (j)(3)(i)(A) of this section was required to be furnished to participants and beneficiaries.

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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 “April 1, 2012”.

Signed at Washington, DC, this \_\_\_\_ day of \_\_\_\_\_, 2011.

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Phyllis C. Borzi

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

**BILLING CODE 4510-29-P**